VIAC || Vienna International Arbitral Centre

EXPLANATORY NOTES

A Secretariat's Guide

VIENNA RULES OF ARBITRATION AND MEDIATION 2021

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PREFACE TO THE EXPLANATORY NOTES

VIENNA RULES AND VIENNA MEDIATION RULES 2021

The last major reform of the Vienna Rules dates back to 2013, which introduced drastic changes and innovations. The Vienna Mediation Rules entered into force - as stand-alone provisions – in 2016. The Vienna Rules and Vienna Mediation Rules were revised again in 2018 triggered by a signficant development in 2017, i.e., the bundling of the jurisdiction for domestic and international arbitration matters within the Economic Chamber's structure at VIAC. The minor revision of the Vienna Rules was necessary to address a number of issues arising from practice over the past years.

On 1 July 2021, new stand-alone VIAC Rules of Investment Arbitration and Mediation ("Vienna Investment Arbitration Rules and Vienna Investment Mediation Rules 2021" (**VIAR** and **VIMR**)) came into force. The addition of these rules was a major milestone for VIAC (separate Explanatory Notes will be made available on these rules).

VIAC took this opportunity in 2021 to update the VIAC Rules of Arbitration and Mediation ("Vienna Rules and Vienna Mediation Rules 2021" (**VR** and **VMR**)) for commercial disputes to address a number of recent developments in international arbitration practice and to introduce rules for disputes relating to succession. Both sets of rules apply to all proceedings commenced after 30 June 2021.

The Rules Revision in 2021 was navigated by two working groups. One working group focused on the drafting of the VIAR and VIMR, while the other was responsible for the revision of the VR and VRM. The latter working group consisted of members of the Secretariat, the VIAC Board and members of the National and International Advisory Board and other important stakeholders, in alphabetical order:

Claudia Annacker, Alice Fremuth-Wolf, Günther Horvath, Elisabeth Kahler, Johanna Kathan-Spath, Stephan Karall, Werner Jahnel, Christian Koller, Paul

Oberhammer, Patrizia Netal, Michael Nueber, Nikolaus Pitkowitz, Dietmar Prager, Lucia Raimanova, Stefan Riegler, Martin Schauer, Franz Schwarz, Irene Welser, Elke Willi and Brigitta Zöchling-Jud.

A special thanks to the working group members for their hard work and dedication.

The new Rules introduced – inter alia – the following new features:

VIAC's competence has been redefined in Article 1 para 1 VR and Article 1 para 1 VRM to explicitly include investment proceedings as well as VIAC acting as an appointing or an administrating authority and unilaterally foreseen arbitration agreements.

As of 1 January 2018, all new proceedings are administered internally by VIAC through an electronic case management system. The "VIAC Portal" for the secure exchange of case related documents has been available to parties and arbitrators since 1 March 2021. As a result, the provisions on the submission of statements of claim and on the transmission of documents had to be adapted accordingly (Articles 7, 12 and 36 VR and Articles 1 and 3 VRM).

Third-party funding has become increasingly popular in international arbitration. The definition in Article 6 para 1.9 VR and the provision in Article 13a VR are intended to create the framework for this instrument, especially to ensure the independence and impartiality of the arbitrators through appropriate disclosure.

The VR now explicitly state that oral hearings may be conducted in person or by other means (e.g. remote via videoconferencing technology - for further information see the "Vienna Protocol - A Practical Checklist for Remote Hearings); the arbitral tribunal shall decide on this, taking into account the views of the parties and the particular circumstances of the case (Article 30 para 1 VR). The same applies to mediation sessions (Article 9 para 3 VMR).

Furthermore, it is now expressly stated that the arbitral tribunal is entitled at any time during the proceedings to assist the parties in their endeavors to reach a settlement (Article 28 para 3 VR).

A further provision to increase the efficiency of the proceedings is contained in Article 32 para 2 VR. The latter provision foresees a time limit for the issuance of the award, i.e. the award shall be rendered no later than three months after the last hearing concerning matters to be decided in an award or the filing of the last authorized submission concerning such matters, whatever is later. This time-period may be extended by the Secretary General upon reasoned request or upon its own discretion.

The arbitral tribunal may now, at any stage of the arbitral proceedings, at the request of a party, make a decision on costs pursuant to Article 44 paras 1.2 and 1.3 and order payment (Article 38 para 3 VR) and need not wait for the final award in this respect.

In determining the advance on costs as well as the arbitrators‘ fees, the Secretary General has more flexibility to address the greater complexity of a proceeding, especially in multiparty proceedings (Articles 42 and 44 VR).

The Schedule of Fees in Annex 3 was also revised. While the registration fee and administrative fees for low amounts in dispute have remained the same, the administrative fees for amounts in dispute above EUR 100,000 as well as the arbitrators’ fees for amounts in dispute above EUR 200,000 have been increased to reflect the increased complexity in proceedings as well as the extended services of VIAC (VIAC Portal, electronic case management database). VIAC continues to remain very attractive for parties in terms of costs when compared with other institutions, but ensures that arbitrators are remunerated fairly for more complex proceedings with high amounts in dispute.

The following model clauses were added to the arbitration and mediation causes in Annex I:

- an Arb-Med-Arb-Clause,
- a mediation clause,
- a model clause for VIAC as an appointing authority,

- a model clause for VIAC as an administering authority, and
- a model clause for disputes relating to succession.

The new Annexes 4 and 5 contain detailed rules for cases in which VIAC is requested to act as an appointing or administering authority.

Annex 6 contains supplementary rules for inheritance disputes, which take into account the special features of arbitration proceedings foreseen in a disposition of property upon death.

These Explanatory Notes prepared by the VIAC Secretariat contain background information on the changes and amendments to the VR and VMR 2021 as compared to the VR and VMR 2018. Only provisions affected by such change/amendment form part of the Notes. Thus, the Notes aim to supplement the "VIAC Handbook 2019 – A Practitioner's Guide. (***VIAC Handbook 2019)"*** and should be read simulataneously**.** The authors of the VIAC Handbook 2019 whose articles were affected by the changes or amendments were contacted and their approval obtained to use passages of their respective commentaries in these Notes. These passages are marked with ▌ on the side. We very much appreciate the review and comments from these authors.

Special thanks to Johanna Kathan-Spath (legal counsel at VIAC from October 2019 to October 2021) who managed both working groups, assisted in both the revision of the VR and VMR and the drafting of these Notes. Jessica Puhr (legal counsel at VIAC since August 2021) also deserves a special mention for her diligence in the final editing of the Notes.

Vienna, February 2022
Alice Fremuth-Wolf
(Secretary General of VIAC from1 January 2018 to 31 December 2021)
Niamh Leinwather
(Secretary General of VIAC)

PART I
VIAC RULES OF ARBITRATION

VIAC AND THE APPLICABLE VERSION OF THE VIAC RULES

Article 1

(1) The Vienna International Arbitral Centre ("VIAC") is the Permanent International Arbitration Institution of the Austrian Federal Economic Chamber[1]. VIAC administers domestic and international arbitrations as well as proceedings pursuant to other alternative dispute resolution methods, if the parties have agreed upon the VIAC Rules of Arbitration ("Vienna Rules"), the VIAC Rules of Mediation ("Vienna Mediation Rules"), the VIAC Rules of Investment Arbitration ("Vienna Investment Arbitration Rules"), the VIAC Rules of Investment Mediation ("Vienna Investment Mediation Rules"); or if it has been otherwise agreed or foreseen that VIAC should serve as the administering institution.

(2) Unless the parties have agreed otherwise, the Vienna Rules shall apply in the version in effect at the time of the commencement of the arbitration (Article 7 paragraph 1) if the parties, before or after the dispute has arisen, have agreed to submit their dispute to the Vienna Rules.

(3) The Board may refuse to administer proceedings if the arbitration agreement deviates fundamentally from and is incompatible with the Vienna Rules.

[1] According to Section 139 paragraph 2 of the Federal Statute on the Economic Chambers 1998 ("Wirtschaftskammergesetz 1998"), Federal Law Gazette I No 103/1998 as amended by Federal Law Gazette I No 27/2021.

EXPLANATORY NOTE[2]

1. Introduction

1 Relevant commentary: *Horvath/Fremuth-Wolf* in VIAC Handbook (2019) Art 1 pp. 15-21.

As far as the provisions remain unaltered, the relevant parts of the commentary are still applicable and are referenced below; if the passages are replicated, they are marked with ▌on the side.

2. The institution

2 Cf. *Horvath/Fremuth-Wolf* in VIAC Handbook (2019) Art 1 mns 2-6.

3. Jurisdiction of the VIAC

3.1 General

3 Paragraph 1 contains the bases for VIAC to administer domestic and international arbitrations as well as proceedings pursuant to other alternative dispute resolution methods, namely if the parties have agreed

- upon the VIAC Rules of Arbitration ("Vienna Rules");
- upon the VIAC Rules of Mediation ("Vienna Mediation Rules");
- upon the VIAC Rules of Investment Arbitration ("Vienna Investment Arbitration Rules");
- upon the VIAC Rules of Investment Mediation ("Vienna Investment Mediation Rules");
- or if it has been otherwise agreed or foreseen that VIAC should serve as the administering institution.

[2] This Explanatory Note on Article 1 is based on *Günther Horvath/Alice Fremuth-Wolf* in VIAC Handbook (2019) Art 1 and *Günther Horvath/Rolf Trittmann* in Handbook Vienna Rules (2014) Art 1. The authors were contacted and their approval obtained to use passages of the respective commentary in these Explanatory Notes. For the sake of readability, footnotes from these passages were removed; please refer to the VIAC Handbook (2019).

As a general rule, the parties agree upon VIAC as the institution as well as on the respective rules of arbitration in their arbitration agreement (or on the Vienna Mediation Rules as applicable rules of mediation in their mediation agreement). 4

VIAC also administers investment arbitration proceedings under the Vienna Investment Arbitration Rules, and investment proceedings pursuant to other alternative dispute resolution methods under the Vienna Investment Mediation Rules. An agreement or the offer to submit a dispute to arbitration/mediation administered by VIAC may be included in a contract treaty, statute or other instrument. For further information, cf. Explanatory Notes Vienna Investment Rules (2022) Art 1. 5

The last option of Article 1 para 2, which reads "if it has been otherwise agreed or foreseen that VIAC should serve as the administering institution" serves as a fallback provision whereby VIAC is included in statutes/articles of association, trusts, disposition of property upon death, including an agreement as to succession, or any other testamentary disposition. 6

In addition, VIAC may be agreed upon as an appointing authority by the parties themselves or a third instance (e.g. the Permanent Court of Arbitration). In these cases, the rules of Annex 4 or 5 will apply (cf. VIAC Explanatory Notes Vienna Rules (2022) to Annex 4 and 5 herein). 7

3.2 Jurisdiction for domestic and international arbitration proceedings

Cf. *Horvath/Fremuth-Wolf* in VIAC Handbook (2019) Art 1 mns 12-15. 8

3.3 Transitional provisions for domestic cases

Cf. *Horvath/Fremuth-Wolf* in VIAC Handbook (2019) Art 1 mns 16-20. 9

4. The VIAC Rules of Arbitration – applicable version (para 2)

Article 1 para 2 was supplemented with the wording "*unless the parties have agreed otherwise*" in order to clarify that the parties may agree in their arbitration clause that a different version of the Vienna Rules shall apply. 10

11 Unless otherwise provided for by the parties, the version of the Vienna Rules in effect at the time of commencement of the proceedings is applicable, if the parties, before or after the dispute has arisen, have agreed to submit their dispute to the Vienna Rules.

5. Refusal to administer arbitration proceedings (para 3)

12 Cf. *Horvath/Fremuth-Wolf* in VIAC Handbook (2019) Art 1 mns 24-25.

ADVISORY BOARDS

Article 3

The Board may establish Advisory Boards that assist the Board in an advisory capacity. Advisory Boards consist of arbitration and/or mediation experts who may be invited by the Board.

EXPLANATORY NOTE[1]

1. Introduction; purpose of the amendment

Relevant commentary: *Schwarzenbacher* in VIAC Handbook (2019) Art 3 pp. 30-31. 1

As far as the provisions remain unaltered, the relevant parts of the commentary are still applicable and are referenced below; if the passages are replicated, they are marked with ▌on the side.

VIAC's first advisory board – the International Advisory Board – was established in 2006. The purpose of the international advisory board is to give VIAC a broader international reach and to simultaneously guide VIAC in its international activities. Due to the significant benefit realised by VIAC from the input of the international advisory board members, two more advisory boards were established. The Mediation Advisory Board was established following the introduction of a set of mediation rules in 2016. The Domestic Advisory Board was established following the change in competence in mid-2018 when VIAC's competencies were extended to administer also purely domestic disputes. With the Rules Revision 2021, the wording of Article 3 was aligned to consider that the Board may establish various advisory boards at its convenience (and is not limited to an International Advisory Board). 2

The task of the advisory boards is to *advise the VIAC Board*. Accordingly, the Board will consult with the respective advisory boards on important issues, even though their recommendations are not binding on the Board. Important issues include, for instance, advise regarding revisions to the Vienna Rules and 3

[1] This Explanatory Note on Article 3 is based on *Erich Schwarzenbacher* in VIAC Handbook (2019) Art 3. The author was contacted and the approval obtained to use passages of the respective commentary in these Explanatory Notes.

the Vienna Mediation Rules, the development of the new Vienna Investment Arbitration Rules, the "Mediation Initiative", which was launched in early 2019 following the Covid-19 pandemic and offers Austrian entrepreneurs fast and cost-effective resolution in order to retain important business relationships.

2. Composition; appointment; meetings of the advisory boards

2.1 International Advisory Board

4 The International Advisory Board was established by the Vienna Rules 2006 with effect as of 1 July 2006. The idea of establishing this body was originally mainly to increase co-operation with arbitral institutions in other countries. The International Advisory Board was also to act as an advisory committee. In the course of time not only a considerable number of members of important foreign arbitral institutions, but also worldwide renowned arbitration and mediation practitioners have accepted invitations to join this body.

5 The International Advisory Board currently (as of January 2022) has the following members:

Diana Akikol, Alexey Anischenko, Davor Adrian Babić, Alexander J. Bělohlávek, Klaus Peter Berger, Markus Burgstaller, James E. Castello, Jalal El Ahdab, Josef Fröhlingsdorf, Ulrike Gantenberg, Manfred Heider, Duarte G. Henriques, Werner Jahnel, Zhao Jian, Veronika E. Korom, Richard Kreindler, Stefan Kröll, Sean (Sungwoo) Lim, Martin Magál, Michael J. Moser, Irina Nazarova, Andrey Panov, Vladimir Pavić, Karl Pörnbacher, Catherine A. Rogers, Maxi Scherer, Dorothee Schramm, Hi-Taek Shin, Herfried Wöss, and Julia Zagonek.

6 The respective VIAC Board appoints the members of the International Advisory Board for a term of its period of office. The Vienna Rules do not specify the number of members, therefore the Board is free to determine the number. Serving as a member of the International Advisory Board is an honorary office.

7 Meetings of the International Advisory Board usually take place once or twice a year. They are attended by the members of the Board, convened by the President and chaired either by him or by one of the Vice Presidents. Since the

International Advisory Board does not have to pass resolutions, its duties do not need to be regulated by means of internal rules of procedure. In case of doubt, a simple majority of the members present is required for "Recommendations of the International Advisory Board".

2.2 Domestic Advisory Board

The Domestic Advisory Board currently (as of January 2022) has the following members: **8**

Nora Aburumieh, Christian Aschauer, Philip Aumüllner, Lisa Beisteiner, Dietmar Czernich, Markus Fellner, Georg Graf, Christian Koller, Ruth Ladeck, Christiane Loidl, Dietmar Lux, Gernot Murko, Martin Mutz, Florian Neumayr, Michael Nueber, Ulrike Paukner-Healey, Martin Platte, Michael Pressl, Manfred Puchner, Hubertus Schumacher, Nikolaus Vavrovsky, and Brigitta Zöchling-Jud.

The respective VIAC Board appoints the members of the Domestic Advisory Board for an indefinite period. The Vienna Rules also do not specify the number of members, therefore the Board is free to determine the number. Serving as a member of the International Advisory Board is an honorary office. **9**

Meetings of the Domestic Advisory Board usually take place at least twice a year. They are attended by the members of the Board, convened by the President and chaired either by him or by one of the Vice Presidents. Since the Domestic Advisory Board does not have to pass resolutions, its duties do not need to be regulated by means of internal rules of procedure. In case of doubt, a simple majority of the members present is required for "Recommendations of the Domestic Advisory Board". **10**

2.3 Mediation Advisory Board

The Mediation Advisory Board currently (as of January 2022) has the following members: **11**

Claudio Arturo, Reinhard Dittrich, Sascha Ferz, Ulrike Frauenberger-Pfeiler, Karin Gmeiner, Anne-Karin Grill, Michael Hamberger, Amelie Huber-Starlinger, Christine Mattl, Margareta Miel, Valentina Philadelphy-Steiner, Stephan Prayer, Stephan Proksch, Michaela Steinwender, Natascha Tunkel.

12 The VIAC Board appoints the members of the Mediation Advisory Board for an indefinite period. The Vienna Rules do not specify the number of members, therefore the Board is free to determine the number. Serving as a member of the International Advisory Board is an honorary office.

13 Meetings of the Mediation Advisory Board take place regularly, at least quarterly.

DEFINITIONS

Article 6

(1) In the Vienna Rules

1.1 **party** or **parties** refer to one or more claimants, respondents or one or more third parties joined to the arbitration in a statement of claim;

1.2 **claimant** refers to one or more claimants;

1.3 **respondent** refers to one or more respondents;

1.4 **third party** refers to one or more third parties who are neither a claimant nor respondent in the pending arbitration and whose joinder to this arbitration has been requested;

1.5 **arbitral tribunal** refers to a sole arbitrator or a panel of three arbitrators;

1.6 **arbitrator** refers to one or more arbitrators;

1.7 **co-arbitrator** refers to any member of a panel of arbitrators except its chairperson;

1.8 **award** refers to any final, partial or interim award;

1.9 **third-party funding** refers to any agreement entered into with a natural or legal person who is not a party to the proceedings or a party representative (Article 13), to fund or provide any other material support to a party, directly or indirectly financing part or all of the costs of the proceedings either through a donation or a grant, or in exchange for remuneration or reimbursement that is wholly or partially dependent upon the outcome of the proceedings.

(2) To the extent the terms used in the Vienna Rules refer to natural persons, the form chosen shall apply to all genders. In practice, the terms in these rules shall be used in a gender-specific manner.

(3) References to "Articles" without further specification relate to the relevant articles of the Vienna Rules.

EXPLANATORY NOTE[1]

1. Introduction; purpose of the amendment

1 Relevant commentaries: With regard to the definitions in Article 6, cf. *Schwarzenbacher* in VIAC Handbook (2019) Art 6. For third-party funding see *Brekoulakis/Riegler/Kröll* in VIAC Handbook (2019) Art 33 mns 42-45.

2 The definition of "Third-Party Funding ("TPF")" was added to the Vienna Rules 2021 to facilitate the new provision on TPF in Article 13a.

3 The definition of "Secretary General" previously contained in Article 6 para 1.9 was deleted as Article 4 para 2 deals with the competence of the Secretary General and her Deputy. Thus, a definition was considered redundant. The Secretary General and her Deputy manage the Secretariat together. The Secretary General may be represented by her Deputy, if she is unavailable, and the Secretary General may authorise her to render decisions. With regard to the duties and tasks of the Secretary General, her Deputy and the Secretariat cf. *Fremuth-Wolf/Vanas-Metzer* in VIAC Handbook (2019) Art 4 mns 5-6.

2. Third-party funding (para 1.9)

4 The last few years have seen a marked increase in funding activity in litigation cases as well as in international commercial and investment arbitration cases. Consistent with this trend, VIAC incorporated a separate provision on TPF into the Vienna Rules 2021, which had previously only been addressed in a chapter in the VIAC Handbook 2019 (cf. *Brekoulakis/Riegler/Kröll* in VIAC Handbook (2019) Excursus on TPF to Art 33 mns 37-91).

5 The definition of the term TPF in Article 6 para 1.9 forms the basis for the provision on TPF in Article 13a. The same definition is contained in the Vienna Investment Arbitration Rules (Article 6 para 1.11).

[1] This Explanatory Note to Article 6 is based on *Schwarzenbacher* in VIAC Handbook (2019) Art 6 and *Brekoulakis/Riegler/Kröll* in VIAC Handbook (2019), Excursus on TPF to Art 33 mns 37-91. The authors were contacted and their approval obtained to use passages of the respective commentary in these Explanatory Notes.

TPF is defined as "any agreement entered into with a natural or legal person who is not a party to the proceedings or a party representative (Article 13), to fund or provide any other material support to a party, directly or indirectly financing part or all of the costs of the proceedings either through a donation or a grant, or in exchange for remuneration or reimbursement that is wholly or partially dependent upon the outcome of the proceedings". **6**

The definition of third-party funding is sufficiently broad to cover any type of third-party funding or material support that is *dependent on the outcome of the proceedings*, including portfolio funding, certain types of "after the event" ("ATE") insurance,[1] and donations or grants that require repayment in case of success. **7**

Brekoulakis/Riegler/Kröll in their Excursus on Third-Party Funding in the VIAC Handbook (2019) to the Vienna Rules 2018, distinguish third-party funding from ATE insurance. ATE insurance was not encompassed in the definition of TPF although the 2018 ICCA-Queen Mary TPF Report[2] did include it.[3] Since then, the market regarding third-party funding has developed significantly. In response to this, several institutions have included a provision on TPF in their institutional rules (Article 43 CAM Rules, Article 11(7) ICC Rules, Article 44 HKIAC Rules). The VIAC Board decided to follow this trend and included a TPF provision in the Vienna Rules and the Vienna Investment Rules 2021. ATE - insurance policies are tied to the outcome of a dispute in a manner that resembles modern forms of third-party funding, ie premiums are only payable in the event of success. The VIAC Board considered it appropriate to include such ATE-insurance in the definition in Article 6 para 1.9 Vienna Rules for the purpose of assessing potential conflicts of interest. **8**

[1] "After-the-event" (ATE) insurance is taken out after a legal dispute has arisen. There are various types of ATE insurance. Some cover the insured's liability for legal fees and costs incurred in relation to arbitration or litigation with the premium or success fee only becoming due if the case is successful. Other ATE insurance policies cover only the insured's risk of having to pay adverse costs in case the insured is unsuccessful in the arbitration or litigation, and require that the insured pays a fixed premium up front, i.e. not in exchange for remuneration that is dependent upon the outcome of the case. The latter type of ATE insurance is hence similar to "before-the-event" (BTE) insurance, which is obtained prior to a dispute to cover the costs of possible future disputes, where the insurer is paid in advance and irrespective of the outcome of the future potential dispute.

[2] Report of the ICCA-Queen Mary Taskforce on Third-Party Funding in International Arbitration (The ICCA Reports no. 4), 2018, pp. 66-67.

[3] *Brekoulakis/Riegler/Kröll* in VIAC Handbook (2019) Excursus on TPF to Art 33.

9 By contrast, commercial loans, "before the event" ("BTE") insurance (including liability insurance) and ATE insurance in which the requirement to pay the lender or insurer is not dependent on the outcome of the proceedings are *not* covered by the definition of TPF in Article 6 para 1.9. Funding received from a party's representative, such as contingency fee arrangements between the party and its counsel, were also excluded from the definition of TPF. This was due to the fact that the VIAC Secretariat and potential arbitrators are aware of the representative's participation in the case for the purpose of assessing potential conflicts of interest.

10 Article 13a paras 1 and 2 include requirements to disclose both the existence of TPF and the funder's identity, early on, to ensure the independence and impartiality of arbitrators and to allow for a conflict check. Please see the Explanatory Note on Article 13a for further detail.

STATEMENT OF CLAIM

Article 7

(1) The arbitral proceedings shall be initiated by submitting a statement of claim. The proceedings shall commence on the date of receipt of the statement of claim by the Secretariat of VIAC or by an Austrian Regional Economic Chamber in hardcopy form or in electronic form (Article 12 paragraph 1); hereby, the proceedings become pending. The Secretariat informs the other parties of the receipt of the statement of claim.

(2) The statement of claim shall contain the following information:

2.1 the full names, addresses, including electronic mail addresses, and other contact details of the parties and any comment on the parties' nationalities;

2.2 a statement of the facts and a specific request for relief;

2.3 the monetary value of each individual claim at the time of submission of the statement of claim if the relief requested is not exclusively for a specific sum of money;

2.4 particulars regarding the number of arbitrators in accordance with Article 17;

2.5 the nomination of an arbitrator if the dispute shall be decided by a panel of three arbitrators, or a request that the arbitrator be appointed by the Board; and

2.6 particulars regarding the arbitration agreement and its content.

(3) If the statement of claim does not comply with paragraph 2 of this Article, or if a copy of the statement of claim or the exhibits is missing (Article 12 paragraph 1), the Secretary General may request that the claimant remedy the defect within a time-period set by the Secretary General. If the claimant complies with the order to remedy the defect within the set deadline, the statement of claim shall be deemed to have been submitted on the date on which it was first received. If the claimant does not comply with the order to remedy the defect within the set deadline, the Secretary General may declare the proceedings terminated (Article 34 paragraph 3). This shall not prevent the claimant from raising the same claims at a later time in another proceeding.

(4) The Secretary General shall transmit the statement of claim to the respondent if no order to remedy pursuant to paragraph 3 of this Article was issued or if the claimant complied with such an order.

EXPLANATORY NOTE[1]

1. Introduction; purpose of the provision

1 Relevant commentary: *Rechberger/Hofstätter* in VIAC Handbook (2019) Art 7, pp. 46-53.

As far as the provisions remain unaltered, the relevant parts of the commentary are still applicable and are referenced below; if the passages are replicated, they are marked with ▌ on the side.

2 The changes made to this Article 7 are limited to minor linguistic changes, two additions in paragraph 2.1 which are intended to provide clarification, and a further change in paragraphs 3 and 4 concerning the remedial procedure.

3 The statement of claim has a number of very important functions, which are addressed by Article 7. The provision describes the minimum (formal and substantive) requirements of a statement of claim as a written submission initiating proceedings. It is intended as a guideline not only for structuring the statement of claim itself, but also for the efficiency of the arbitration. Upon receipt of the statement of claim, the proceedings become *"pending"* (cf. to these implications *Rechberger/Hofstätter* in VIAC Handbook (2019) Art 7 mn 4-6).

4 Article 7 also regulates the remedial procedure to be used if a statement of claim is incomplete or copies are missing.

[1] This Explanatory Note to Article 7 is based on *Walter H. Rechberger / Michael Hofstätter* in VIAC Handbook (2019) Art 7. The authors were contacted and their approval obtained to use passages of the respective commentary in these Explanatory Notes.

2. Commencement of the arbitration (para 1)

Cf. *Rechberger/Hofstätter* in VIAC Handbook (2019) Art 7 mns 2-7. 5

3. Requirements regarding the contents of the statement of claim (para 2)

The requirements regarding the contents of the statement of claim have not changed significantly compared to the Vienna Rules 2018. In addition to the full names and addresses and other parties' contact details, electronic mail addresses are explicitly required as well as a comment on the parties' nationalities. Parties may need to provide information on the nationality of the parties, if it is not self-evident or in case of multiple nationalities. The latter is to facilitate any sanction checks that may be necessary for the VIAC Secretariat to conduct. If the parties have agreed that the nationality should be taken into account, this may also be relevant when the VIAC Board is requested to appoint an arbitrator. 6

Other forms of written submissions instituting proceedings with fewer requirements as to the contents, such as the so-called "notice of arbitration" (cf. Article 3 para 3 of the Swiss Rules of Arbitration; Article 6 SCC Rules; Article 1 LCIA Rules) do not suffice. Even if in practice several briefs are usually submitted, the Vienna Rules (following the tradition of Austrian procedural law and arbitration law) thereby aim at a swift and comprehensive resolution of the arbitration. 7

The statement of claim must in any case contain information about the parties, a statement of the facts and circumstances, particulars regarding the number of arbitrators (Article 17) and a specific request for relief. It is not necessary to request evidence in the statement of claim or to include a copy of the agreement from which the arbitral tribunal's jurisdiction results. However, particulars regarding the arbitration agreement and its content must be provided (Article 1 para 1). The parties have the option (whether in cases of one or several arbitrators) to refrain from nominating an arbitrator and instead request in the statement of claim that the arbitrator be appointed by the Board. 8

9 If the relief requested is not exclusively for a specific sum of money, the monetary value of each individual claim at the time of submission of the statement of claim must be stated.

10 The details listed in Article 7 para 2 only constitute the minimum requirements for the statement of claim. The claimant may add other information and list means of evidence he considers relevant, or even produce the same together with the statement of claim. Since the arbitral tribunal has not been constituted at the time the statement of claim is submitted, claimants often wait until it has been constituted before they submit more extensive pleadings to be able, on the one hand, to take account of the requirements of the arbitral tribunal and, on the other, to be able to respond to the respondent's reaction in the answer to the statement of claim. According to Article 7 and following Article 23 para 1 UNCITRAL Model Law, the statement of claim must in any case be designed in such a way that the *relief requested is presented conclusively.*

4. Incomplete statements of claim (para 3)

4.1 Examination of the statement of claim

11 The VIAC Secretariat will review the statement of claim for completeness in accordance with Article 7 para 2. If any of the required particulars or if a copy of the statement of claim or the exhibits is missing, the Secretary General may ask the claimant to remedy the defect within the time limit set by the Secretary General according to Article 7 para 3 ("order to remedy"). Article 7 para 3 is a discretionary provision. Hence, the Secretary General will initiate a remedy procedure in line with its established, service-oriented practice, differentiating between missing particulars of the statement of claim as listed in para 2 and a missing copy of a statement of claim or exhibits. Note that following the Rules Revision 2021 and according to Article 12 para 1, a statement of claim, including exhibits, shall be submitted in electronic form and hardcopy form (only) in the number of copies necessary to provide each party with a copy (no longer requiring copies also for the Secretariat and each arbitrator).

Article 7 para 3 provides that if an order to remedy is executed within the deadline, the statement of claim shall be deemed to have been submitted on the date on which it was first received. In case management practice, with regard to missing copies, the VIAC Secretariat will usually waive such an order to remedy to ensure the continuity of proceedings. The statement of claim will be transmitted to the respondent if no order to remedy pursuant to Article 7 para 3 was issued or if the claimant complied with such an order. Again, in case management practice, the Secretariat reserves the right to waive the order to remedy if necessary. **12**

Upon fruitless expiration of the deadline for an order to remedy the Secretary General *may* declare the proceedings terminated according to Article 7 para 3 and in connection with Article 34 para 3. Pursuant to Article 12 para 8 last sentence the time limit to remedy defects may be extended on sufficient grounds (as to time limits, its observance in general and as to the possibility of extensions, cf. *Gantenberg/Kühn* in VIAC Handbook (2019) Art 12 mn 28 et seqq. and *Vanas-Metzler/Rogge* in VIAC Handbook (2019) Excursus Art 12 mn 57). **13**

If Austrian law is applicable, the tolling of the statute of limitations becomes ineffective retroactively by such termination of the proceedings. Article 7 para 3 Vienna Rules expressly provides that in the case of such termination of proceedings, the claimant is free to assert its claims in other proceedings. Therefore, the Secretary General's declaration to terminate the proceedings (which were instituted in an incomplete manner) must be considered equivalent to a withdrawal of the statement of claim with no waiver of the claim. **14**

If the claimant fails to nominate an arbitrator despite the Secretary General's request to supplement the statement of claim, the Secretary General may declare the proceedings terminated according to the wording of Article 7 para 3. However, the provisions of Article 17 paras 3 and 4 (as *lex specialis*) apply, according to which the arbitrator is appointed by the Board if the party fails to nominate one within the time limit (cf. *Riegler/Boras* in VIAC Handbook (2019) Art 17 mn 13 et seqq.). **15**

16 The following provides guidance on the required number of copies to be submitted according to Article 12 para 1:

1 claimant **1** respondent **3** arbitrators	**1** copy *
1 claimant **2** respondents **1** arbitrator	**2** copies *
2 claimants **3** respondents **3** arbitrators	**3** copies *

* one copy for each respondent only

4.2. Examination of jurisdiction

17 Cf. *Rechberger/Hofstätter* in VIAC Handbook (2019) Art 7 mns 16-20.

5. Transmission of the statement of claim (para 4)

18 If no order to remedy as described in Article 7 para 3 has been issued, or if such an order has been complied with, the Secretary General will transmit the statement of claim to the respondent.

19 If copies of the statement of claim or exhibits are missing (e.g. if it was submitted only in an electronic version), the Secretary General will defer transmission of the statement of claim to the respondent. Under the Vienna Rules 2018, this was explicitly mentioned in para 4, but the deletion of this sentence was meant only to ease reading and to remove the differentiation of "order to remedy" and "order to supplement" which appeared somewhat artificial.

20 In practice, the statement of claim will normally be sent to the respondent by a courier or any other kind of postal delivery with proof of service (international return receipt). The Secretariat will inform the claimant if there are problems with the transmission of the statement of claim to enable him to supplement the service details. Even though the claimant is solely responsible for providing the correct address of the respondent, VIAC is often able to assist through the Austrian Foreign Trade Centers or embassies.

If the correct address for service of the statement of claim cannot be located, the question arises whether it will be possible and admissible to continue with the arbitration. Pursuant to Article 12 para 5.2, written communications shall be deemed to have been received on the day on which receipt can be presumed. If the written communication was properly sent (i.e. to the address of the party or the party's representative (as last notified) in a manner that provides a record of sending (Article 12 paras 3 and 4)[2], receipt is presumed (Article 12 para 5.2). Ultimately, however, the claimant is exposed to the risk that the arbitral award may not be enforceable or may even be set aside due to a violation of the right to be heard (cf. *Gantenberg*/Kühn in VIAC Handbook (2019) Art 12 mn 16; *Vanas-Metzler/Rogge* in VIAC Handbook (2019) Excursus Art 12 mn 48; *Haugeneder/Netal* in VIAC Handbook (2019) Art 28 mn 29). **21**

If the claimant cannot provide a valid service address, the claim will usually be withdrawn. The Secretary General may terminate the proceedings, if an order to remedy the address pursuant to Article 34 para 3 was not complied with (cf. *Schifferl/Wong* in VIAC Handbook (2019) Art 34 mn 22). **22**

[2] cf. VIAC Explanatory Notes Vienna Rules (2022) Art 12.

WRITTEN COMMUNICATIONS, TIME LIMITS AND DISPOSAL OF FILE

Article 12

(1) A statement of claim, including exhibits, shall be submitted in electronic form and in hardcopy form in the number of copies necessary to provide each party with a copy.

(2) After transmission of the file to the arbitral tribunal, all written communications and exhibits shall be sent to each party and each arbitrator in the manner stipulated by the arbitral tribunal. The Secretariat shall receive all written communications between the arbitral tribunal and the parties in electronic form.

(3) Written communications shall be sent in hardcopy form by registered mail, letter with confirmation of receipt, courier service, or in electronic form, or by any other means of communication that provides a record of sending.

(4) Written communications shall be sent to the address of the addressee for whom it is intended, as last notified. Once a party has appointed a representative, the written communication shall be sent to the representative's address, as last notified.

(5) Written communications shall be deemed to have been received on the day

5.1 the addressee has actually received the written communication; or

5.2 receipt can be presumed if the written communication was sent in accordance with paragraphs 3 and 4 of this Article.

(6) If a statement of claim against multiple respondents cannot be transmitted to all respondents, upon request of the claimant the arbitration shall proceed only against those respondents that received the statement of claim. Upon request of the claimant the statement of claim against the remaining respondents shall be addressed in a separate proceeding.

(7) Time limits shall start to run on the day following the day of receipt (paragraph 5) of the respective written communication triggering the commencement of the time limit. If this day is an official holiday or a non-business day at the place of receipt, the time limit shall start to run on the next business day. Official holidays or non-business days falling during a time period shall not interrupt the continuation or extend the time limit. If the last day of the time limit is an official holiday or a non-business day at the place of receipt, the time limit shall end on the next business day.

(8) A time limit relating to any written communication is satisfied if it is sent in the manner stipulated in paragraphs 3 and 4 of this Article on the last day of the time limit. Time limits may be extended where sufficient grounds for such extension are considered to exist.

(9) After termination of the proceedings (Article 34), the Secretariat may dispose of the entire file of a case, with the exception of decisions (Article 35).

EXPLANATORY NOTE[1]

1. Introduction; purpose of the provision

Relevant commentary: *Gantenberg/Kühn* in VIAC Handbook (2019) Art 12, pp. 70-84. **1**

As far as the provisions remain unaltered, the relevant parts of the commentary are still applicable and are referenced below; if the passages are replicated, they are marked with ▌ on the side.

In March 2019, the online case management platform, the "VIAC Portal" was introduced. It did not require any particular changes to Article 12 as the provision was flexible enough to allow for the submission of documents via this platform. To provide users guidance on how to use the platform and exchange files securely, the Secretariat has drafted the VIAC Portal Guidelines which are available on the VIAC website. For further information cf. *infra* item 7 mns 38 et seqq. Excursus: VIAC Portal. **2**

The main changes made to Article 12 are linguistic in nature. Most of the linguistic changes are to avoid the use of the term "service" as the Secretariat is not a delivery organ ("Zustellorgan"). Article 12 paras 2-8 merely intend to express that the Secretariat transmits *written communication* and the manner in which it does so. The term "service" thus has been replaced by "transmit" or "receipt", depending on the context. **3**

In order to support greener arbitrations,[2] Article 12 para 1 has been amended to provide that hardcopies for the Secretariat and arbitrators are no longer required.

[1] This Explanatory Note to Article 12 is based on *Ulrike Gantenberg / Wolfgang Kühn* in VIAC Handbook (2019) Art 12. The authors were contacted and approval obtained to use passages of therespective commentary in these Explanatory Notes.

[2] VIAC has signed the Green Pledge (see https://www.greenerarbitrations.com/greenpledge) in December 2021.

2. Form of submitting the statement of claim

4

5 Article 12 para 1 provides that a statement of claim including its exhibits shall be filed in electronic and in hardcopy form in sufficient copies so as to provide each party with a copy. As mentioned above, hardcopies for the Secretariat and the arbitrators are no longer required in order to support greener arbitration.

6 In subsequent correspondence, the parties shall transmit all documents in electronic form to the VIAC Secretariat in accordance with Art 12 para 2. VIAC shall also communicate with the parties in electronic form in the further course of the proceedings. With regard to extensions of claims, VIAC reserves the right to request and forward paper copies in addition to the electronic submission.

7 If not all enclosures are submitted (in their entirety) to VIAC in electronic form, this will have no effect on the effective date of receipt of the statement of claim and the commencement of the proceedings. The receipt of the mere statement of claim itself in paper or electronic form is decisive (Art 7 para 1). In this respect, the provision in Art 12 with regard to the form of the contribution (cumulative hardcopy and electronic form) differs from the regulatory effect and the relevant time of service in Art 7 para 1. In the absence of (sufficient number of) copies of the statement of claim or exhibits (Art 12 para 1) the Secretary General may request the party to remedy this within a specified period (Art 7 para 3).

8 VIAC transmits the statement of claim to the respondent together with exhibits in hardcopy in order to obtain a record of sending in the form of a return receipt or other confirmation of transmission. This is particularly relevant for the enforcement of the award if the defendant subsequently ceases to participate in the proceedings. Should it not be possible to transmit the statement of claim in hardcopy, it may be sent electronically if the respondent's email address is known.[3] The transmission of the statement of claim in hardcopy form is one of two cases whereby an exception to the principle that all written communications in VIAC proceedings shall only be sent electronically is made.

9 The second exception to the latter rule is the transmission of the award to the parties, in accordance with Art 6 para 5 first sentence. If it is not possible or feasible to send the award in hardcopy within a reasonable time, or if the

[3] Cf. mns 15 et seqq.

parties so agree, the Secretariat may send a copy of the award in electronic form. In this case, a hardcopy may be sent at a later stage (Art 36 para 5 second and third sentence).

In addition, at the request of a party, VIAC may send the text of the award (without signatures) in electronic form to both parties (cf. Explanatory Notes Vienna Rules (2022) Art 36 mn 13). **10**

Since the introduction of the VIAC Portal in March 2021, a statement of claim may also be filed by uploading it to the platform after registration and successful authentication (cf. *infra* item 7 mns 38 et seqq. Excursus: VIAC Portal). Thus, claimants are advised to contact the VIAC Secretariat prior to filing a statement of claim so that access to the VIAC Portal can be provided in a timely manner. **11**

3. Transmission of written communications in VIAC proceedings; VIAC Portal

3.1. General

Following the Rules Revision 2021, the provisions in Art 12 paras 3 to 5, which regulate the transmission of written communications in VIAC proceedings, have been amended and brought in line with the new wording (the term "service" has been removed). The Vienna Rules provide for transmission of written communications to a specific addressee in a specific, predefined form, with special rules in Art 7 paras 1 and 4 (statement of claim), Art 14 para 3 (joinder of third parties), and Art 36 para 5 (arbitral awards). **12**

The rules on transmission ensure both: the equal treatment of written communications and equal treatment of the parties involved. Unless the arbitral tribunal determines otherwise after the transfer of the case in accordance with Art 12 para 2, Art 12 applies equally to all written submissions and correspondence of the parties, the arbitral tribunal and the VIAC, insofar as they concern the arbitration proceedings.[4] Notwithstanding any stipulation by the arbitral tribunal, all correspondence from the parties to VIAC in relation **13**

[4] *Schwarz/Konrad* in VIAC Handbuch (2019) Art 13 mn 13-14.

to VIAC shall be in electronic form in accordance with Art 12 para 2 second sentence.

14 In March 2021, VIAC introduced the VIAC Portal – an online case management platform hosted on HighQ, a cloud-based file sharing and collaboration software operated by Thomson Reuters. The VIAC Portal is set up to increase efficiency in VIAC cases further, enable transparency between case participants, and address the participants' ever-increasing needs for data security, confidentiality, and privacy. For more information about the characteristics and functionality of the VIAC Portal, please read the Guidelines available on our website and cf. *infra* item 7 mns 38 et seqq. Excursus: VIAC Portal.

3.2. Form (para 3)

15 Article 12 para 3 provides that written communications shall be sent in hardcopy form by registered mail, letter with confirmation of receipt, by courier service or in electronic form, or by any other means of communication that provide a record of sending.[5]

16 The term "electronic form" includes transmission via e-mail. Article 12 para 3 regulates in general terms that sending written communications in electronic form is permissible. The term "electronic form" must be interpreted broadly. Transmission in electronic form includes e-mail, the online case management platform, i.e. the VIAC Portal, but also the transmission of documents on a USB stick . When transmission via "electronic form" is chosen, the sender must ensure data security to guarantee the confidentiality of the arbitration proceedings. If transmission per e-mail proves problematic due to the volume of data, a different form of electronic transmission such as a platform should be chosen to ensure successful transmission.

[5] Sending written communications in war-zones, such as Syria, Sudan, Iran, Ukrain or to remote parts of China, where courier deliveries are not accepted and postal return receipts not returned, remains problematic. In such cases the sender, usually the claimant, will bear the risk of transmission and receipt by respondent. An experienced arbitral tribunal will be in a position to address this issue with the parties accordingly.

A critical point is that sending of written communications by e-mail or another electronic form does not ensure secure proof of transmission or a record of sending. Even though the sending of an e-mail message can be traced in one's own mailbox, transmission to and, above all, receipt of an e-mail message by the addressee is not recorded. There is no transmission report as there is with a fax transmission. Even a confirmation that the e-mail has been read, which, for example, may be activated in MS Outlook, is not sufficient proof. Receipt can only be assumed if the recipient replies to the message. **17**

Thus, the recipient should expressly be asked to do so. Otherwise, proving receipt of a simple e-mail message is not possible. The addressee of other forms of electronic service should equally be requested to acknowledge receipt. Although the first sentence of Art 12 para 8 provides that the action of sending the document suffices to comply with the time limit, proof of dispatch is no protection against an allegation to the effect that the recipient did not receive the document. **18**

As regards "any other means of communication", a record of sending must be equally ensured. The physical delivery of the document continues to be possible because in practice the personally encountered addressee is required to confirm receipt. The risk of proof of service remains where no confirmation of receipt is handed over. The person effecting service bears the burden of demonstrating and proving due service. **19**

In practice, the arbitral tribunal will stipulate detailed regulations on the type of transmission of documents for the proceedings in its first procedural order and is entitled to do so pursuant to Art 12 para 2 first sentence ("in the manner stipulated by the arbitral tribunal"). Since the introduction of the VIAC Portal in March 2021, the tribunal could, for example, stipulate that any written communication and documents are to be uploaded to the VIAC Portal within the time limit set. **20**

3.3. Address and addressee (para 4)

Pursuant to the first sentence of Art 12 para 4, written communications shall be sent to the address of the addressee for whom it is intended, as last notified. Once a party has appointed a representative, the written communication shall be sent to the representative's address, as last notified. A presumption of **21**

receipt is stipulated in Art 12 para 5 if a written communication was sent to the addressee in accordance with Art 12 para 4. This legal fiction is necessary to prevent a situation where a party can no longer be reached and, in this way, otherwise might block the proceedings.[6]

22 With the introduction of the VIAC Portal in March 2021, the following has to be noted: At the beginning of the proceedings, the parties (their representatives) will be requested to name at least one designated user and a respective e-mail address. By naming a user and specifying their e-mail address, the party (its representative) acknowledges that the Portal operates as a notified address pursuant to the applicable rules (Art 12 para 4). The act of registration confirms this provision. If the registered user is a party representative, i.e. Acting on behalf of one of the parties to the arbitration, the user obligated the respective party.

23 The regulation reflects the parties' duty to provide a valid address and other contact details of the parties in their written submissions instituting the proceedings.[7] Written communications that are sent to such notified address shall be deemed to have been duly received even if the party can no longer be reached at the address.[8] In the same vein, the parties should immediately notify any change in their address, including e-mail address, in the interest of the proceedings and their own legal certainty. If a change of address is not notified and the party *de facto* excludes itself from the proceedings, this should not, however, constitute grounds for setting aside the arbitral award based on an infringement of the right to be heard[9] there is a record of sending (and receipt) of the notification (provided upon commencement of the arbitration).[10]

24 If the statement of claim cannot be sent to the respondent, the claimant will, in practice, be notified by the Secretariat and given an opportunity to supplement the address details.[11] The claimant bears the risk of transmission

[6] *Schwarz/Konrad* in VIAC Handbook (2019) Art 13 mn 13-14.
[7] Cf. Art 7 para 2.1; Art 8 para 2.1; *Schwarz* in *Liebscher/Oberhammer/Rechberger* II mn 8/183.
[8] *Schwarz/Konrad* in VIAC Handbook (2019) Art 13 mn 13-14.
[9] Cf. Art V (1) (b) of the New York Convention; *Scherer* in *Wolff*, New York Convention Article V mn 167 et seq.
[10] See also *Schwarz/Konrad* in VIAC Handbook (2019) Art 13 mn 13-14.
[11] *Rechberger/Hofstätter* in VIAC Handbook (2019) Art 7 mn 21. According to the wording of Art 12 paras 3 and 4, the provision must be applied to initial service of statements of claim as well, i.e. a statement of claim will be deemed received if it was addressed to the service address most recently notified and in any of the

and delivery; the presumption of receipt of a written communication stipulated in Article 12 para 5 (if a written communication was sent to the addressee in accordance with Article 12 para 4) is to ease this burden. The statement of claim thus will be deemed to have been received by the respondent even though the respondent might actually not have gotten it. An arbitral award that is subsequently rendered may nevertheless risk being set aside on the basis of an infringement of the right to be heard, or enforcement of the same may be uncertain. In practice, the claimant will often withdraw the claim if it is impossible to advise a proper address of the respondent. VIAC may then discontinue the proceedings in accordance with the third sentence of Article 7 para 3 in conjunction with Article 34 para 3 (cf. *Schifferl/Wong* in VIAC Handbook (2019) Art 34 mns 21 et seq.).

Once a party has appointed a representative, written communications shall be sent to the representative's address, as last notified. Any written communication sent to the address of the representative will be deemed to have been received by the represented party (Article 12 para 4 in conjunction with para 5.2). **25**

3.4. Time of receipt of written communications (para 5)

The regulation of Article 12 para 5 assumes a fictitious time of receipt. The time of receipt is essential for the calculation of time limits. Written communications shall be deemed received on the day the addressee has actually received it (Article 12 para 5.1). This will be the case when the document enters the recipient's sphere of control in such a way that the recipient is able to take note of the document. However, actual taking note of or personal delivery is not required. **26**

In addition, written communications shall be deemed to have been received on the day receipt can be presumed if the written communication was sent in accordance with paragraphs 3 and 4 of Article 12 (Art 12 para 5.2), i.e., when it was sent in the manner stipulated by para 3 and to the address as notified under para 4. **27**

forms stipulated in Article 12 paras 3 and 5.2.

28 If both alternatives stated in Article 12 para 5 are realised, actual receipt will prevail. The legal presumption of effective service in (Art 12 para 5.2) only applies where there is no personal receipt. For example, where the sender receives no service slip but the recipient replies by referring to the document, actual receipt has obviously occurred (the sender just does not know the time or date) and Article 12 para 5.1 applies. Accordingly, and for lack of proper knowledge, receipt will be deemed to have occurred no later than at the time the party appears in the proceedings.

29 The Vienna Rules 2006 provided that where there was no record of sending but the conduct of the recipient allowed the conclusion that he had actually received the document, in the case of doubt the date of the written reply of the recipient was considered the date of receipt to be on the safe side.

3.5. Number of copies (para 1)

30 Pursuant to Article 12 para 1, the statement of claim and its exhibits shall be submitted in hardcopy form in sufficient numbers to enable each party to receive one copy. The 2021 Rules Revision no longer requires that hardcopies of the statement of claim (including exhibits) are provided to the Secretariat and each arbitrator.

31 After the case has been submitted to the arbitral tribunal, the documents and exhibits shall be submitted to the parties and the respective arbitrators in the manner determined by the arbitral tribunal. VIAC maintains a complete arbitration file in the electronic database and is thus informed of the current status of proceedings. VIAC may provide the complete file immediately in the case of a change of arbitrator(s).

32 Article 12 para 2 clarifies that, in the interests of transparency and efficiency, once the file has been transmitted to the arbitral tribunal, all communications must simultaneously be sent to the arbitral tribunal and the other parties. By reverse conclusion this means that, as long as the file has not been transmitted to the arbitral tribunal, all communications will be handled via the Secretariat of VIAC. If the office of arbitrator is accepted, the arbitrator submits to the Vienna Rules and undertakes in particular to forward all documents to the Secretariat in accordance with Article 12 para 2. This ensures the completeness of the arbitration file at VIAC (cf. the declaration of acceptance for the office of

arbitrator).

In March 2021 the VIAC was introduced (cf. *supra* mn 18 and cf. *infra* item 7 mns 38 et seqq. Excursus: VIAC Portal). **33**

Ex parte communication, i.e., communication between only one party and (any or all) arbitrators should be avoided. However, in certain circumstances, bilateral communication between one party and the VIAC Secretariat may be deemed admissible. In such cases, the VIAC Secretariat will – in the interest of transparency – immediately notify the other party and the arbitrators of essential procedural circumstances, which go beyond mere information on organizational issues.[12] As a matter of principle, however, unilateral communication is not recommended in order to avoid challenge of the arbitral award on that ground at a later stage. **34**

4. Time limits

Cf. *Gantenberg/Kühn* in VIAC Handbook (2019) Art 12 mns 28-41. **35**

5. File destruction

Cf. *Gantenberg/Kühn* in VIAC Handbook (2019) Art 12 mns 42-43. **36**

6. Excursus: Electronic file

Cf. *Vanas-Metzler/Rogge* in VIAC Handbook (2019) Art 12 mns 44-57. **37**

7. Excursus: VIAC Portal

In March 2021, VIAC introduced the VIAC Portal – an online case management platform hosted on *HighQ*, a cloud-based file sharing, and collaboration software operated by *Thomson Reuters*. The VIAC Portal can be used for all types of VIAC proceedings for communication between VIAC, the parties, and the arbitrators or other third-party neutrals. On the VIAC Portal, a separate case site will be opened for each case. The VIAC Portal is set up to **38**

[12] *Derains/Schwartz*, Guide to the ICC Rules[2] 35.

further increase efficiency in VIAC cases, to facilitate transparency between the case participants, and address users' ever-increasing need for data security, confidentiality, and privacy.

39 The VIAC Portal can be used for all VIAC proceedings – besides arbitral proceedings also for proceedings in accordance with the Vienna Mediation Rules or for *ad hoc* proceedings in which VIAC assists.

40 All new cases received will dispose of a separate platform („Case Site" or „Site") in the VIAC Portal, specifically created for this purpose.[13]

7.1 Registration

41 The parties, arbitrators, or other third-party neutrals involved in VIAC proceedings will receive an e-mail with registration details.

42 At the beginning of the proceedings, the parties (their representatives) will be requested to provide the name and e-mail address at least one designated user and his e-mail address. By naming this person and his e-mail address, the party (its representative) acknowledges that the Portal functions as notified address pursuant to the applicable rules (Article 12 para 4; cf. *supra* mn 21). When registering, the user confirms this provision, and - if he/she is acting on behalf of a company - that by using the Portal, he/she equally obligates the company itself.

7.2 VIAC Portal Guidelines

43 The VIAC Portal Guidelines aim to provide users with a basic overview of the Portal's functionalities. A detailed user manual that thoroughly explains every aspect of the VIAC Portal can be found on the VIAC Portal. Furthermore, the experts at the VIAC Secretariat who deal with the VIAC Portal on a daily basis and have an in-depth understanding of its functionalities can provide further assistance to users where required.

[13] For further information on the VIAC Portal, see on the VIAC website: https://www.viac.eu/en/arbitration/viac-portal.

7.3 Scope of use

Prior to the transfer of the file to the arbitral tribunal, all written communications and exhibits between the parties and the VIAC Secretariat will be transmitted via the VIAC Portal. **44**

Upon transfer of the file, the arbitral tribunal shall determine the means of communication between the parties and the arbitral tribunal (Article 12 para 2 Vienna Rules). Therefore, the arbitral tribunal shall decide together with the parties during the first case management conference to what extent the VIAC Portal should be used. It should be agreed specifically which set of modules should be used. The VIAC Secretariat shall be informed about any such agreement. Arbitrators and parties are encouraged to maximise the use of the VIAC Portal. **45**

Depending on the determined method of communication, the correspondence with VIAC is carried out via the VIAC Portal or in another electronic form, following the transfer of the file to the arbitral tribunal. **46**

The manner of transmission according to the applicable VIAC Rules (Article 12 para 3 Vienna Rules) shall remain unaffected by the introduction of the platform, i.e., written communications shall continue to be sent in one of the forms specified therein. For instance, it is still possible (although undesirable) to transmit communication via e-mail in parallel to using the VIAC Portal. Should technical problems arise with the VIAC Portal, users are requested to contact the Secretariat immediately to find a solution or discuss an alternative form of transmission. **47**

7.4 Users

Members of the arbitral tribunal and at least one representative per party are required to register in and log into the VIAC Portal. The parties themselves receive access if they are not represented or if this is expressly requested. If the parties are represented, usually, only the party representatives will have access to the VIAC Portal. If a party representative represents more than one party, a single registration for all represented parties is sufficient. If, on the other hand, a party is represented by more than one party representative, it is sufficient for the case administration by VIAC to register one party representative. If party **48**

representation is prematurely terminated, the VIAC Secretariat will immediately revokeaccess for the respective users. A new user will be invited on behalf of the party.

49 Parties and arbitrators are each responsible for uploading their respective case-related communications.

50 Permissions to access the VIAC Portal for a specific case can only be granted by the VIAC Secretariat. For security reasons, only the VIAC Secretariat has the power to grant access to the VIAC Portal. For this reason, people involved in the particular case cannot gain access themselves or invite other people. Once the file has been transferred to the arbitral tribunal, any changes to the access granted to a specific party will only be made after consultation with the arbitral tribunal.

7.5 Volume and costs

51 In each case, a maximum of eight users for the parties (i.e., four for claimant and respondent respectively), users for the arbitral tribunal and the administrative secretary and a total of 5 GB of storage space are available at no additional cost. If the amount in dispute exceeds EUR 1 million, both the number of users and the storage space are doubled. If more users or storage space is required, additional packages are available for a fee. The VIAC Secretariat will provide users with such offers upon request.

52 The storage space available for each Case Site is not limited from a technical point of view. If users exceed their data volume, files can still be uploaded simple resulting in subsequent costs. Prior to filing extraordinarily large submissions, it is recommended to contact the VIAC Secretariat to ensure there is sufficient storage space on the platform.

7.6 Duration of use

53 For the duration of the proceedings, the Case Site will be made available to users. After termination of the proceedings, VIAC may terminate access to the Case Site. Users will be notified of termination well in advance. If users are interested in extended use for archiving purposes, they can contact the VIAC Secretariat.

7.7 Security

Data security considerations played a crucial role in developing the VIAC Portal. The aim was to create a platform that is modern and secure. VIAC partnered up with Thomson Reuters and their HighQ system, which was used for the VIAC Portal. **54**

This platform was chosen for its state-of-the-art security measures. All data is securely stored on servers in Germany. Moreover, the VIAC Portal is designed to address security and confidentiality concerns, to protect against threats or hazards to security or integrity, as well as to prevent unauthorized activities in relation to the contents. **55**

Furthermore, HighQ's security controlled programme complies with the applicable laws as well as the accepted standards for the industry. Both VIAC and Thomson Reuters are subject to strict confidentiality obligations regarding the content and users of the HighQ VIAC Portal. Additionally, VIAC is subject to the provisions of the General Data Protection Regulation. For security reasons, the login to the VIAC Portal is made using two-factor authentication. After entering the e-mail address and password, during each login process, a code is sent to the registered e-mail address, which must be entered within five minutes. Only after this two-stage process, the users gain access to the Sites of the VIAC Portal which are available to them. **56**

THIRD-PARTY FUNDING

Article 13a

(1) A party shall disclose the existence of any third-party funding and the identity of the third-party funder in its statement of claim or its answer to the statement of claim, or immediately upon concluding a third-party funding arrangement.

(2) If a party discloses third-party funding prior to the constitution of the arbitral tribunal, the Secretary General shall inform any arbitrator nominated for appointment or already appointed of such disclosure for purposes of completing the arbitrator declaration (Article 16 paragraph 3).

EXPLANATORY NOTE[1]

1. Introduction; purpose of the provision

1 The inclusion of a provision on third-party funding (TPF) serves to determine the nature and extent of disclosure of TPF arrangements in arbitration proceedings to ensure the independence and impartiality of the arbitrators through appropriate disclosure at the outset (paras 1 and 2).

2 Article 13a paras 1 and 2 are identical to the provisions in the Vienna Investment Arbitration Rules 2021. However, the Vienna Investment Rules contain an additional paragraph 3.[2] To address concerns often raised in the context of investment arbitration a third paragraph was added (Article 13a para 3) which aims at providing further clarification as to the powers and limits of the arbitral tribunal in connection with TPF.

3 In exceptional cases, there may also be the need in international commercial arbitration for the tribunal to order the disclosure of further details regarding the third-party funding arrangement. In principle, such possibility is covered by the inherent powers of the arbitral tribunal under the Vienna Rules (Articles 28 and 29 Vienna Rules). Although, that there were no explicit provisions on TPF under the 2018 version of the Vienna Rules, the arbitral tribunal already had the power and the discretion to consider TPF when

[1] This Explanatory Note on Article 13a is based on *Brekoulakis/Kröll/Riegler* in VIAC Handbook (2019) Excursus to Art 33 mns 37-91. The authors were contacted and their approval obtained to use passages of the respective commentary in these Explanatory Notes.

[2] Cf. Explanatory Notes Vienna Investment Rules (2022) Art 13a.

ordering security for costs or deciding on the allocation of costs under the Vienna Rules 2018. However, the mere existence of TPF does not in itself justify ordering security for costs. (Cf. *Brekoulakis/Kröll/Riegler* in VIAC Handbook (2019) Excursus to Art 33 mns 83-91)

This Explanatory Note on Article 13a is to be read in conjunction with the definition of TPF contained in Article 6 para 1.9 (cf. in more detail Explanatory Notes Vienna Investment Rules (2022) Art 6). Furthermore, the VIAC Handbook (2019) contains a chapter on "Third-Party Funding in Arbitration under the Vienna Rules" (cf. *Brekoulakis/Kröll/Riegler* in VIAC Handbook (2019) Excursus to Art 33 mn 37 et seqq.), which is still relevant and applicable to VIAC's policy regarding TPF. **4**

2. Disclosure of the existence of TPF and the identity of funder (para 1)

For the purpose of establishing the existence of a conflict of interest of a party and its third-party funder in relation to the tribunal, Article 13a para 1 requires a party to disclose both the existence of any TPF and the funder's identity in its statement of claim, its answer to the statement of claim, or immediately upon concluding a TPF arrangement. This disclosure requirement is an ongoing duty throughout the proceedings. **5**

3. Disclosure prior to the constitution of the arbitral tribunal (para 2)

Prior to the constitution of the arbitral tribunal, the existence of TPF and the funder's identity have to be disclosed to the VIAC Secretariat. The Secretary General will immediately inform any arbitrator (nominated/already appointed) of such disclosure in order to facilitate the completion or amendment of the arbitrator's declaration of acceptance (Article 16 para 3).[3] **6**

[3] For the Arbitrator's Acceptance of Office [Status: July 2021] see: https://www.viac.eu/en/arbitration/documents-for-arbitrators.

CONFIRMATION OF THE NOMINATION

Article 19

(1) After an arbitrator has been nominated, the Secretary General shall obtain the arbitrator's declarations pursuant to Article 16 paragraphs 3 and 4. The Secretary General shall forward a copy of these statements to the parties. The Secretary General shall confirm the nominated arbitrator if no doubts exist as to the impartiality and independence of the arbitrator and the ability to carry out the mandate. The Secretary General shall inform the Board of such confirmation at the subsequent meeting of the Board.

(2) If deemed necessary by the Secretary General, the Board shall decide whether to confirm a nominated arbitrator. Prior to the decision of the Board, the Secretary General may request comments from the arbitrator to be confirmed and from the parties. All comments shall be communicated to the parties and the arbitrator.

(3) Upon confirmation the nominated arbitrator shall be deemed appointed.

(4) If the Secretary General or the Board refuses to confirm a nominated arbitrator, the Secretary General shall request the party/parties entitled to nominate the arbitrator, or the co-arbitrators to nominate a different arbitrator or chairperson within 30 days. Articles 16 to 18 shall apply by analogy. If the Secretary General or the Board refuses to confirm the newly nominated arbitrator, the right to nominate shall lapse and the Board shall appoint the arbitrator.

EXPLANATORY NOTE[1]

1. Introduction

1 Relevant commentary: *Stefan Riegler/Alexander Petsche* in VIAC Handbook (2019) Art 19, pp. 142-147.

As far as the provisions remain unaltered, the relevant parts of the commentary are still applicable and are referenced below; if the passages are replicated, they are marked with ▌on the side.

2 Paragraph 2 was supplemented to reflect the estabilised practice in the arbitrator confirmation process.

[1] This Explanatory Note on Article 19 is based on *Stefan Riegler/Alexander Petsche* in VIAC Handbook (2019) Art 19. The authors were contacted and their approval obtained to use passages of the respective commentary in these Explanatory Notes.

2. Confirmation of the nomination

Cf. *Riegler/Petsche* in VIAC Handbook (2019) Art 19 mns 2-6. 3

The current version of VIAC's "Arbitrator's Acceptance of Office" may be downloaded on our website as well as the Guidelines for Arbitrators.[2] 4

The "Arbitrator's Acceptance of Office" form is part of the case file. It is made available to all of the arbitrators upon the transmission of the case file (Article 11). The form is currently made available via upload on the VIAC Portal (cf. Explanatory Notes Vienna Rules (2022) Art 12 item 7 mn 38 et seqq. Excursus: VIAC Portal). 5

2.1. Secretary General or board

Cf. *Riegler/Petsche* in VIAC Handbook (2019) Art 19 mns 7-11. 6

2.2. Confirmation by the Secretary General

Cf. *Riegler/Petsche* in VIAC Handbook (2019) Art 19 mns 12-16. 7

2.3. Confirmation by the board

The Board will examine the nominated arbitrator according to the same criteria as those used by the Secretary General. However, it will not refuse to confirm the arbitrator merely because of "any" doubts "whatsoever" as to independence, etc. but only where the arbitrator has significantly qualified his independence etc., or where the parties have raised objections and substantiated the same. In principle the Board will accept the choice of the parties and will not refuse to confirm an arbitrator nominated by the parties without appropriate reason. 8

Prior to the decision of the Board, the Secretary General may request comments from the arbitrator to be confirmed and from the parties. All comments shall be communicated to the parties and the arbitrator. This provision was introduced with the 2021 Rules Revision. It reflects the current procedure in challenge proceedings (Article 20 para 3). The main difference being that pursuant to Article 19 Vienna Rules, the Secretary General "may 9

[2] Documents for Arbitrators: https://www.viac.eu/en/investment-arbitration/documents-for-arbitrators.

request comments" whereas Article 20 para 3 Vienna Rules foresees that the Secretary General "shall" request comments from the challenged arbitrator and the other party/parties).

10 The decision of the Board is discretionary; the Board does not have to disclose the reasons for its decision (the same applies to the Secretary General). Upon successful confirmation, the arbitrator is deemed to have been successfully appointed.

3. Refusal of confirmation

11 Cf. *Riegler/Petsche* in VIAC Handbook (2019) Art 19 mns 19-22.

CONDUCT OF THE ARBITRATION

Article 28

(1) The arbitral tribunal shall conduct the arbitration in accordance with the Vienna Rules and the agreement of the parties in an efficient and cost-effective manner, but otherwise at its own discretion. The arbitral tribunal shall treat the parties fairly. The parties shall be granted the right to be heard at every stage of the proceedings.

(2) Upon prior notice, the arbitral tribunal may inter alia consider pleadings, the submission of evidence, and requests for the taking of evidence to be admissible only up to a certain point in time of the proceedings.

(3) At any stage of the proceedings, the arbitral tribunal is entitled to facilitate the parties' endeavors to reach a settlement.

EXPLANATORY NOTE[1]

1. Introduction

Relevant commentary: *Haugeneder/Netal* in VIAC Handbook (2019) Art 28 pp. 199-206. 1

As far as the provisions remain unaltered, the relevant parts of the commentary are still applicable and are referenced below; if the passages are replicated, they are marked with ▌ on the side.

Article 28 determines the conduct of the arbitration by the arbitral tribunal. It stipulates that the arbitral proceedings shall be conducted in compliance with the fundamental principles applying to arbitral proceedings: the principle of party autonomy including the primacy of the parties' agreement, compliance with the Vienna Rules, the principle of fairness and the right to be heard. Otherwise the arbitral tribunal may conduct the proceedings at its discretion, however, must proceed in an efficient and cost-saving manner. Article 28 para 1 therefore allows the parties and the arbitral tribunal to adjust the porceedings to the requirements of each specific case. 2

[1] This Explanatory Note on Article 28 is based on *Florian Haugeneder / Patrizia Netal* in the VIAC Handbook (2019) Art 28. The authors were contacted and their approval obtained to use passages of the respective commentary in these Explanatory Notes.

3 The 2021 Rules Revision introduced a third paragraph to encourage settlements in arbitration proceedings conducted under the Vienna Rules 2021.

2. Fundamental procedural principles (para 1 and para 2)

4 Cf. *Haugeneder/Netal* in VIAC Handbook (2019) Art 28 mns 4-30.

3. Facilitation of settlement by the arbitral tribunal (para 3)

5 In order to encourage settlements in the course of pending arbitration proceedings, it is now clarified in Article 28 para 3 that the arbitral tribunal is entitled to assist the parties in their endeavors to reach a settlement at any stage of the proceedings. An explicit provision on settlement can be found in certain civil law jurisdictions (e.g., Section 1053 of the German Code of Civil Procedure). The Austrian Code of Civil Procedure ("Zivilprozessordnung") does not provide for such an explicit provision nor did the 2018 Vienna Rules. This did not mean that such encouragement was not possible. However, since arbitrators, mainly from common law jurisdictions, when conducting arbitration proceedings seated in Austria, were often hesitant to encourage the parties' settlement endeavors , the members of the VIAC International Advisory Board suggested adding a paragraph 3 to clarify this point.

6 However, two aspects are worth noting in this regard: It was decided to use a general and soft wording to highlight that the arbitrator should not push the parties to a settlement. Good practice requires that the arbitrators ask for the parties' agreement prior to making any steps towards facilitating a settlement. Second, an arbitrator should not act as mediator in this scenario. The mediator role is an entirely different function. Invoking the role of arbitrator and mediator simultaneously is incompatible with the duty to remain independent and impartial. It may also pose the question which information and evidence the arbitrators may consider when rendering the award, which should be avoided.

ORAL HEARING

Article 30

(1) Unless the parties have agreed otherwise, the arbitral tribunal shall decide whether the proceedings should be conducted orally or in writing. If the parties have not excluded an oral hearing, upon any party's request the arbitral tribunal shall hold such a hearing at an appropriate stage of the proceedings. Having due regard to the views of the parties and the specific circumstances of the case, the arbitral tribunal may decide to hold an oral hearing in person or by other means. The parties shall in any case have the opportunity to acknowledge and comment on the requests and pleadings of the other parties and on the result of the evidentiary proceedings.

(2) The date of the oral hearing shall be fixed by the sole arbitrator or the chairperson. Hearings shall not be open to the public. The sole arbitrator or the chairperson shall prepare and sign minutes of the hearing, which shall contain at a minimum a summary of the hearing and its results.

EXPLANATORY NOTE[1]

1. Introduction; purpose of the provision

Relevant commentary: *Hahnkamper* in VIAC Handbook (2019) Art 30 pp. 214-219. 1

As far as the provisions remain unaltered, the relevant parts of the commentary are still applicable and are referenced below; if the passages are replicated, they are marked with | on the side.

The oral hearing – if there is one – forms the heart of arbitration proceedings. The preceding procedural steps serve to prepare for the oral hearing. The purpose of the oral hearing is to establish a reliable basis for the decision of the arbitral tribunal. It offers the parties an opportunity to fine-tune the arguments and counter-arguments presented earlier, and the arbitrators to work towards clarification of contradictions, supplementation of allegations of fact and, if possible, to put issues beyond dispute. Furthermore, at the oral hearing the personal evidence is taken by way of examination of witnesses, parties and experts. In the vast majority of cases this is done orally. This is why one of the 2

[1] This Explanatory Note on Article 30 is based on *Wolfgang Hahnkamper* in VIAC Handbook (2019) Art 30. The author was contacted and his approval obtained to use passages of the respective commentary in these Explanatory Notes.

basic rights of a party in arbitration is known as the right to be "heard".

3 The Vienna Rules deal with oral hearings in Article 30. The text stems from Article 20 para 3 (omitting its second sentence) and Article 20 para 4 of the Vienna Rules 2006. With the Rules Revision 2021, one sentence was added to Article 30 in para 1 to expressly state that the arbitral tribunal may decide to hold an oral hearing in person or also by other means, most importantly remotely by using video technology.[2] Although this was also possible pursuant to Article 30 para 2 Vienna Rules 2018, the general consensus was that it should be expressly provided for in order to provide assurance to arbitrators and to reflect a decision of the Austrian Supreme Court ("OGH"), which was rendered in the context of the Covid-19 pandemic in July 2020.[3] The latter decision was rendered at the outset of the COVID-19 pandemic and related to the holding of an oral hearing via video technology (for details on this decision, see *infra* mns 17-23).

4 Article 30 para 1 Vienna Rules is almost identical to the wording of Section 598 of the Austrian Code of Civil Procedure ("ZPO"). Repeating that provision here makes sense since Austrian procedural law is not necessarily applicable to all VIAC proceedings (for example, because the seat of the arbitral tribunal is outside Austria). In any event, the regulation in the Vienna Rules and the one in the Code of Civil Procedure comply with Article 24 para 1 of the UNCITRAL Model Law.

5 Despite the title, the provision not only sets forth principles that apply to oral hearings but also those for proceedings that are exclusively conducted in writing.

[2] The "Vienna Protocol – A Practical Checklist for Remote Hearings", which was developed by members of the VIAC Board, may be of useful guidance for parties, counsel and arbitrators when conducting hearings remotely. The Vienna Protocol is available on the VIAC website at: https://www.viac.eu/en/arbitration/general-measures-covid-19.

[3] OGH, 18 ONc 3/20s (2020).

2. Scope of oral hearing

Cf. *Hahnkamper* in VIAC Handbook (2019) Art 30 mns 5-8. **6**

3. Summons and preparation

Cf. *Hahnkamper* in VIAC Handbook (2019) Art 30 mns 9-11. **7**

4. No oral hearing

Cf. *Hahnkamper* in VIAC Handbook (2019) Art 30 mns 12-14. **8**

5. Safeguarding the right to be heard; ground for setting aside the arbitral award

The right of the parties to be heard is one of the fundamental principles of arbitration. If the place of arbitration is in Austria, any infringement of this principle will constitute grounds for setting aside the award as defined in Section 611 para 2 no 2 ZPO. **9**

Prior to the SchiedsRÄG 2006, it only constituted a ground for setting aside the arbitral award if the claimant was completely denied the right to be heard in the proceedings; the right to beheard was satisfied if the parties had an opportunity to file a written submission. **10**

When the SchiedsRÄG 2006 entered into force, it was initially unclear whether the fact that no oral hearing took place – despite a party's request – only constituted a procedural error, which is not subject to a sanction.[4] A subsequent OGH decision, took a firm stance on this point[5] where no oral hearing, despite a party's request to the contrary, constitutes a ground for setting aside the arbitral award as defined in Section 611 para 2 no 2 ZPO. **11**

[4] *Hausmaninger* in *Fasching/Konecny* IV/2[3] Sec 598 *ZPO* mn 34, provides that a ground for setting aside the award is only established if the parties were not even granted an opportunity to comment in writing.
[5] OGH, 7 Ob 111/10i of 30 June 2010, the Supreme Court found that according to section 598 sentence 2 ZPO (Art 20 para 1 Vienna Rules) that it is in principle correct that an oral hearing is mandatory if it has not expressly been excluded by mutual agreement and one of the parties has requested it.

12 A more recent OGH decision[6] took a more balanced approach, whereby the above-mentioned decision of 2010 was in principle upheld. The failure to hold a requested hearing does not necessarily constitute a violation of the right to be heard in the narrower sense, if the parties - as was undisputed in that case - were given the opportunity to present their arguments. The OGH also emphasized that the non-performance of a requested hearing can normally but "not necessarily" lead to an annulment. The Supreme Court looked at the purpose of an oral hearing: the purpose of an oral hearing mainly is to enable the parties to present their arguments orally. If this purpose cannot be realized, the hearing's conduct would be a mere formalism, which is not intended by Section 598 sentence 2 ZPO.

6. Oral hearing despite waiver by the parties

13 Cf. *Hahnkamper* in VIAC Handbook (2019) Art 30 mns 18-19.

7. Conduct of oral hearings; minutes

14 It is the tribunal's task to fix a date for the oral hearing, to prepare it and finally carry it out. The task lies with the sole arbitrator or (in panels) the chairman (presiding arbitrator). Best efforts should be excerpted to reach agreement with the parties (party counsel), but the ultimate decision rests with the tribunal. The procurement (and financing or co-financing) of appropriate facilities and of the record-keeping is, in today's practice, usually done by the parties' counsel.

15 It is international practice to keep minutes of oral hearings. As a minimum, a summary of the hearing and its results (summary minutes) is required. If hearings, in particular those including the taking of evidence, extend over several days or even weeks, it is common practice to keep a verbatim record.

16 A valuable source of information on the efficient conduct of an oral arbitration hearing can be found in the UNCITRAL Notes on Organizing Arbitral Proceedings.[7] For evidentiary hearings, the IBA Rules on the Taking

[6] OGH, 18 OCg 9/19a of 15 January 2020.
[7] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-notes-2016-e.pdf [accessed on 27.10.2021].

of Evidence in International Arbitration (2020) are an important guideline even if they have not been expressly agreed upon.

With the Rules Revision 2021, one sentence was added in Article 30 paragraph 1 to emphasize that the arbitral tribunal may decide to hold an oral hearing in person or by other means, most importantly remotely, by using video technology. This amendment reflects the decision of the Austrian Supreme Court (OGH 18 ONc 3/20s of 23 July 2020), which can be summarized as follows: The respondents in an arbitration seated in Vienna and administered by VIAC had challenged the arbitral tribunal because of its decision to conduct an oral hearing remotely by videoconference, despite the respondents' objection. The issue was whether conducting an oral hearing by videoconference despite one party's objection may violate due process. The Supreme Court upheld the arbitral tribunal's decision to hold an oral hearing remotely in such cases. The main points of the Supreme Court's reasoning are the following: **17**

According to the Supreme Court, the decision of the arbitral tribunal to conuct the arbitration hearing remotely neither violated the fundamental principle that both parties be treated fairly nor their right to be heard. Videoconferencing technology (both for the taking of evidence and the conduct of hearings) is widely used in judicial proceedings before state courts and this also applies to arbitral proceedings. The OGH emphasized that the Austrian legislature has expressly promoted the use of videoconferencing technology during the COVID-19 pandemic to ensure that judicial proceedings could be advanced. It also recognized that commentators have similarly endorsed the use of remote hearings in arbitral proceedings during the pandemic. **18**

Furthermore, the OGH expressly confirmed that, as a general rule, remote arbitration hearings are not only permissible if both parties agree but are also permissible if one of the parties objects. For this, the court relied on Article 6 ECHR. In such circumstances as the COVID-19 pandemic, insisting on an in-person hearing would lead to a standstill of proceedings. Videoconferencing provides a useful tool to ensure effective access to justice and the right to be heard. According to the OGH, this general conclusion in favor of remote hearings could only be reversed by sufficiently strong countervailing **19**

factual considerations in a particular case. The latter considerations were not found in this case.

20 As result of the time difference between Vienna and Los Angeles, the hearing could not occur during core business hours for all hearing participants. The Supreme Court, however, took the view that starting a hearing at 6.00 a.m. local time was less burdensome than having to travel from Los Angeles to Vienna for an in-person hearing.

21 With regard to the alleged witness tempering, the Supreme court stated, blanket allegations regarding the potential misuse of videoconferencing technology for the examination of witnesses do not render them inappropriate as such. The risk of witness tampering also exists in in-person hearings (e.g. through influencing a witness's testimony prior to the hearing or feeding the witness information on other evidence adduced during the course of the hearing).

22 Moreover, remote hearings allow for measures to control witness tampering that even "partly go beyond those available at a conventional hearing". Such measures specific to remote witness testimony include:

23

i. the (technical) ability of all participants to closely observe the person testifying from the front;
ii. the possibility to record the evidence;
iii. instructing the witness to look directly into the camera and keep his or her hands visible on screen at all times (making it impossible to read messages); and
iv. requesting the witness to show the room in which he or she is testifying (ensuring that no other person is present).

CLOSURE OF THE PROCEEDINGS AND TIME FOR RENDERING THE AWARD

Article 32

(1) As soon as the arbitral tribunal is convinced that the parties have had sufficient opportunity to make submissions and to offer evidence, the arbitral tribunal shall declare the proceedings closed as to the matters to be decided in the award. The arbitral tribunal may reopen the proceedings at any time.

(2) The award shall be rendered no later than three months after the last hearing concerning matters to be decided in an award or the filing of the last authorized submission concerning such matters, whatever is the later. The Secretary General may extend the time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative. Exceeding the time limit for the award will not render the arbitration agreement invalid or deprive the arbitral tribunal of its jurisdiction.

EXPLANATORY NOTE[1]

1. Introduction; purpose of the provision

Relevant commentary: *Schifferl/Wong* in VIAC Handbook (2019) Art 32 pp. 223-226. 1

As far as the provisions remain unaltered, the relevant parts of the commentary are still applicable and are referenced below; if the passages are replicated, they are marked with | on the side.

Article 32 provides for two obligations of the arbitral tribunal: 2

First, the arbitral tribunal must formally close the proceedings. Article 32 thereby intends to prevent surprise decisions and to safeguard the parties' right to be heard. 3

Second, a further provision to increase the efficiency of the proceedings was introduced by the Rules Revision 2021. Para 2 of Article 32, now sets a time limit for the issuance of the award. 4

[1] This Explanatory Note on Article 32 is based on *Markus Schifferl/Venus Valentina Wong* in the VIAC Handbook (2019) Art 32. The authors were contacted and their approval obtained to use passages of the respective commentary in these Explanatory Notes.

5 Article 32 para 1 provides that the arbitral tribunal must "declare the proceedings closed as to the matters to be decided in the award". Pursuant to Article 32 the arbitration proceedings must be closed not only before the arbitral tribunal renders a final award, but also before it renders an interim or partial award.

2. Closure of proceedings (para 1)

6 Cf. *Schifferl/Wong* in VIAC Handbook (2019) Art 32 mns 3-10.

3. Time limit for rendering the award (para 2)

7 Cf. *Schifferl/Wong* VIAC Handbook (2019) Art 32 mns 11-15 on the topic of "Anticipated Date of the Arbitral Award" is entirely replaced by the following commentary due to the introduction of a 3-month-time-limit for rendering the award.

8 According to Article 32 para 2, the award shall be rendered no later than three months after the last hearing concerning matters to be decided in an award or the filing of the last authorized submission concerning such matters, whatever is the later. The Secretary General may extend this period upon reasoned request or on its initiative. Exceeding the time limit for the award, however, does not render the arbitration agreement invalid or deprive the arbitral tribunal of its jurisdiction.

9 In commercial arbitration proceedings, a 3-month period is generally considered a reasonable time limit within which the tribunal may render an award. An extension will be granted in especially complex cases, but the provision should not lead to abuse with a remedy. Article 44 para 8 provides the Secretary General when fixing the arbitrators' fees (i.e., increase or decrease by up to 40%; cf. VIAC Explanatory Notes Vienna Rules (2022) Art 44 mn 33-44), taking into account whether the time limit for rendering the award was adhered to or not and for what reasons. This should not be perceived as a threat to decrease arbitratorts' fees but rather as a tool that may and will be used to motivate arbitrators to render the award within the foreseen time limit.

INTERIM AND CONSERVATORY MEASURES / SECURITY FOR COSTS

Article 33

(1) Unless the parties have agreed otherwise, as soon as the file has been transmitted to the arbitral tribunal (Article 11), the arbitral tribunal may, at the request of a party, grant interim or conservatory measures against another party as well as amend, suspend or revoke any such measures. The other parties shall be heard before the arbitral tribunal renders any decision on interim or conservatory measures. The arbitral tribunal may require any party to provide appropriate security in connection with such a measure. The parties shall comply with such orders, irrespective of whether they are enforceable before national courts.

(2) Any orders for interim or conservatory measures pursuant to this Article shall be in writing. In an arbitration with more than one arbitrator, the signature of the chairperson shall suffice. If the chairperson is hindered from acting, the signature of another arbitrator shall suffice, provided the arbitrator signing the order records the reasons for the absence of the chairperson's signature.

(3) Unless the parties have agreed otherwise, orders for interim or conservatory measures shall state the reasons upon which they are based. The order shall identify the date on which it was issued and the place of arbitration.

(4) Orders for interim and conservatory measures shall be retained in the same manner as awards (Article 36 paragraph 5).

(5) The provisions of paragraphs 1 to 4 of this Article do not prevent the parties from applying to any competent national authority for interim or conservatory measures. A request to a national authority to order such measures or to enforce such measures already ordered by the arbitral tribunal shall not constitute an infringement or waiver of the arbitration agreement and shall not affect the powers of the arbitral tribunal. The parties shall immediately inform the Secretariat and the arbitral tribunal of any such request as well as of all measures ordered by the national authority.

(6) The arbitral tribunal may, at the request of a party, order any party asserting a claim or counterclaim to provide security for costs, if the requesting party shows cause that the recoverability of a potential claim for costs is, with a sufficient degree of probability, at risk. When deciding on a request for security for costs, the arbitral tribunal shall give all parties the opportunity to present their views.

(7) If a party fails to comply with an order by the arbitral tribunal for security for costs, the arbitral tribunal may, upon request, suspend in whole or in part, or terminate, the proceedings (Article 34 paragraph 2.4).

EXPLANATORY NOTE[1]

1. Introduction

1 As far as the provisions remain unaltered, the relevant parts of the commentary are still applicable; they are not replicated but referenced below.

2. Interim measures

2 Cf. *Zeiler/Beisteiner* in VIAC Handbook (2019) Art 33 mns 4-18.

3. Security for costs

3 Cf. *Gabriel/Haugeneder/Pörnbacher* in VIAC Handbook (2019) Art 33 mns 19-36.

4 In the course of the Rules Revision 2021, it was clarified in the wording of paragraph 6 that not only the respondent but any party may request an order from the arbitral tribunal against any other party (and not only against the claimant) asserting a claim or counterclaim to provide security for costs. This was already understood to be applicable to counterclaims (counter-respondent and counter-claimant; cf. *Gabriel/Haugeneder/Pörnbacher* in VIAC Handbook (2019) Art 33 mn 25) under the old version of paragraph 6. However, there might also be other constellations.

5 Given the introduction of a provision on third-party funding following the 2021 Rules Revision, it should be emphasized that the mere existence of a TPF arrangement does not automatically justify granting security for costs (cf. VIAC Explanatory Notes Vienna Rules (2022) Art 13a mn 3).

[1] This Explanatory Note on Article 33 is based on *Zeiler/Beisteiner* in the VIAC Handbook (2019) Art 33 pp. 227-233; *Gabriel/Haugeneder/Pörnbacher* in the VIAC Handbook (2019) Art 33 pp. 234-238. The authors were contacted and their approval obtained to use passages of therespective commentary in these Explanatory Notes.

ARBITRAL AWARD

Article 36

(1) Awards shall be in writing. Awards shall state the reasons on which they are based unless all parties have agreed in writing or in the oral hearing that the award may exclude the reasons.

(2) The award shall identify the date on which it was issued and the place of arbitration (Article 25).

(3) All original copies of an award shall be signed by all arbitrators. The signature of the majority of the arbitrators shall suffice if the award states that one of the arbitrators refused to sign or was prevented from signing by an impediment that could not be overcome within a reasonable period of time. If the award is a majority award and not a unanimous award, this shall be stated upon request of the dissenting arbitrator.

(4) All original copies of the award shall be signed by the Secretary General and bear the VIAC stamp, which shall confirm that it is an award of VIAC, rendered and signed by one or more arbitrators appointed under the Vienna Rules.

(5) The Secretary General shall transmit the award to the parties in hardcopy form. If it is not possible or feasible to send the award in hardcopy form within a reasonable time, or if the parties so agree, the Secretariat may send a copy of the award in electronic form. In this case a copy of the award in hardcopy form may be sent at a later stage. Article 12 paragraphs 3, 4 and 5 apply. The Secretariat shall retain an original copy of the award and the documentation of proof of sending.

(6) Upon request of a party, the sole arbitrator or chairperson (or in case he is prevented from acting, another arbitrator) or, in case they are prevented from doing so, the Secretary General shall confirm that the award is final and binding on all original copies.

(7) By agreeing to the Vienna Rules, the parties undertake to comply with the terms of the award.

EXPLANATORY NOTE[1]

1. Introduction; purpose of the provision

1 Relevant commentary: *Hauser* in VIAC Handbook (2019) Art 36 pp. 266-275.

As far as the provisions remain unaltered, the relevant parts of the commentary are still applicable and are referenced below; if the passages are replicated, they are marked with ▌ on the side.

2 ▌ Article 36 contains important information on the rendering of an effective arbitral award and on its effects.

3 The change in Article 36 following the 2021 Rules Revision is limited to a change in para 5. In March 2020, paragraph 5 was already slightly amended to ease the transmission of awards during the Covid-19 pandemic.[2]

4 During the 2021 Rules Revision, it was decided to amend the provision to facilitate the general electronic transmission of arbitral awards.

2. Formal requirements

5 Cf. *Hauser* in VIAC Handbook (2019) Art 36 mns 2-21.

[1] This Explanatory Note on Article 36 is based on *Hauser* in the VIAC Handbook (2019) Art 36. The author was contacted and his approval obtained to use passages of the respective commentary in these Explanatory Notes.

[2] "(5 - new) The Secretary General shall serve the award on the parties in paper form. If it is not possible or feasible to serve the award in paper form within a reasonable time, the Secretariat may additionally send a copy of the award in electronic form. Article 12 paragraphs 3, 4 and 5 apply to the effectiveness and date of service. The Secretariat shall retain one original copy of the award, and shall also retain the documentation of proof of service. A copy of the award in paper form may be served at a later stage. (applicable to all proceedings that commence after 31 March 2020)".

3. Effectiveness

The provisions of Article 36 paras 5-7 deal with the effectiveness of the arbitral award. 6

3.1 Transmission of the award to the parties

When the arbitrators have finalised the award, the final version of the award without the signature pages is submitted electronically to the Secretariat. The Secretariat is responsible for binding the award, adding the signature pages and sending it to the parties (for the detailed procedure when finalizing the award for arbitrators, see the Guidelines for Arbitrators, item I. 8. available on the VIAC website).[3] 7

Article 36 para 5 provides that the Secretary General shall transmit the arbitral award to the parties in hardcopy form. This underlines the "*origin*" of the arbitral award because the award is sent by the VIAC via courier and not by the arbitrator(s). The origin of the award, issued under the rules and administration of an institution as renowned and experienced as the VIAC, gives the award a similar authority to that of state court judgments. 8

The Vienna Rules do not state when the arbitral award becomes effective vis-à-vis the parties since this depends on the applicable law. Instead, reference is made to Article 12 paras 3, 4 and 5 that apply to the award's transmission and date of delivery (cf. VIAC Explanatory Notes Vienna Rules (2022) Art 12 mns 12-34). In Austria, the arbitral award does not become effective for the parties on the date of the decision stated in the award, but only upon receipt of the award by the parties, when it becomes binding on them. Arbitral awards are not subject to appeal and therefore take immediate effect. 9

Moreover, in many countries, the statutory period for bringing actions to set aside awards begins from the date of delivery/receipt. After that period, an award may no longer be set aside. To clarify any potential disputes over the date on which the time limit starts to run, the VIAC Secretariat keeps proof of delivery (record of sending) of the award to the parties in its archives, in addition to an original copy of the award. 10

[3] Documents for Arbitrators: https://www.viac.eu/en/arbitration/documents-for-arbitrators.

11 While Article 27 para 5 of the Vienna Rules 2006 referred to "records of the serving" to be kept by the VIAC Secretariat, Article 36 para 5 Vienna Rules now refers to the "documentation of proof of sending". Awards are usually sent by post or courier service with a return receipt.

3.2 Electronic submission

12 Due to difficulties experienced during the Covid-19 pandemic in relation to sending documents via post or courier, a further alternative for the transmission of the award was introduced with the Rules Revision 2021. If it is not possible or feasible to send the award in hardcopy form within a reasonable time, or if the parties so agree, the Secretariat may send a copy of the award in electronic form - including the scanned signature pages or including an electronic signature of the arbitrators; for international awards a scanned signature is preferable to an electronic signature. In this case, a copy of the award in hardcopy form may be sent at a later stage. However, the time-limit for filing a setting-aside claim may well be triggered already by the receipt of the electronic version of the award containing signatures; this needs to be assessed by the parties according to the place of arbitration or the place of intended enforcement of the award. The potential enforcement problems that could occur in relation to an award issued only in electronic form (with (electronic) signatures) resulted in a clear preference in the Vienna Rules for sending the award in hardcopy form.

13 In addition, and upon request of a party, the Secretary General may (still) transmit the final version of the arbitral award without signature pages to the parties in electronic form[4] the so-called “informal information copy”. The respective wording that was contained in the old version of Article 36 para 5 Vienna Rules 2018 was deleted in the course of the Rules Revision 2021 in order to avoid confusion. However, this possibility still exists. Since this “informal information copy” does not contain the signature page, the sending of the award in this form cannot qualify as transmission of the award. It will be for the parties with a seat of arbitration outside of Austria to review whether sending an “informal information copy” of the award that has not been signed nevertheless triggers deadlines at the respective place of arbitration.

[4] See *Fremuth-Wolf/Vanas-Metzler*, ecolex 2018, 301.

The time of receipt of the award is important for filing a setting-aside claim – at least for arbitral awards issued in Austria. Such periods are only triggered by the receipt of a signed version, be it electronically or in hardcopy form.[5] **14**

3.3 Confirmation of the award being final and binding

Article 36 para 6 deals with the confirmation of the final and binding nature of awards. In some countries, even domestic arbitral awards must be declared enforceable by a state court,[6] but awards issued by an arbitral tribunal with a seat in Austria do not need to be declared enforceable by an Austrian court. Pursuant to Section 1 no 16 of the Austrian Enforcement Code ("EO"), final awards already constitute enforceable instruments on the basis of which the decision may be enforced. Such "domestic" arbitral awards are, thus, besides being final and binding, also enforceable and non-appealable in Austria immediately upon service on the parties.[7] If a petition for enforcement of such a "domestic" award is filed in Austria, apart from a copy of the enforceable instrument (the arbitral award itself), only the confirmation of its finality and binding nature and its enforceability must be enclosed (Section 54 para 2) EO).[8] Such confirmation of enforceability may only be issued for domestic awards rendered in Austria but not for awards rendered outside of Austria. **15**

Accordingly, pursuant to Article 36 para 6 each party may request that the arbitral tribunal explicitly confirm that the award is final and binding by way of a note on *all original copies* of the award. Such confirmation must be issued by the sole arbitrator or, in the case of several arbitrators, by the chairman. If the chairman is prevented from acting, the signature of another member of the panel of arbitrators will suffice. **16**

[5] *Hausmaninger* in *Fasching/Konecny* IV/2³ Sec 606 *ZPO* mns 98 et seqq. (with reference in mn 103 to the explicit abolition of the possibility of the transmission via e-mail in the SchiedsRÄG 2006); a transmission by electronic means with a qualified electronic signature pursuant to Section 4 para 1 *SVG* would be possible, however, outside the framework of the Vienna Rules (see *Hausmaninger* in *Fasching/Konecny* IV/2³ Sec 606 *ZPO* mn 103 with further references).

[6] For example, an arbitral award issued by an arbitral tribunal whose seat is in Germany is not automatically enforceable in Germany but requires a declaration of enforceability by a German court; see Section 1060 German *ZPO*; *Kröll* in *Böckstiegel/Kröll/Nacimiento*, Arbitration in Germany, Sec 1060 German *ZPO* mn 1.

[7] *Hausmaninger* in *Fasching/Konecny* IV/2³ Sec 606 *ZPO* mns 56, 99.

[8] If, on the other hand, a foreign arbitral award (where the seat of the arbitral tribunal is abroad) is to be enforced in Austria, it must at first be declared enforceable in accordance with Section 614 *ZPO* in conjunction with Section 79 et seq. *EO* in Austria.

DECISION ON COSTS

Article 38

(1) When the proceedings are terminated, upon request of a party, the arbitral tribunal shall set forth, in the final award or by separate award, the costs of the arbitration as determined by the Secretary General pursuant to Article 44 paragraph 1.1 and determine the amount of the appropriate costs of the parties pursuant to Article 44 paragraph 1.2, as well as other additional expenses pursuant to Article 44 paragraph 1.3.

(2) The arbitral tribunal shall also establish who will bear the costs of the proceedings or the apportionment of these costs. Unless the parties have agreed otherwise, the arbitral tribunal shall decide on the allocation of costs according to its own discretion. The conduct of any or all parties as well as their representatives (Article 13), and in particular their contribution to the conduct of efficient and cost-effective proceedings, may be taken into consideration by the arbitral tribunal in its decision on costs according to this Article.

(3) Notwithstanding paragraphs 1 and 2, upon request by a party, the arbitral tribunal may at any stage during the arbitral proceedings make decisions on costs pursuant to Article 44 paragraphs 1.2 and 1.3 and order payment.

EXPLANATORY NOTE[1]

1. Introduction; purpose of the provision

1 Relevant commentary: *Peters* in VIAC Handbook (2019) Art 38 pp. 287-295.

As far as the provisions remain unaltered, the relevant parts of the commentary are still applicable and are referenced below; if the passages are replicated, they are marked with ▌ on the side.

2 ▌ Precisely because in international arbitration decisions must be taken on considerable amounts in dispute, the parties often deploy substantial funds in defence of their legal positions. In practice, even where the amount in dispute is high, the costs of the proceedings often amount to over 10 % of its value. If the amount in dispute is not so high, or if the facts of the case are particularly complex, the percentage of procedural costs may be even higher.

[1] This Explanatory Note to Article 38 is based on *Philipp Peters* in VIAC Handbook (2019) Art 38. The author had been contacted and his approval was obtained to use passages of their respective commentaries in these Explanatory Notes.

The arbitral tribunal's decision on the reimbursement of costs is therefore of great practical relevance. However, it is quite rare that the parties themselves regulate the possibility and details of reimbursement of costs. 3

The provision of Article 38 mostly corresponds to Article 37 of the Vienna Rules 2013. However, the express provision that the arbitral tribunal may take into consideration the parties' – and notably also their respective representatives' – conduct in its decision on the allocation of costs, in particular in light of their contributions to efficiency and cost-effectiveness, has been newly introduced. 4

Para 3 was introduced with the Rules Revision 2021 and gives the arbitral tribunal the power, at any stage of the arbitral proceedings, and upon the request of a party, to make a decision on costs pursuant to Article 44 paras 1.2 and 1.3 (i.e. parties' costs and other expenses) and order payment. The tribunal no longer has to wait for the final award to issue such a costs decision. 5

2. General remarks on the decision on costs

Before dealing with issues of determination of the costs of the arbitration and their apportionment between the parties, some fundamental particularities of the Vienna Rules and the Austrian legal system must be addressed (where the place of arbitration is Austria). 6

2.1 Relationship to section 609 para 1 ZPO

The first sentence of Section 609 para 1 Austrian Code of Civil Procedure ("ZPO") provides that, unless the parties have agreed otherwise, the arbitral tribunal has to render a decision on costs. According to Section 609 para 1 ZPO, this decision shall take into account the outcome of the proceedings. It is debatable whether this regulation is superimposed on, or replaced by, the provision of Article 38, since according to arguments advanced by some authors in legal writing only the first sentence of Section 609 ZPO is optional for the parties. 7

An interpretation to that effect would not, however, be in line with the *telos* of the provision. If the parties can completely exclude reimbursement of costs, they should also be allowed to regulate the criteria for reimbursement of costs, albeit within the limits of generally accepted moral principles. For example, the 8

Austrian Supreme Court deemed a regulation to be a violation of "public policy" which, independent of the outcome of the proceedings, stipulated that the costs must always be borne by the party instituting the proceedings.

9 Since Article 38 leaves the decision on costs to the discretion of the arbitrators, one may assume that the provision of Section 609 para 1 ZPO is superseded in its entirety. Accordingly, the relative success in the proceedings (second sentence of Section 609 para 1 ZPO) is not a mandatory criterion, so that sufficient flexibility for the arbitrators to take into account different international principles of reimbursement of costs is provided.

2.2 Obligation to issue a decision on costs?

10 Upon request of any of the parties involved in the arbitration, the arbitral tribunal must decide on reimbursement, if any, of the costs related to the proceedings. This means that if a party so requests, the arbitral tribunal is obliged to decide on the costs. This must – in the event of a pending request – consequently also apply when there is lack of jurisdiction to render a decision on the merits of the case. The arbitral tribunal, in addition to its competence to decide on the merits of the case, also has the authority to rule on any claim for reimbursement of costs, respectively the duty to decide on existing applications for reimbursement of costs at the end of the proceedings. In addition, the arbitral tribunal is competent to decide on its own jurisdiction (*Kompetenz-Kompetenz*). Therefore, any arbitral award, including an award rejecting an action for lack of jurisdiction, must contain a decision on costs, if a party has requested such decision.

11 In contrast to Section 609 ZPO*,* the arbitral tribunal is to decide on the costs only at the request of a party. Although it is hardly relevant in practice, this derogation from the statutory provision makes sense because it clarifies that the adversarial principle applies in the matter of costs, and not some attenuated form of the principle of investigation.

12 Lastly, the provision also protects the arbitral tribunal from uncertainty regarding potential contestability of the arbitral award. If a decision on costs was rendered without being requested by any of the parties, a challenge of the award on costs as a decision *ultra petita* would at least be conceivable. Admittedly, this deviation from Section 609 ZPO is of limited practical

relevance.

Ultimately, this means that the obligation or permission to decide on the costs of the proceedings is subject to an appropriate and timely request. 13

2.3 Discretionary determination of costs?

Pursuant to Section 609 *ZPO*, the arbitral tribunal must, as a matter of principle, take into consideration the parties' success in the individual stages of the proceedings when determining their costs. In principle, this regulation is in line with common practice, which, for the purpose of allocation of costs, is primarily based on the relative success in the proceedings. However, it does not take account of the fact that, due to the great variety of possible circumstances of cases and parties, and the different principles of reimbursement of costs in different jurisdictions, this principle may not always be appropriate. 14

According to the Vienna Rules, the arbitral tribunal may decide on the costs in the manner it deems appropriate, unless the parties have agreed otherwise. This provision supersedes the stricter criterion of the second sentence of Section 609 para 1 ZPO (cf. *supra* mn 7 et seqq.) and allows maximum flexibility to take account of the individual circumstances of the case. The Vienna Rules expressly provide that the conduct of the parties and their representatives may be taken into account by the arbitral tribunal in deciding on the allocation of costs, in particular with regard to measures that contributed to an efficient and cost-effective conduct of the proceedings. In practice, consideration of the procedural conduct of the parties and their representatives – irrespective of the outcome of the proceedings – has already been considered to be an aspect within the tribunal's discretion in its decision on the allocation of the procedural costs under Article 37 of the Vienna Rules 2013. Therefore, the 2018 supplementation was merely a clarification. While the arbitral tribunal may take into account the parties' behaviour and possible contributions to a cost- and time-efficient conduct of the proceedings, it is not obliged to do so. However, in particular, in cases where one party's conduct significantly delays the proceedings, or where the costs of the proceedings or the respective other party are considerably increased by a party's conduct without objective justification, consideration of this conduct – irrespective of the outcome of the proceedings – will certainly be appropriate. 15

16 However, the provision does not clarify the degree of "discretion" granted to the arbitrators. The wording "in the manner it deems appropriate" clearly indicates that the arbitrators are to be granted broad discretion in this context. Nevertheless, their discretion will be limited where a decision on costs would be *contra bonos mores* or would violate public policy.

3. Determination of reimburseable costs

17 When a party has filed a request for reimbursement of costs the arbitral tribunal is obliged to decide on that request. In view of the need for flexibility, however, the Vienna Rules do not regulate in detail the procedure for determining costs. This means that the procedure will be designed at the discretion of the arbitral tribunal unless otherwise agreed to by the parties. It is reasonable for the arbitral tribunal to ask the parties for their submissions, and to ask them to produce their statements of costs, at the end of the proceedings. The opposing party should normally be granted an opportunity to comment.

18 The subject matter of the decision as to costs is regulated in Article 44 para 1 and costs comprise of the following: (i) the administrative fees of the VIAC, the arbitrators' fees and the reasonable expenses plus any applicable value-added tax; (ii) the parties' costs, i.e. the reasonable expenses of the parties for their representation; and (iii) other expenses related to the arbitration proceedings, in particular those listed in Article 43 para 1.

3.1 Costs to be determined by the Secretary General

19 In principle, the arbitral tribunal is entitled to decide on the amount and allocation of costs. However, as to the costs to be determined by the Secretary General (administrative fees of the VIAC, arbitrators' fees and expenses) the arbitral tribunal is only entitled to determine the allocation of the costs between the parties. This can be taken from the Vienna Rules, according to which the arbitral tribunal is obliged to state the costs in the arbitral award as determined by the Secretary General without verification of the content. To provide additional assurance that this obligation will be met, each arbitrator must on appointment expressly undertake to accept the Secretary General's decision on these costs as binding.

The Secretary General will determine the costs according to the schedules of fees which are attached to the Vienna Rules as Annex 3 (see in detail VIAC Explanatory Notes Vienna Rules (2022) Art 44) and which are based on the amount in dispute, although she is allowed to deviate from the amount in dispute as fixed by the parties. 20

Only the administrative fees and the arbitrators' fees can be determined according to the schedules of fees. The Secretary General will determine the expenses of the arbitral tribunal purely on a case-by-case basis. At the time of appointment, each arbitrator receives detailed guidance on the reimbursement of expenses, from which the reasonableness of expenses will be determined . 21

3.2 Costs of the parties

While the amounts of administrative fees, arbitrators' fees and expenses are determined by the Secretary General, the arbitrators are responsible for determining the costs of the parties. 22

The Vienna Rules do not regulate how such costs are to be determined in specific cases, which may be a difficult task. Such a regulation would not be reasonable due to the vast number of possible circumstances. The general provision of Article 44 para 1.2 only defines that the costs of the parties are "the reasonable expenses of the parties for their representation" . 23

Therefore, the question of whether and to what extent expenses are reimburseable is answered according to the principle of "reasonableness". The parties' expenses should reflect the complexity of the case, which is not always dependent on the amount in dispute. This applies to the costs of legal counsel as well as to the production of private expert opinions and other means of evidence. 24

To satisfy the requirement of reasonableness, however, a party does not necessarily have to choose the most economical type of representation or production of evidence at all times. 25

Costs are deemed reasonable if they are proportionate to the proceedings to an objectively verifiable degree. In practice, not only objective criteria of reasonableness will be considered, but also the reasonableness of the costs of 26

several parties in relation to each other. Substantial disparities may be taken into account when assessing reasonableness, although this must usually not lead to a situation where the objectively verifiable and reasonable costs of a party are reduced only because the other party's costs of representation in the proceedings were low.

27 Since only the "expenses" of the parties will serve as the basis for the arbitral tribunal's calculation, such calculation must only take into account those costs that were actually incurred by the parties. The parties are not entitled to claim exclusively fictitious costs (such as a statement of fees according to the Austrian Statute on Lawyers' Tariffs where such costs were not actually invoiced to the party; on the other hand, in-house costs, which are frequently claimed in practice, are not fictitious but must be appropriately substantiated). In practice, a number of different approaches have developed as to the details required to substantiate such costs and it is often left to the parties to agree on the details required for evidencing costs.

28 The parties' costs also include costs of proceedings related to the arbitration (such as proceedings before state courts), unless these are reimbursed in such proceedings.

29 The question of whether or not party costs should be awarded inclusive or exclusive of VAT cannot be answered uniformly for all cases. It depends primarily on the applicable (VAT) tax law.

30 If Austrian tax law is applicable, the party being reimbursed its legal costs is, in principle, entitled to claim such costs inclusive of VAT. However, the reimbursing party may subsequently claim repayment from the reimbursed party of the VAT thusly paid, provided that the reimbursed party is entitled to deduct VAT (Article XII Z 3 EG-UStG). This provision is specific to Austrian law and cannot be expected to have a corresponding provision under other legal regimes (for example, under German law, a party entitled to deduct VAT can claim net costs only).

31 As the proper solution may vary depending on the seat of the involved parties, the issue should be addressed by the arbitrators vis-à-vis the parties early on in the proceedings (possibly during the case management conference). This

applies to the arbitrators' fees as well as to the fees of the parties' representatives. In any event the arbitrators should request the parties to provide their respective VAT registration numbers.

3.3 Other expenses

The third category of reimburseable costs consists of "other expenses related to the arbitration". These are mainly costs incurred due to orders of the arbitral tribunal (for example, tribunal-appointed experts, site visits, etc.) and other costs incurred by the parties (see in detail VIAC Explanatory Notes Vienna Rules (2021) Art 44 mn 23 et seq.). **32**

4. Allocation of costs among the parties

The arbitral tribunal may allocate the costs among the parties "in the manner it deems appropriate". This means that it does not have to observe any fixed rules when deciding on the allocation of costs. It is thereby ensured that the arbitral tribunal will be able to consider the specifics of the case with a maximum degree of flexibility. **33**

In addition to the actual outcome of the proceedings, arbitral tribunals in practice consider many other factors, including but not limited to the parties' conduct during the proceedings. The Vienna Rules 2018 expressly take this existing practice into account by including it in Article 38 para 2 (see *supra* mn 15). Following Article 9 para 7 of the IBA Rules on the Taking of Evidence, the arbitral tribunal may, for example, take into account how co-operative the parties were in the taking of evidence. It may even go further and consider the overall conduct of the parties when deciding on the allocation of costs, in particular any attempts to delay the proceedings. **34**

In practice it may be useful for the arbitral tribunal to announce its intention to do so as early as possible in the proceedings. This might help to avoid delaying tactics so that an actual sanction by means of the decision on costs will not become necessary. **35**

5. Form of the decision on costs

36 Subject to a request by one of the parties (cf. *supra* mn 10 et seqq.) the decision on costs must in any case be rendered in the form of an award, be it in the final award or by a separate award. Accordingly, notwithstanding the arbitral tribunal's discretion, the decision on costs must in principle be reasoned, unless the parties have agreed that the award may exclude the reasons (Article 36 para 1). Due to the arbitral tribunal's discretion the requirements for such reasons should not be overly strict.

37 Determining the costs in the form of an arbitral award is intended to ensure that: (i) the decision on the costs will be enforceable internationally; and (ii) the decision can be reviewed in proceedings regarding the setting aside or enforcement of the award, although such review is obviously strictly limited. As with the award on the merits of the case, a *revision au fond* by a State court is excluded. This means that the State judge is not allowed to ascertain whether the costs awarded were reasonable for an appropriate pursuit of the claim. Although an "exorbitantly excessive" decision on costs could theoretically violate the substantive *ordre public* according to most recent case law,[2] the arbitral tribunal has quite substantial discretionary power in its assessment.[3]

6. Timing of the costs decision (para 3)

38 Paragraph 1 states that costs are to be determined at the time of termination of the proceedings upon request of a party. The Vienna Rules 2018 did not provide for the possibility of reimbursement of costs of separate stages of the proceedings while the proceedings were pending. This did not, however, prevent the tribunal at the end of the proceedings from assessing specific stages of the proceedings separately when deciding on the allocation of costs (e.g. for the purposes of a separation of costs). The Vienna Rules 2018, however, did not provide for interim awards on reimbursement of costs of specific stages of the proceedings.

[2] Cf. Austrian Supreme Court 9.10.2018, 18 OCg 2/18w.
[3] Cf. for example Higher Regional Court Munich 21.6.2012, 34 Sch 4/12.

Practitioners requested a change to this rules and thus, it was addressed in the Rules Revision 2021. The rationale behind it is as follows: In lengthy proceedings that can be split into various stages due to bi-furcation, the parties did not want to wait until the final award to be awarded costs for the respective stages, at least for the costs of party representation and expenses. **39**

The tribunal now has the power, at any stage of the arbitral proceedings, and upon the request of a party, to make a decision on costs pursuant to Article 44 paras 1.2 and 1.3, (i.e. only with respect to parties' costs and other expenses related to the arbitration but not with respect to administrative or arbitrators' fees and reasonable expenses pursuant to Article 44 para 1.1) and order payment. **40**

ADVANCE ON COSTS

Article 42

(1) The Secretary General shall fix the advance on costs for VIAC's prospective administrative fees, the prospective arbitrators' fees and the prospective expenses, including any applicable value-added tax, separately for claims and counterclaims.

(2) Claims raised by way of set-off (Article 44 paragraph 6) shall – for the purpose of calculating the advance on costs – be treated as separate claims to the extent that these claims may require the arbitral tribunal to consider additional matters.

(3) For requests for joinder (Article 14), the Secretary General may fix separate advances on costs (paragraph 1) having regard to the circumstances of the case.

(4) The advance on costs shall be paid in equal shares by the parties prior to the transmission of the file to the arbitral tribunal within 30 days upon receipt of the request for payment.

(5) In multi-party proceedings, one half of the advance on costs shall be paid jointly by the claimants and one half jointly by the respondents, unless otherwise determined by the Secretary General having regard to the circumstances of the case.

(6) Where counterclaims or claims by way of set-off are submitted and separate advances on costs are fixed, the Secretary General may decide that each party shall pay the advance on costs corresponding to its claims.

(7) Where the Secretary General has previously fixed advances on costs pursuant to paragraph 1 to 3, these shall be replaced by the advances fixed pursuant to paragraphs 5 and 6 and the amount of any advance paid previously by any party shall be credited towards its share of advances as determined by the Secretary General pursuant to paragraphs 5 and 6.

(8) By agreeing to the Vienna Rules, the parties mutually undertake to bear their respective share of the advance on costs pursuant to this Article.

(9) If the advance on costs allocated to one party is not received or is not received in full within the time limit specified, the Secretary General shall inform the other party/parties and request payment of the outstanding amount within 30 days upon receipt of the request. This shall not affect the obligation of the non-paying party to bear its share of the advance on costs pursuant to this Article.

(10) If a party fails to fulfil its share of the payment obligations pursuant to this Article, and if the other party/parties pay(s) the respective share pursuant to paragraph 9 of this Article, upon the paying party's/parties' request and to the extent it finds that it has jurisdiction over the dispute the arbitral tribunal may order the non-paying party, by an award or other appropriate form, to reimburse the paying party/parties for the share accruing on it/them. This shall not affect the arbitral

tribunal's authority and obligation to determine the final allocation of costs pursuant to Article 38.

(11) In principle, the arbitral tribunal shall only address the claims or counterclaims, for which the advance on costs has been paid in full. If a payment is not made within the deadline set by the Secretary General, the arbitral tribunal may suspend the arbitral proceedings in whole or in part, or the Secretary General may terminate the arbitral proceedings (Article 34 paragraph 3) with respect to the relevant claims. This shall not prevent the parties from raising the same claims at a later time in another proceeding.

(12) If an additional advance on costs is necessary and determined accordingly by the Secretary General, the procedure as outlined in paragraphs 1 to 11 of this Article shall apply. Until payment of the additional advance on costs, in principle, the arbitral tribunal shall not address the claims that led to the increase or additional advance on costs. If a payment is not made within the deadline set by the Secretary General, the arbitral tribunal may suspend the arbitral proceedings in whole or in part, or the Secretary General may terminate the arbitral proceedings (Article 34 paragraph 3).

EXPLANATORY NOTE

1. Introduction; purpose of the provision

Article 42 on "Advance on Costs" was revised in order to give the Secretary General more flexibility to address the complexity of cost issues, especially in the case of joinder and multiparty proceedings. 1

Relevant commentary: *Peters* in VIAC Handbook (2019) Art 1 pp. 15-21. 2

The following commentary on each paragraph of Article 42 replaces the commentary contained in the VIAC Handbook (2019). As far as the commentary is still applicable, it is referenced below; if the passages are replicated, they are marked with ▌on the side. The new additions to the commentary are based on the considerations of the Working Group when drafting the new provision.

Arbitration proceedings are normally conducted on the basis of an arbitration agreement made between the parties. The parties are obliged to finance and bear the costs of the entire proceedings, with the final allocation of costs to be decided by the arbitral tribunal at the end of the proceedings (cf. *Peters* in VIAC 3

Handbook (2019) Art 38 mns 15 et seqq.). In addition to the registration fee that must first be paid by the claimant/s (cf. *Fremuth-Wolf/Rogge* in VIAC Handbook (2019), Art 10 mns 1 et seqq.), the parties must pay an advance on the anticipated costs before the file is transmitted to the arbitrators (costs as defined in Article 44 para 1.1).

4 The advance on costs to be paid at the start of the proceedings is primarily intended to ensure that the total expected procedural costs will be fully paid in advance so that the proceedings will not be delayed later for financial reasons or, in the worst case, that the proceedings have to be terminated due to lack of funds.

5 By agreeing to the Vienna Rules, the parties mutually undertake to bear the costs in equal shares. The arbitral tribunal may directly order fulfilment of this obligation. Since the inclusion of this clarification in the Vienna Rules 2013, the parties' general payment behaviour has significantly improved, perhaps influenced by the fact that arbitral tribunals have repeatedly made use of their authority to order payment of the advance. Nevertheless, respondents have continued to use non-payment of the advance on costs as a means to impede the conduct of the proceedings in cases the claimant is unwilling or unable to bear both parts of the advance.

2. Determination by the VIAC's Secretary General

6 Article 42 provides that the Secretary General must request an advance on costs equal to the amount of the expected total cost of the arbitration proceedings that will cover the anticipated administrative costs as well as the arbitrators' fees and expenses. Both the administrative fees and the arbitrators' fees must be determined according to the schedule of fees in Annex 3 to the Vienna Rules. Generally, an extra amount is calculated on the arbitrators' fees as a buffer in order to have sufficient cover in cases of an increase in the arbitrators' fees as provided for in Art 44 para 7 (cf. *Fremuth-Wolf/Vanas-Metzler* in VIAC Handbook (2019) Art 44 mns 35 et seq.).

7 Where the arbitrators, upon acceptance of their mandate, advised of their liability to pay value added tax on their fees, the Secretary General will include this amount in her calculation of the advance on costs. This is intended to

avoid requests by any of the arbitrators for additional advances on costs for value added tax.

The Secretary General determines the amount of the expected expenses on the basis of past experience, taking into account the information provided in the Statement of Claim. **8**

In doing so and in order not to exceedingly burden the parties at the outset of the proceedings, the Secretary General will request a modest advance on costs for envisaged hearings. At this stage of the proceedings, it is generally not clear whether a hearing will be conducted in person or remotely. In turn, it is unclear to what extent travel expenses for arbitrators and rent for hearing facilities etc will be incurred. Thus, the provision in para 12 stipulates that if an additional advance on costs is necessary (when the format and length of the oral hearing have been agreed upon), it will be determined accordingly by the Secretary General and the procedure as outlined in paragraphs 1 to 11 of this Article shall apply. **9**

The stipulation that the advance on costs be determined by the Secretary General and not by the arbitral tribunal itself avoids giving the impression that the arbitrators are in any way involved in a decision to their own benefit. **10**

To enable the Secretary General to calculate the advance, she must know the anticipated amount in dispute, the number of arbitrators to be appointed and the number of parties involved. In this respect, the claimant must ensure that his claims are expressed in figures, and he must state the number of arbitrators. This is in any case the minimum information required for a Statement of Claim under the Vienna Rules. If any of this information is missing in the Statement of Claim, the Secretary General may issue a respective order to remedy. If the claimant remains in default, the Secretary General may declare the proceedings terminated. **11**

A calculation of costs made on the basis of the amount in dispute and the schedule of fees contained in Annex 3 will allow the parties to estimate the advance to be paid beforehand and with relative accuracy. To make these calculations easier the VIAC provides a cost calculator on its website (http://www.viac.eu). One should also bear in mind that a flat rate for the **12**

expenses and value added tax of the arbitrators must be added to the amount calculated (see mns 6 et seq. *supra*).

3. Counterclaims and claims raised by way of set-off; separation of advances on costs

13 Advances on costs must be calculated and paid separately for counterclaims (para 1). The same applies to claims raised by way of set-off, which shall – for the purpose of calculating the advance on costs – be treated as separate claims to the extent that these claims may require the arbitral tribunal to consider additional matters (para 2).[1] In such a case, the Secretary General will inform the parties and the arbitrators in advance of her intention to calculate the advance on costs separately for the set-off claims and will give them the opportunity to comment. She will then make a decision based on her reasoned discretion.[2]

14 The amounts in dispute for claims, counterclaims, and any set-off claims will therefore not be totaled (ie. sum of all amounts in dispute) to determine the advance on costs. The advance on costs are determined separately for the (statement of) claim, counterclaim and any set-off claims (if so decided) respectively. An advance payment of the respective advance on costs is necessary in order for the respective claim to proceed.

15 The general rule provides that the parties are liable for their respective shares of the advance on costs for the claim on the one hand and the counterclaim or set-off claim on the other hand (para 4). The standard consequences for non-payment apply.

16 The Vienna Rules now foresee the possibility of a separation of the cost advances for the claim and the counterclaim or set-off claim, which enables the Secretary General to order the claimant to pay the entire advance for the claim and to order the respondent to pay the entire advance for the counterclaim or set-off claim (paras 6 and 7). This is to avoid a scenario where the claimant refuses to pay its share of the advance on costs of the counterclaim or set-off claim after the respondent has paid its share of the advance on costs for the

[1] Cf. Art 44 para 6.
[2] Cf. also Selected Arbitral Awards, Vol 1 (2015), A 23 Set-off vs Counterclaim (*Rechberger/Hofstätter*), 442.

claim, and thus the bigger burden on advance on costs is on respondent's shoulders.

4. Requests for joinders

Paragraph 3 now contains an explicit provision in relation to the advance on costs for joinder requests (Art 14). In all joinder scenarios (a stand-alone request or in a statement of claim), the Secretary General may fix separate advances on costs having regard to the circumstances of the case. This ensures more flexibility as each joinder case is different and the advance on costs should be addressed differently in each case. **17**

Under the Vienna Rules 2018, requests for joinder with a statement of claim were always treated as independent claims in relation to costs, i.e., separate advances on costs were automatically calculated and requested from the parties, depending on the respective amount in dispute of the requests for joinder with a statement of claim (Article 44 para 5 Vienna Rules 2018). The Secretary General did not have any discretion in this regard. **18**

Whereas a simple multi-party surcharge (Article 44 para 4 Vienna Rules2018) was requested for joinders (without a statement of claim), once the third party was admitted as a secondary intervener or another form of joinder. The arbitrators' fees and administrative fees were increased by 10 percent for the additional party admitted (up to a maximum of 50 percent). **19**

Experience showed that this strict division was too harsh and did not reflect the reality in certain complex cases, such as cross-joinder-(counter-)claims, and could ultimately lead to multiple and unjustifiably high advances on costs for the same facts. **20**

Under the new Art 42 para 3, the Secretary General may assess each (multi-party and joinder) case separately and ensure that the arbitrators receive a fair fee while simultaneously not unduly overburding the parties with costs. In each case, the Secretary General will inform the parties and the arbitrators in advance and invite comments. The Secretary Generalwill then make a decision based on her reasoned discretion. **21**

5. Separation of advances on costs; credit of paid amounts to new advance on costs

22 The Secretary General has the power to order the separation of the advance on costs for claims and counterclaims or set-off claims and request that each party shall pay the advance on costs corresponding to its claims (para 6; cf. *infra* mn 29). The Secretary General also has the power to order separate advances on costs in cases of joinder (multi-party) and order payment of these advances in different shares (para 5; cf. *infra* mn 30 and mn 17 *supra*). Thus, it was necessary to introduce a provision that regulates the fate of the previously fixed advance on costs.

23 Paragraph 7 thus provides that in cases where the Secretary General has previously fixed separate advances on costs for claims, counterclaims, claims by way of set-off, and for joinders, these shall be replaced by the advances fixed following the Secretary General having exercised the power to order separation (para 6) or re-allocate shares for an already fixed advance on costs after a joinder was admitted (para 5). Accordingly, the amount of any advance paid previously by any party shall be credited towards its share of advances as subsequently determined by the Secretary General.

6. Payment of advances on costs

24 The advance on costs determined by the Secretary General must be paid by the parties in equal shares within 30 days of service of the corresponding notification (paragraph 4). In this respect, the registration fee paid by the claimant upon submission of the Statement of Claim will not be deducted from his share of the advance.

25 If multiple parties are involved on the claimants' side and/or on the respondents' side, the costs must be allocated to all claimants, on the one side, and all respondents, on the other side, on a 50:50 basis, i.e. irrespective of the number of parties involved on either side. The parties on each side are jointly and severally liable to pay the advance on costs. Under the 2021 Vienna Rules, depending on the circumstances of the case the Secretary General may also determine otherwise (paragraph 5). This change takes into account that in certain multi-party-scenarios it might not be possible to attribute all parties to

either the claimant or respondent side (e.g. joinder-cross-claim) and the Secretary General, therefore, may need to split the advance on costs on a 1/3 : 1/3 : 1/3 basis (or any other ratio the Secretary General deems appropriate under the circumstances).

The parties are required to transfer the advance on costs into a bank account. The Secretary General will advise the parties of the relevant bank details upon determination of the amount of the advance. To ensure that the bank transfers are allocated correctly, the parties are requested to state the file reference on the money transfer form. **26**

In order to avoid frustrated expenses, the case file will be forwarded to the arbitrators by the VIAC only upon receipt of the total advance on costs. Payment of the advance by instalments or a "provisional" advance on costs, as is possible under the ICC Rules, is not provided for. Similarly, the advance on costs cannot be paid by way of a bank guarantee. However, the revised version of paragraph 5 allows for a certain discretion to initially set the advance on costs at a lower level (with regard to expenses) and order payment of an additional advance at a later stage, should this become necessary. **27**

7. Subsequent increase in the advance on costs

The administrative fees to be determined by the Secretary General and the arbitrators' fees will mainly depend on the value of the claims to be dealt with in the proceedings. The costs will therefore increase accordingly if new claims are raised in the arbitration proceedings, or if there is an increase in the amount in dispute of claims that are already the subject matter of the proceedings (cf. VIAC Explanatory Notes Vienna Rules (2022) Art 44 mns 29 et seqq.). The Secretary General must order payment of an additional advance on costs if the advance already paid is insufficient. Until full payment of the additional advance on costs is made, the arbitrators do not need to consider the claims that led to a change in the amount in dispute (see also *infra* mn 32). **28**

However, apart from an increase in the procedural costs due to the amount in dispute, it is also possible that the expenses of the arbitrators may exceed the amounts that were estimated by the Secretary General in her calculation of the anticipated advance on costs, for example where several oral hearings were **29**

held. In this case according to Art 42 para 12 the Secretary General must request the parties to pay an additional advance on costs. In this respect it is recommended that the arbitrators advise the Secretary General in a timely manner of insufficient coverage and in any case before the amount for cash expenses covered by the advance on costs will be exceeded.

30 Similarly, in cases of particularly small amounts in dispute, the advance is sometimes calculated at a particularly low level at the outset of the proceedings, in order not to overburden the parties with high advances. This means that certain buffers generally included by the Secretariat are only considered to a minimum extent. Notably, especially in these cases, it may become necessary to collect further advances on costs in the course of the proceedings if, for example, the arbitrators incur unplanned expenses (with regard to expenses for procedural steps, see also Article 43).

31 In particular in cases where the need for an additional advance on costs cannot be attributed to specific (possibly newly introduced) claims, the Vienna Rules now expressly clarify that, should both parties fail to pay the additional advance, the arbitral tribunal may suspend the arbitral proceedings in whole or in part, or the Secretary General may declare the proceedings terminated (see also *infra* mn 31).

32 If, after the final decision on costs has been made, it turns out that the actual costs of the proceedings are lower than the amount advanced (see in this respect *Peters* in VIAC Handbook (2019) Art 38 mns 17 et seqq.), the remaining amount will be refunded to the parties *pro rata* to the advances paid by them (provided that both parties have paid their share in full). If the amount in dispute on which a decision is to be made in the proceedings decreases, for example due to a reduction in the amount claimed or partial recognition, neither the arbitrators' fees nor the administrative costs or the advance on costs will be affected once the file has been transmitted to the arbitral tribunal.

33 The provisions on advances on costs apply to the calculation and payment of subsequent increases in the advance on costs.[3]

[3] Art 42 para 12.

8. Obligation to pay the advance on costs

the advance on costs in equal shares constitutes a contractual obligation which is assumed by agreeing on the applicability of the Vienna Rules. The obligation to pay an equal share of the advance does not arise towards VIAC or the arbitrators, but in the relationship between the parties to the proceedings. This means that non-fulfilment of that obligation constitutes a breach of contract, which is subject to sanctions by the arbitral tribunal at the request of a party. **34**

The obligation of the non-paying party to pay its share of the advance remains unaffected by the substitute payment of the other party. **35**

9. Non-payment of the advance on costs

If and when a party fails to pay its share of the advance on costs in full or in part within the set time limit, the Secretary General must ask the other party to pay the outstanding amount within 30 days of receipt of such request. **36**

While the Vienna Rules 2006 expressly provided for payment of the other half of the advance on costs only in the event that the respondent was in default of payment, substitute payment of the other half of the advance must now generally be imposed on the "opposing party" since the entering into force of the Vienna Rules 2013. **37**

9.1. Default of the respondent

The claimant may of course pay the non-paying respondent's half of the advance on costs to initiate the proceedings. This is necessary for the sole reason that the respondent must not be given the opportunity to prevent the proceedings by simply refusing to pay the advance. **38**

If the claimant fails to pay the respondent's share of the advance on costs despite being requested to do so, the Secretary General may declare the proceedings terminated. In this case it has been expressly stipulated that such a termination does not imply any waiver of the claim by the claimant. **39**

9.2. Default of the claimant

40 Where the claimant is in default of payment of its share of the advance on costs, the respondent must be asked to pay the second half of the advance on costs as well. If the respondent complies with this request, the proceedings will continue; otherwise the proceedings will be terminated.

41 In this context, one might, at first, tend to think that the respondent will not usually be interested in continuing proceedings initiated against him. This must be countered by the argument that for the purpose of legal certainty the respondent may have a considerable legal interest in ascertaining that the asserted claims have no substance. If the respondent were not granted the opportunity to force the proceedings, it would have to bring a separate action for a negative declaration to achieve this goal.

42 In practice, there might also be a situation where a claimant files a statement of claim only for the purpose of exerting pressure on the respondent. Substantial expenses may already be incurred by the respondent in connection with its Answer to the statement of claim. If the claimant fails to pay the advance on costs in that case, and the proceedings are terminated immediately, no decision on the reimbursement of costs can be made. In this case the respondent may have a substantial interest in the constitution of the arbitral tribunal in order to have its costs reimbursed without having to institute separate proceedings.

9.3. Default of both parties

43 In practice it may occur that, after submission of the Statement of Claim and payment of the registration fee by the claimant, none of the parties pays its share of the advance on costs (for example, where the parties have reached a settlement).

44 The Vienna Rules provide in Article 11 that the case will only be transferred to the arbitral tribunal once the advance on costs has been paid in full. In such a case, the Secretary General will first ask the claimant to pay the respondent's share of the advance on costs and the respondent to pay the claimant's share of the advance. As a result, the immediate termination of the proceedings without any additional time limit or any further contact would neither be

appropriate nor practicable. In practice, the Secretary General regularly grants an extension of time to both parties, granting them both the opportunity to pay the full advance on costs. However, in the event of non-payment, the proceedings may be terminated according to Art 34 para 3.1.

45 This set of circumstances used to be more problematic where, in the course of the proceedings, payment of an additional advance on costs was requested. In the case of additional advances due to an extension of the claim, it always was unequivocal that in the case of default of both parties the extended claims simply need not be taken into account.

46 This is now clarified in Art 42 para 11, which statesthat in principle, the arbitral tribunal shall only address the claims or counterclaims, for which the advance on costs has been paid in full. If payment is not made, the tribunal may suspend the arbitral proceedings in whole or in part, or, ultimately, the Secretary General may terminate the proceedings according to Art 34 para 3. Where the amount in dispute was initially assessed incorrectly or where expenses were not covered and an additional advance on costs was requested which was not paid, Art 42 para 12 provides that the arbitral tribunal shall not address the claims that led to the increase or additional advance on costs, or stay the proceedings in whole or in part until the additional advance on costs is not paid within the time limit set by the Secretary General. Also, in this case, the Secretary General may terminate the proceedings in accordance with Art 34 para 3, in cases of persistent refusal to pay by both parties. This rule duly reinforces the principle that proceedings according to the Vienna Rules may only be conducted if the relevant advances on costs have been paid.[4]

47 In this context, the last sentence of Article 42 para 11 (and is also valid for the termination according to Article 42 para 12) provides that such a termination of the proceedings by the Secretary General shall not prevent the parties from subsequently raising their claims in other proceedings. This provision merely clarifies that the termination as such has no effect on the claims raised in the proceedings (and therefore does not entail a waiver of claims). The procedural and substantive consequences of such termination of the proceedings, however, in particular also with regard to the pendency of the proceedings, must be assessed in accordance with the applicable law (cf.

[4] Cf., e.g., Art 11, Art 39 para 2, Art 40, Art 42 para 4, Art 43 para 2.

Rechberger/Hofstätter in VIAC Handbook (2019), Art 7 mn 6).

10. Reimbursement of the amount paid for the other party

48 By agreeing on the Vienna Rules, the parties mutually undertake to pay in equal shares the advances on costs determined by the Secretary General (see mn 43 *supra*). Non-payment of the share of the advance on costs therefore constitutes a breach of contract by the non-paying party towards the other parties to the arbitration. This principle is taken account of by the Vienna Rules, which grant the party effecting substitute payment the express opportunity to demand reimbursement while the proceedings are still pending (i.e. not only in connection with the final decision on costs at the end of the proceedings). As non-payment constitutes a violation of a separate contractual obligation, the arbitral tribunal may treat the matter separately and resolve this legal dispute as soon as possible, irrespective of the complexity of the actual dispute over the merits of the claim.

49 This (contractual) obligation is derived from the mere conclusion of the arbitration agreement alone. It also derives from the foregoing that the matter may be decided by way of an arbitral award. By expressly vesting the depositing party with the right to request reimbursement already in the course of the proceedings, respondents are prevented from refusing to pay the advance on costs without being sanctioned, which was frequently and deliberately used as a means to increase the financial pressure on the claimant.The main reasons given in legal writing by those who used to take the view that the arbitral tribunal would not be allowed to decide on the obligation to directly reimburse the half of the advance on costs paid in substitute, or at least not in the form of an arbitral award, were that: (i) no obligation to reimburse existed in the absence of an express agreement to that effect; (ii) the arbitral tribunal had no authority to make such a decision; and (iii) such a decision did not constitute a final decision and therefore could not be rendered in the form of an arbitral award. Both the obligation to reimburse as well as the jurisdiction to decide thereon, have been explicitly enshrined in the Vienna Rules since the entering into force of their 2013 version. The form of the decision of the arbitral tribunal is left to its discretion, taking into account the possible particularities of the applicable national legal systems (as the case may be, also in enforcement

proceedings).

The draft bill of the Ludwig Boltzmann Institute for the new Austrian arbitration law that preceded the Austrian Arbitration Act 2006 (*SchiedsRÄG 2006*) still expressly provided that those issues be resolved by providing for the possibility of rendering partial awards to that effect. The proposed regulation was, however, dropped by the legislator without any reasons being given. However, from the silence of the legislator alone it cannot be concluded that an arbitral award on reimbursement of the share of the advance on costs paid would be inadmissible. Rather, it may be assumed that in view of international practice the legislator assumed that such a (merely clarifying) regulation was not necessary. **50**

10.1. Basis for the reimbursement obligation

Notwithstanding the question of whether a mutual contractual obligation to pay the advance on costs in equal shares results from the mere conclusion of the arbitration agreement alone, this is expressly laid down in Article 42 para 8 (former Article 42 para 2). By agreeing on the applicability of the Vienna Rules, the parties have incorporated this express provision of Article 42 para 8 into their contract. **51**

If any doubts are voiced, they may only concern the situation where the arbitration agreement was concluded at a time when the obligation was not yet contained in the rules referred to (i.e. in particular where the Vienna Rules 2006 or the Vienna Rules 2001 apply). However, these doubts can be addressed in two ways. **52**

Firstly, most academics hold that the obligation to bear a share of the advances on costs does not need to be expressly regulated at all but results from the conclusion of the arbitration agreement (see mns 34 et seq. *supra*). Article 42 para 8 only serves as a clarification in this respect. **53**

However, even if the implied existence of such an obligation is denied, it must be assumed that Article 42 para 8 is legally effective at least for arbitration agreements concluded during the period in which the Vienna Rules 2001 and 2006 applied. In fact, both the Vienna Rules 2001 and the Vienna Rules 2006 contained a regulation according to which reference to the VIAC Rules of **54**

Arbitration in an arbitration agreement was to be deemed dynamic (and not static) (cf. in this respect also *Horvath/Fremuth-Wolf* in VIAC Handbook (2019), Art 1 mns 11 et seqq.). According to those provisions, the version of the Vienna Rules in force at the time of commencement of the arbitration applied as a matter of principle. Since the principle of cost-sharing between the two parties was already embodied in the versions of 2001 and 2006[5] and is largely accepted as international best practice, the clarifying obligation stipulated in Article 42 para 2 already laid down in the version of 2013 cannot unduly surprise the parties to older arbitration agreements. Consequently, there are no reasons why the regulation of the new Article 42 para 8 should be excluded from the dynamic reference of Article 1 para 2.

10.2. Jurisdiction of the arbitral tribunal

55 The second argument against a partial award on reimbursement of advances on costs paid must be accepted to the extent that the arbitral tribunal may take a decision only if it has jurisdiction over the claimed breach of contract. The usually broad phrasing of arbitration clauses (such as the VIAC model clause: "All disputes or claims arising out of or in connection with this contract [...]") show that, in principle, disputes over the breach of an arbitration clause (including the procedural rules referred to) by any of the parties fall within the jurisdiction of the arbitral tribunal. The Austrian Supreme Court arrived at the same conclusion, ruling that the state courts have no jurisdiction over matters of reimbursement of substitute advances on costs.

56 In the drafting process of Article 42 para 10 (former Article 42 para 4) there was particular discussion as to whether it would be necessary to expressly mention the arbitral tribunal's jurisdiction as a prerequisite for a decision on the allocation of the advance on costs. In particular, concerns were voiced that an explicit mentioning could constitute an invitation to the respondents to contest the arbitral tribunal's jurisdiction only for the purpose of avoiding an arbitral award on the allocation of the advance on costs. This was countered by the arguments that, especially where jurisdiction is contested abusively, it should easily be possible to render a separate affirmative arbitral award on jurisdiction, and that, in any event, the decision on the issue of jurisdiction should be accelerated to the extent possible.

[5] See Art 23 para 2 of the Vienna Rules 2001; Art 34 para 2 of the Vienna Rules 2006.

In the end, the arbitral tribunal's jurisdiction as a prerequisite for rendering such a decision was explicitly mentioned for the avoidance of doubt, and to reduce the likelihood of decisions without legal ground of arbitral tribunals having no jurisdiction to the extent possible. In essence, if the respondent contests the arbitral tribunal's jurisdiction over the asserted claims, this usually also implies that it did not agree to arbitration for the pending case. Consequently, if no arbitration agreement exists for the case at hand, there is also no contractual basis for the claim to reimbursement of half of the advance on costs. In this regard, the issue of jurisdiction constitutes a preliminary question as to the existence of a contractual obligation to pay a share of the advance on costs, which must in any case be clarified before an arbitral award on reimbursement of the amount paid in substitute can be issued. **57**

10.3. Form of the decision

The objective of the arbitral tribunal's decision on reimbursement of an advance on costs paid in substitute is obviously to create an enforceable instrument on the reimbursement claim. Consequently, the most important form of decision is the arbitral award. **58**

Critics argue that the decision on reimbursement of costs does not constitute a final decision, since reimbursement of costs would have to be decided on only at the end of the proceedings; however, on closer examination this is not true. The parties agreed by contract to bear the costs of the arbitration proceedings in equal shares. This has no effect whatsoever on the arbitral tribunal's final decision as to costs and is, in particular, aimed at preventing one party from making it unnecessarily difficult for the other party to obtain justice. The decision on reimbursement of the advance on costs is therefore a conclusive (final) decision on contractual fulfilment of the obligation to finance the proceedings in advance, rather than a preliminary decision on the allocation of costs. **59**

This is not changed by a ruling of the Austrian Supreme Court of 2006 on the previous Austrian arbitration law (before the *SchiedsRÄG* 2006), according to which a decision on reimbursement of the advance on costs paid in substitute did not constitute an arbitral award that could be contested under the Austrian Code of Civil Procedure (*ZPO*). This decision must be seen against the background that under the former arbitration law only one arbitral award could **60**

be rendered on the merits of the case. The former law did not expressly recognise separate decisions in the form of arbitral awards, for example on the ground for the claim or on elements of the case already resolved and ready for an award. Decisions of the arbitral tribunal could therefore only be contested upon issuance of the final award. In this regard, the previous law did not allow decisions on the reimbursement of costs to be contested separately.

61 The Austrian Supreme Court fostered the prevailing doctrine and practice as early as 1985, when it recognised the enforcement of a Swiss arbitral award on reimbursement of an advance on costs paid in substitute. That means that the Austrian Supreme Court at least has no principal objections to such decisions being rendered in the form of arbitral awards.

62 Nevertheless, the provision of Article 42 para 10 leaves open the option of other forms of decisions. Since the appropriateness of the arbitral award as a form of decision in such cases is not undisputed, the provision is not limited to decisions by way of arbitral awards. Rather, the arbitral tribunal may take account of the circumstances of the specific case, including any concerns about enforceability, and select any form of decision that it deems appropriate.

63 Practical tip:

It is frequently omitted to inform the institution on whether an arbitral award on the payment of the reimbursement claim has eventually been complied with. This information, however, is crucial if, following determination of the costs of the proceedings by the Secretary General, a remainder is to be paid back to the depositing party(ies). If, in the meantime, the share of the advance on costs has been repaid, the parties are treated as if they had paid their respective share of the advance on costs from the outset. Otherwise, payment is only made to the party having paid the advance. It is therefore recommended that, at the end of the proceedings, the arbitral tribunal discusses this issue with the parties and informs the institution accordingly.

COMPOSITION AND CALCULATION OF THE PROCEDURAL COSTS

Article 44

(1) The costs of the arbitration consist of:

1.1 the administrative fees of VIAC, the arbitrators' fees and the reasonable expenses (such as arbitrators' or tribunal secretary's travel and subsistence costs, costs for sending of communications, rent, court reporter fees), including any applicable value-added tax; as well as

1.2 the parties' costs, i.e. the reasonable expenses of the parties for their legal representation; and

1.3 other expenses related to the arbitration, in particular those listed in Article 43 paragraph 1.

(2) The Secretary General shall calculate the administrative fees and the arbitrators' fees on the basis of the schedule of fees (Annex 3) according to the amount in dispute and determine these fees together with the expenses at the end of the proceedings (paragraph 1.1 of this Article). Prior to termination of the arbitral proceedings, the Secretary General may make payments on account to the arbitrators in consideration of the stage of the proceedings. The arbitral tribunal shall determine and fix the costs and other expenses outlined in paragraphs 1.2 and 1.3 of this Article in the award (Article 38).

(3) In fixing the amount in dispute, the Secretary General may deviate from the parties' determination if the parties have made only a partial claim or if a party has clearly undervalued its claim or assigned no value to it.

(4) If more than two parties are involved in an arbitration, the amount of administrative fees and arbitrators' fees listed in Annex 3 shall be increased by 10 percent for each additional party, up to a maximum increase of 50 percent. This increased amount will then be the basis for a further increase or decrease according to paragraph 8 of this Article.

(5) For counterclaims (Article 9), the Secretary General shall calculate and determine the administrative fees and arbitrators' fees separately.

(6) For claims raised by way of set-off against the principal claims, the Secretary General may calculate and determine the administrative and arbitrators' fees separately to the extent that these claims have required the arbitral tribunal to consider additional matters.

(7) For requests for joinder of third parties (Article 14), the Secretary General may calculate and determine the administrative fees and arbitrators' fees separately, having regard to the circumstances of the case.

(8) The arbitrators' fees listed in Annex 3 apply to sole arbitrators. The total fee for a panel of arbitrators is two-and-a-half times the rate of a sole The Secretary General may increase the

arbitrators' fees according to his own discretion by a maximum total of 40 percent vis-à-vis the schedule of fees (Annex 3), in particular for especially complex cases or for especially efficient conduct of proceedings; conversely, the Secretary General may decrease the arbitrators' fees by a maximum total of 40 percent, in particular for inefficient conduct of proceedings.

(9) The fees listed in Annex 3 comprise all partial and interim decisions such as awards on jurisdiction, partial awards, decisions on the challenge of experts, orders for conservatory or interim measures, other decisions including additional procedural steps in setting aside proceedings, and procedural orders.

(10) A reduction in the amount in dispute shall be taken into consideration in the calculation of the administrative and arbitrators' fees only if the reduction was made before transmission of the file to the arbitral tribunal.

(11) If the proceedings or the arbitrator's mandate are prematurely terminated, the Secretary General may reduce the administrative and the arbitrators' fees according to his own discretion in consideration of the stage of the proceedings at the time of If arbitral proceedings under the Vienna Rules are commenced before, during or after proceedings under the Vienna Mediation Rules between the same parties and concerning the same subject matter, the Secretary General may apply this paragraph by analogy for the calculation of the arbitrators' fees.

(12) If proceedings under the Vienna Mediation Rules are commenced before, during, or after arbitral proceedings under the Vienna Rules between the same parties and concerning the same subject matter, the administrative fees of the preceding proceedings shall be deducted from the administrative fees in the subsequently commenced proceedings.

(13) The fees listed in Annex 3 do not include value added tax, which may apply to the arbitrator's fees. Upon accepting their mandate, those arbitrators whose fees are subject to value added tax shall inform the Secretary General of the prospective amount of value added tax.

EXPLANATORY NOTE

1. Introduction; purpose of the provision

1 Article 44 contains provisions relating to the calculation of procedural costs and largely corresponds to Article 44 of the Vienna Rules 2018. The changes in paras 4-7 reflect the changes made in Article 42 that now give the Secretary General more flexibility to address the greater complexity of proceedings, especially in multiparty proceedings and joinder cases.

The following commentary on the new provisions of Article 44 replaces the commentary by *Fremuth-Wolf/Vanas-Metzler* contained in the VIAC Handbook (2019) in its entirety. It is based on the considerations of the Working Group when drafting the new provision. **2**

As far as the commentary is still applicable, it is referenced below; if the passages are replicated, they are marked with ▌on the side. The new additions to the commentary are based on the considerations of the Working Group when drafting the new provision. **3**

Procedural costs may be classified into three categories. The first category includes the costs related to the arbitral institution (VIAC). Pursuant to Article 44 para 1.1, this includes the administrative fees of the VIAC, the arbitrators' fees plus any value added tax (VAT) and other reasonable expenses in connection with the organisation of the proceedings, such as the travel and subsistence expenses of the arbitrators or a tribunal secretary, the costs of service, the rent of premises for the hearing, consultation, breakout for witnesses, parties and their representatives as well as court reporter fees. The amount of these costs is determined by the Secretary General, not by the arbitrators. Such costs are covered by the advances on costs made by the parties and paid out of the same (cf. Peters in VIAC Handbook (2019) Art 42 mn 4 et seqq.). **4**

The second category includes costs incurred by the parties, while the third category includes all other costs resulting from the procedural steps ordered by the arbitrators in accordance with Article 43 para 1, and those which do not fall into any of the other two cost categories. **5**

2. Costs that are determined by the arbitral institution (para 1.1)

2.1. Administrative fees of the VIAC

2.1.1. Objective

6 Administrative fees are the remuneration for the infrastructural services of the arbitral institution and are therefore levied for all institutional arbitration proceedings. The administrative fees can be compared with the court fees applicable in state court proceedings, which are to be paid by the plaintiff as a lump sum. In comparison, however, the VIAC's costs are moderate. According to VIAC's internal calculations, a comparison of the Austrian court fees (sum for first, second and third instance) with the amounts according to VIAC's schedule of fees as of 2018 (sum for registration fee, administrative fees and arbitrators' fees) reveals the following two relevant thresholds: If the amount in dispute exceeds EUR 35,000, the sum of the aforementioned court fees is higher than the sum of the aforementioned VIAC costs in the case of a sole arbitrator. If the amount in dispute exceeds EUR 2,000,000, the sum of the aforementioned court fees is higher than the sum of the aforementioned VIAC costs in the case of a tribunal of three arbitrators.

2.1.2. Amount and calculation

7 The amount of the administrative fees shall be determined solely by the amount in dispute and shall be calculated on the basis of the schedule of fees set out in Annex 3. Following the revision of the rules in 2018, a further differentiation of administrative fees in the lower range of amounts in dispute has also been made in order not to keep the financial burden on the parties too high for small amounts in dispute and not to act as an unintended hurdle. In contrast to arbitrator fees, there is no possibility of increasing administrative fees due to the particular complexity of case administration (cf. in detail mns 35 et seqq. *infra*). For the increase (multiparty surcharge, increase in the value of the dispute, etc.) of the administrative costs cf. in detail *infra* mns 29 et seqq and 37.

In turn, a premature termination of the proceedings (Article 44 para 11 *e contrario*; cf. *infra* mn 41 and 42) or a reduction of the amount in dispute after the transmission of the file (Article 44 para 10; cf. *infra* mn 29) does not affect the administrative fees. The administrative fees are not reduced in these cases because they are intended to cover the work and expenses of the Secretariat, which on the one hand are incurred primarily at the preliminary stage to the actual arbitration proceedings (i.e. before the transmission of the file to the arbitrators pursuant to Article 11) and on the other hand only upon its termination. These activities must be carried out without restriction even in the event of premature termination of the proceedings. Once the file has been transferred, this also means that the preliminary proceedings before the Secretariat have already been completed. There is also no reduction of workload at the end of the proceedings. The Secretary General must determine the costs of the arbitration and shall prepare and send written communications to the parties and to the arbitrators in connection with the termination of the proceedings. The fact that these notices are not accompanied by an award does not substantially facilitate this work. **8**

2.2. Arbitrators' fees

2.2.1. Dependence on amount in dispute

As with the administrative fees, the arbitrators' fees are, as a matter of principle, based on the amount in dispute and calculated according to the schedule of fees in Annex 3. The schedule only states the fees for sole arbitrators. For a panel of three arbitrators 2.5 times the sole arbitrator's fee is payable. The amounts stated are flat rates covering all services provided by the arbitrator(s) in connection with the case, such as arbitral awards on jurisdiction, partial awards, etc. (Article 44 para 8). **9**

The internal distribution of the arbitrators' fees among the members of an arbitral tribunal remains at their discretion. If no other distribution is announced at the end of the proceedings, at the latest with the announcement of the cash expenses not yet settled, the fees shall normally be allocated by the VIAC Secretariat at a ratio of 40 per cent for the chairperson and 30 per cent each for the co-arbitrators. However, the VIAC Secretariat reserves the right to propose a different allocation formula if this seems justified in view of the circumstances of the individual case. This may also be particularly relevant in **10**

the case of an increase or reduction of the arbitrators' fees pursuant to Article 44 para 8.

2.2.2. Value-added tax applicable to arbitrator's fees (Article 44 para 13)

11 The arbitrators' fees in the wider sense also include any value added tax that may be payable on the fees, which – to the extent known to the Secretariat – is already taken into account in the advance for costs and is paid to the arbitrators together with the fee. The arbitrators render their services to the parties (cf. in VIAC Handbook (2019) *Riegler/Boras*, Art 16 mn 29, and *Steindl*, Art 46 mn 16) and shall invoice them at the end of the proceedings. Proper accounting is important in order to avoid later problems with the tax office, both for the arbitrator and for the party.

12 With regard to value added tax on arbitrators' fees, the services of the arbitrators shall be deemed to have been rendered equally to all parties. The arbitrator's fee is therefore always charged 50:50 to the parties (i.e. the claimant's and the respondent's side), since the arbitrator's services are rendered equally to the parties (or party's sides), regardless of who has paid the advance on costs (different for mediator's fees, cf. *Fremuth-Wolf/Rogge* in VIAC Handbook (2019) Art 8 Vienna Mediation Rules mn 15). To prevent the non-paying party from reclaiming VAT in the form of input VAT deduction, the invoice to the parties in such a case should contain a note stating that only one party has paid the advance. A fee advance paid by the institution to an arbitrator is also already a taxable "payment" and must therefore be invoiced to the parties.

13 Arbitrators must themselves determine which VAT law they are subject to, to what extent they must invoice VAT and how the invoice is properly issued. A fundamental distinction must be made between parties who are domiciled in the same country as the arbitrator, in another EU country or in a third country, and between parties who are entrepreneurs or non-entrepreneurs. In Austria (and other member states of the European Union), for the purpose of implementation of Council Directive 2008/8/EC of 12.2.2008 as regards the place of supply of services, the principle applies that services rendered by an arbitrator are deemed to be rendered at the relevant party's place of business and that vis-à-vis EU-entrepreneurs the "reverse charge" mechanism is to be

applied.[1] According to the "reverse charge" principle, the entrepreneur for whom the service was provided in accordance with Article 44 of the Directive is liable for VAT if the service was provided by a service provider not established in this Member State (Art 196 of the Directive).

The distinctions in VAT law in practice entail that arbitrators belonging to the same arbitral tribunal may have their fees treated differently in respect of taxation, while the shares of such arbitrators' fees that have been advanced by the parties may also be taxed differently or may even be exempt from VAT altogether. In order for the Secretary General to be able to calculate the applicable VAT an advance on costs correctly, the arbitrators must advise the anticipated tax rate (Article 44 para 13). In practice, this is done in the course of completing the Declaration of Acceptance (cf. also VIAC Explanatory Notes Vienna Rules (2022) Art 42 mn 7). **14**

The following (non-binding) overview table shows the different scenarios:[2] **15**

A) Arbitrator's Domicile in A			
	Party's Domicile		
	A	EU (-A)	ex EU
Company	20%	reverse charge	no VAT
Person	20%	20%	20% (?)

B) Arbitrator's Domicile in X (EU)			
	Party's Domicile		
	X	EU (-X)	ex EU
Company	X%	reverse charge	no VAT
Person	X%	X%	X% (?)

As to the question of how VAT is to be treated in the context of the decision on costs, cf. *Peters* in VIAC Handbook (2019) Art 38 mn 26 et seqq.

2.2.3. Reasonable expenses

Arbitrators' fees in the broader sense also include the cash expenses of the arbitrators. The latter consist mainly of travel and subsistence expenses, the reasonableness of which is checked by the VIAC on the basis of the "Guidelines for Arbitrators". The Secretary General must be provided with documents (invoices, accounting receipts, etc.) to prove the amount of the expenses. The *per diem* rate for non-resident arbitrators, any refunds for overnight stays and any mileage allowance for journeys by car shall be reimbursed – upon request – in accordance with the Guidelines for Arbitrators. **16**

[1] Cf. *Risse/Meyer-Burow*, SchiedsVZ 2009, 330 et seq.; *Risse/Kuhli*, SchiedsVZ 2016, 3.
[2] For a brief overview of VAT in arbitration proceedings cf. also *Fiebinger* in *Salger/Trittmann*, Internationale Schiedsverfahren (2018) 629 et seq.

17 The potential expenses incurred by the arbitrators for a tribunal secretary are now also expressly mentioned. Typically, these are flight and subsistence expenses in connection with the presence at the oral hearing. These are eligible for compensation if they are reasonable and, in particular, if the tribunal secretary has been duly appointed (cf. *Fischer/Wong* in VIAC Handbook (2019) Excursus Art 16 mn 54 et seqq.). They are to be proven just like the expenses of the arbitrators. Due to the increased use of remote or semi-remote hearings, these expenses are expected to decrease in the future.

2.3. Other expenses

18 Article 44 para 1.1 lists other costs that do neither belong to the category of administrative fees of the VIAC nor to that of arbitrators' fees in the wider sense. Here the Vienna Rules expressly mention the "costs for service of communications, rent, court reporter fees" (with regard to rent of rooms and court reporters cf. also *Hahnkamper* in VIAC Handbook (2019) Art 30 mn 20 et seqq.). This is only a non-exhaustive list. The only relevant factor is that such costs are related to the arbitral institution and covered by the advances on costs as defined by Article 42. Due to the increased use of remote or semi-remote hearings, the costs associated with with e.g. technical and recording equipment and a technical secretary/assistant for the hearing, will increase.

19 In practice, the costs for postal services are not invoiced separately, but are paid by the VIAC out of the registration fee and the administrative fees. However, this does not apply to international courier services or express service in Austria.

20 The bearer organisation of the VIAC is the Austrian Federal Economic Chamber (AFEC), which has many modern conference rooms of all sizes at its disposal. The vast majority of arbitral tribunals under the Vienna Rules make use of these facilities for the conduct of oral hearings. When calculating the advances on costs, it is therefore normally assumed that the hearings will be held on the premises of the AFEC and the applicable rent is charged. This also applies to break-out rooms for arbitrators, parties and witnesses.

21 Article 30 para 2 and Section 207 et seqq. of the Austrian Code of Civil Procedure ("ZPO") provide that summary minutes of hearings be kept, which are dictated by the arbitrator to a court reporter (or onto a recording device,

from which a transcript is later made). Regarding the costs of the court reporter or of transcripts, empirical values are used when calculating the advances on costs. Verbatim records are also possible at the request of the arbitrators (and/or the parties), but these will lead to considerably higher costs which are hardly foreseeable. Such costs do not fall within the category of costs of the arbitral institution, but constitute expenses as defined in Art 44 para 1.3.

3. The costs of the parties (para 1.2)

22 The costs of the parties are exclusively defined as reasonable expenses of the parties for their representation. The parties advise such costs to the arbitrators in their statement of costs. In practice, the fees of the representatives are stated on the basis of chargeable hours. Occasionally, however, the standard tariff of the Austrian lawyers as laid down in the Austrian Statute on Lawyers' Tariffs (*Rechtsanwaltstarifgesetz/RATG*) may be applied. The arbitrators will decide whether the fees including their basis are reasonable.

4. Other expenses (para 1.3)

23 These expenses include "in particular those [costs] listed in Article 43 para 1" (cf. *Peters* in VIAC Handbook (2019) Art 43 mns 4 et seqq.). Other than the costs stated therein (for experts, interpreters, etc.), this category also includes, for example, the costs for private expert opinions of the parties (expert opinions on the subject matter of the case and legal opinions).

24 As already mentioned in Article 10 (cf. *Fremuth-Wolf/Rogge* in VIAC Handbook (2019) Art 10 mn 5), unlike the other costs of the arbitral institution, the registration fee is a fee *sui generis* and is not determined by the Secretary General. The amount of this fee is determined by the Extended Presiding Committee of the AFEC, and – since the latest revision of the Vienna Rules – depends on the amount in dispute (cf. *Fremuth-Wolf/Rogge* in VIAC Handbook (2019) Art 10 mn 2). It belongs to the "other expenses" as defined in Article 44 para 1.3. Claims for reimbursement of the registration fee must be made by inclusion in the statement of costs by the party that had to bear the same.

5. Calculation and determination of costs

25 In general, costs are determined at the end of the proceedings (Art 38 para 1). However, with the addition of Article 38 para 3, upon request by a party, the arbitral tribunal may at *any* stage of the arbitral proceedings make decisions on costs pursuant to Article 44 paragraphs 1.2 and 1.3 and order payment (cf. *supra* Art 38 mn 39).

5.1. Responsibilities

26 The Secretary General determines the administrative fees, the arbitrators' fees and the other expenses stated in Article 44 para 1.1. For this purpose, the arbitrators notify the Secretary General that the proceedings will soon be terminated and advise her of their expenses, furnishing evidence of the amounts actually spent. In order to ensure that all costs have been taken into account, the Secretary General usually sends a preliminary calculation of the same to the arbitrators, who may request changes (with respect to both the amount and the basis of calculation). Since the Vienna Rules 2018, the Secretary General may make payments on account to the arbitrators consideration of the stage of the proceedings also prior to termination of the arbitral proceedings.

27 The arbitrators are responsible for determining the costs of the other two categories (para 1.2 and 1.3) and will render their decision in the form of an arbitral award.

28 Any decision on the reimbursement of costs (irrespective of who is responsible for determining them) will always be made by the arbitrators (cf. *Peters* in VIAC Handbook (2019) Art 38 mns 33 et seq.).

5.2. Basis of calculation

5.2.1. Amount in dispute and its increase or reduction before or after transmission of the file

29 The arbitrators' fees and the administrative fees are calculated on the basis of the amount in dispute (Article 44 para 2). The latter must be stated by the claimant in its Statement of Claim (Counterclaim) and shall be taken as the basis for the calculation unless a correction (cf. mn 30) has to be made by the

Secretary General. Since the advance on costs must be paid before the transmission of the file (Article 11), the time of the transmission of the file is also decisive for taking account of reductions in the amount in dispute. These may only be taken into account in the calculation of the arbitrators' and administrative fees if made before the file was transmitted to the arbitrators (Article 44 para 10). However, increases in the amount in dispute are still cost-effective after this date (Article 44 para 10) *e contrario*), i.e. the advance on costs must be recalculated on the basis of the new amount in dispute and, if necessary, a further advance on costs must be prescribed (Article 42 paras 11 and 12; cf. VIAC Explanatory Notes Vienna Rules (2022) Art 42 mns 22 et seqq. for the consequences of non-payment). When the advance on costs is paid, the increased amount in dispute is also decisive for determining the arbitrator's fees and administrative costs at the end of the proceedings.

5.2.2. Correction of the amount in dispute by the Secretary General

30 If the parties have made only a partial claim, if a claim has clearly been undervalued or if no value has been assigned by the parties, the Secretary General may deviate from the amount in dispute determined by the parties (Article 44 para 3). A similar provision was first introduced in the version of the Vienna Rules that entered into force on 1.1.2001. The purpose of that provision was to ensure the fair remuneration of the arbitrators' work and that of the VIAC. While the first part (assertion of a partial claim) was more or less agreed upon in the discussions of the Board, there were differences of opinion as to how to value the amount in dispute in the case of non-pecuniary claims. Originally, the intention had been to grant the Secretary General authority to determine a different amount in dispute only at the request of the arbitrators, since only the arbitrators are allowed to assess the disputed facts of the case as to their merits. This option was dropped and the Vienna Rules 2001 (as well as the 2006 version) included the wording "obvious" undervaluation and granted the Secretary General sole power to decide thereon. In practice, however, it occasionally happens that the arbitrators suggest a correction of the amount in dispute. The term "obvious" was replaced by the term "clearly" in the Vienna Rules 2013; this terminology was maintained in the Vienna Rules 2018. The degree of clarity was not further defined. For an interpretation of the term "clearly" it may help to look more closely at the previous requirement of "obviousness" and to study Section 269 ZPO for a

supplementary interpretation of the rule. Section 269 ZPO reads as follows: "Facts that are obvious to the court need not be proved." In this context, Austrian academics and court decisions distinguish between facts known to the public and facts known to the court. However, the issue of "undervaluation of the amount in dispute" cannot be classified under either of the two categories of obviousness. Accordingly, the only criterion that must be met is that of having to be able to ascertain the fact of undervaluation without any evidence, since the Secretary General has no authority to evaluate evidence. For the Secretary General to be able to exercise her power as defined in Article 44 para 3 the fact of undervaluation must therefore either result from the request for relief as such (because it is then a fact acknowledged by the claimant) or from facts that the parties have put beyond dispute.

31 In a second step, the deviating, i.e. "true", amount in dispute has to be determined by the Secretary General. However, she cannot do so at her sole discretion. Rather, the Secretary General should at least be able to reliably estimate the "true" amount in dispute. In practice, the Secretary General will make a reasoned proposal for the amount in dispute, will send it to the parties and the arbitrators and will invite their comments. She will then make a decision based on her reasoned discretion.

5.2.3. Separate calculation and no aggregation of amounts in dispute for statement of claim and counterclaim (Article 44 para 5)

32 As a matter of principle, all claims made in a statement of claim must be totalled and the total amount will constitute the basis for calculating the costs, ie the costs depend on the total amount in dispute.

33 The same applies to claims raised in counterclaims. Counterclaims are independent claims and are also treated as such in terms of costs, i.e. separate advances on costs are calculated and prescribed for each counterclaim, depending on the respective amount in dispute of the counterclaim (Article 44 para 5). Thus, the amounts in dispute of claims and counterclaims that are dealt with in one proceeding cannot be added together for the purposes of costs calculations.

5.2.4. Special case set-off claims (Article 44 para 6)

A special regulation applies to set-off claims (Article 6; cf. *Pitkowitz/Dobosz* in VIAC Handbook (2019) Art 9 mn 16 et seq.). To ensure that the arbitrators and the VIAC are fairly remunerated, the Secretary General may determine separate administrative and arbitrators' fees to the extent that these claims have required the arbitral tribunal to consider additional matters (cf. *supra* Article 42 mn 17 et seqq. for the advance on costs in joinder scenarios). However, this only applies when such claims would require substantial additional work (Article 44 para 6). In such cases, the Secretary General will, in practice, inform the parties and the arbitrators of her intention to calculate the costs separately and will request comments. A decision on such matters will be based on her reasoned discretion.[3] **34**

5.2.5. Joinder of third parties (Article 44 para 7)

The Secretary Tribunal has more flexibility in determining and fixing the arbitrators' fees and the administrative fees in relation to joinders (made in a statement of claim or by seperate request), depending on the circumstances of the case (cf. *supra* Article 42 mn 17 for the advance on costs). A joinder may be taken into account by adding a multi-party surcharge (Article 44 para 4) if the third-party is admitted to the case by the tribunal or by increasing the arbitrators' fees by a complexity surcharge (Article 44 para 8) of up to 40%. If it is a completely separate claim (e.g. third-party cross-claim), the Secretary General may treat this as a (counter-)claim and fix separate fees for this claim (Article 44 para 5; cf. *supra* mn 33 and VIAC Explanatory Notes Vienna Rules (2022) Art 42 mn 24 et seqq. with examples). **35**

5.3. Determination of amounts

5.3.1. In general

The amount of administrative and arbitrators' fees are primarily based on the value in dispute. However, there are a number of factors that can lead to an increase or decrease of such fees. These are briefly outlined below. **36**

[3] Cf. also Selected Arbitral Awards, Vol 1 (2015), A 23 Set-off vs Counterclaim (*Rechberger/Hofstätter*), 442.

5.3.2. Multiparty surcharge for arbitrators' fees and administrative fees (Article 44 para 4)

37 The arbitrators' fees and administrative fees increase if more than two parties are involved by 10 per cent for each additional party up to a maximum of 50%. This increased amount will then be the basis for a further increase or decrease according to para 8 (complexity or (in)efficiency surcharge). The administrative fees are capped at a maximum of EUR 75,000 (EUR 21,750 + EUR 53,250 according to Annex 3), irrespective of the amount in dispute. A multi-party surcharge may, however, be added to the maximum amount of administrative fees. If a third party is admitted as a secondary intervener or another form of joinder, there may also be a subsequent multiparty surcharge.

5.3.3. Complexity and efficiency surcharge on arbitrators' fees (Article 44 para 8)

38 The arbitrators' fees (but not the administrative fees) may also increase as a result of the particular complexity of the case (Article 44 para 8). According to current practice, such particular complexity may be assumed where complex issues of applicable substantive law must be solved and where the majority of arbitrators often work in different jurisdictions. A case with numerous individual claims to be dealt with may also be particularly difficult. In addition, unusually time-consuming taking of evidence by the arbitrators would justify an increase in their fees, such as where a hearing lasts ten or more days or where the arbitrators must travel to places other than the place of the hearing to take evidence.

39 On the other hand, particularly efficient conduct of proceedings by the arbitrators should also be rewarded (e.g. in case of expedited proceedings) in order not to create a (negative) incentive to conduct proceedings as long and costly as possible in order to obtain a complexity surcharge. For this reason, the Secretary General can also award a surcharge on the fee if the arbitrators have conducted a procedure very quickly and efficiently.

40 The actual increase must be assessed on a case-by-case basis and a combination of several of the factors described here may also be possible. The amount of the increase may now be up to 40 per cent. The basis for the (complexity or (in)efficiency surcharge is the (already) increased amount after

having added the multi-party surcharge (Article 44 para 4; cf. *supra* mn 35). For a panel of three arbitrators, the costs may therefore range from 2½ times to 3½ times the fee of a sole arbitrator. In practice, once the arbitral award has been submitted to the Secretariat for its review (cf. *Hauser* in VIAC Handbook (2019) Art 36 mn 4; Guidelines for Arbitrators), the Secretary General will inform the parties and the arbitrators of her intention to raise the arbitrators' fees, will invite their comments and will make a decision based on her reasoned discretion. Any possible increase always refers to the total amount of arbitrators' fees; for the allocation among arbitrators, cf. mn 10 *supra*.

5.3.4. Reduction of arbitrators' fees, in particular for inefficient conduct of proceedings (Article 44 para 8)

41 Just as arbitrators may take into account the conduct of parties and party representatives in the course of proceedings in their decision on costs (cf. *Peters* in VIAC Handbook (2019) Art 38 mn 31), the conduct of arbitrators in the course of proceedings may also be taken into account in determining their fees. Para 8 therefore now provides that the Secretary General may reduce the arbitrator's fee by a maximum of 40 per cent. The inefficient conduct of proceedings is cited as an example, which is to be understood mainly as very long delays in the proceedings not caused by the parties themselves. Exceeding the 3-month time limit for rendering the arbitral award (cf. VIAC Explanatory Notes Vienna Rules (2022) Art 32 mn 9 for the new 3-month time limit to render the award) will, in many cases, also lead to a reduction of the fee. This possibility should only be used in exceptional cases and should encourage the arbitrators to conduct the proceedings quickly and cost-effectively in the interests of the parties. A possible reduction always refers to the total amount of the arbitrators' fees; for the allocation among arbitrators cf. mn 10 *supra*.

5.3.5. Reduction of arbitrators' fees in case of premature termination of proceedings (Article 44 para 11 first sentence, first case)

42 In the event of premature termination of the proceedings, the Secretary General may reduce the arbitrators' fees (but not the administrative fees) in the manner she deems appropriate (Article 44 para 11). In practice, certain criteria will be applied. The arbitrators' work on the proceedings may theoretically be divided into three stages. The first stage is the period after the

Secretariat has transmitted the file to the arbitrators. This period will usually be concerned with studying the files, initial contact between the arbitrators and issuing the first few procedural orders. The second stage in theory consists of the actual proceedings, with a focus on preparing and conducting the oral hearing(s) for the taking of evidence. During the third and last stage of the proceedings, deliberations are conducted and the arbitral award is rendered and issued. From a theoretical perspective, these three stages are equivalent and the share for each stage is estimated at approximately one third of the total work. Depending on the stage of the proceedings at the time of premature termination, an appropriate reduction in fees may be justified. The weighting described here is theoretical and may differ according to the facts and circumstances of the case. As the Secretary General has to use her discretion, she will inform the arbitrators and the parties of her planned approach and will grant them the opportunity to comment.

5.3.6. Reduction of arbitrators' fees in case of premature termination of arbitrator's mandate (Article 44 para 11 first sentence, second case)

43 Here we would like to briefly describe how the Secretariat of the VIAC proceeds if an arbitrator's mandate terminates prematurely and the proceedings are continued. Para 11 expressly provides for the possibility of reducing the arbitrator's fee in this case as well. In this situation, the issue will arise of whether *pro rata* fees are to be paid to the departing arbitrator and, if so, in what amount. To assess this question, first of all the reason for the premature termination of the mandate must be considered. If the arbitrator is responsible for the termination (for example, if he failed to appropriately disclose facts concerning his independence and impartiality, even with only slight negligence, and is later successfully challenged on that ground) or if he resigned without any reason, in principle he will not be entitled to any fees. Different criteria will need to be applied if the arbitrator's resignation is not exclusively under his control (for example, if an arbitrator meets with unfounded hostility from one party and resigns from office in order to smooth the future course of proceedings).

44 The arbitrator's contract is a contract for work (*Werkvertrag*) with elements of agency (cf. in this respect *Riegler/Boras* in VIAC Handbook (2019) Art 16 mn 30). From the general rules on contracts for work, it can be deduced that a claim to *pro rata* remuneration for work exists if the work rendered so

far by the departing arbitrator was reasonable and can be used for the further proceedings. If the arbitrator's contract is subject to Austrian law, Section 1170 of the Austrian Civil Code ("ABGB") is relevant. According to that provision, a claim to remuneration only arises upon completion of the work. However, if the work had to be rendered "in certain separate parts" a portion of the remuneration may under certain circumstances be claimed prior to completion. This issue should be judged on a case-by-case basis.

In the past, the Secretary General has discussed the issue according to the above criteria with both the remaining arbitrators and the new arbitrator, and has always arrived at an amicable solution. Ultimately, the Secretary General decides at her discretion. **45**

5.3.7. Reduction of arbitrators' fees in parallel and subsequent proceedings (Article 44 para 11 second sentence)

If, before, during or after proceedings under the Vienna Mediation Rules, arbitral proceedings under the Vienna Rules are commenced between the same parties and concerning the same subject matter, Article 44 para 11 second sentence now expressly stipulates that the Secretary General may moderate the fees of the arbitrators at her own discretion in order – analogous to the premature termination – to avoid hardship if this is appropriate. This is particularly aimed at Arb-Med-Arb cases in which the arbitrators may not have had the full procedural effort because, due to an intermediate mediation procedure, the parties reached a (partial) agreement, which is then "only" implemented by the arbitrators in an award on agreed terms (for a detailed description of possible constellations and their cost consequences for arbitrators and mediators cf. *Fremuth-Wolf/Rogge* in VIAC Handbook (2019) Art 8 Vienna Mediation Rules mn 29 et seqq.). The arbitrator will already be informed of this in the Guidelines when he is appointed. **46**

5.3.8. Deduction of administrative fees in parallel and subsequent proceedings (Article 44 para 12)

If proceedings under the Vienna Mediation Rules are commenced before, during, or after arbitral proceedings under the Vienna Rules between the same parties and concerning the same subject matter, the administrative fees of the preceding proceedings shall be deducted from the administrative fees in the **47**

subsequently commenced proceedings; the Vienna Rules 2018 newly inserted this provision here. Cf. *Fremuth-Wolf/Rogge* in VIAC Handbook (2019) Art 8 Vienna Mediation Rules mn 27 et seq.

DISCLAIMER AND WAIVER OF IMMUNITY

Article 46

(1) The liability of the arbitrator, the tribunal secretary, the Secretary General, the Deputy Secretary General, the Board and its members, as well as the Austrian Federal Economic Chamber and its employees for any act or omission in relation to the arbitration is excluded, unless such act or omission constitutes willful misconduct or gross negligence.

(2) By agreeing to submit a dispute to arbitration pursuant to the Vienna Rules, a party shall be deemed to have waived any right of immunity from jurisdiction in respect of proceedings relating to the arbitration to which such party might otherwise be entitled. A waiver of immunity relating to the enforcement of an arbitral award must be expressed separately.

EXPLANATORY NOTE[1]

1. Introduction

Relevant commentary: *Steindl* in VIAC Handbook (2019) Art 46 pp. 354-365. **1**

Article 46 on limitation of liability is a long-standing provision of the Vienna Rules, as it was introduced by the Vienna Rules 2001[2] and formed part of the Vienna Rules 2006, 2013, 2018, and now 2021. Over time, the wording on limitation of liability was slightley modified and adapted to the current structure of VIAC personnel, e.g. the denomination of "Secretary General" (Vienna Rules 2006) and the establishment of the role of the "Deputy Secretary General" (Vienna Rules 2013). The Rules Revision 2021 saw the addition of the tribunal secretary to the list of beneficiaries to take into account the increased use of this instrument. **2**

Article 46 has proven successful over the years and was therefore only slightly amended in the course of the Rules Revision 2021, now stating that liability for any act or omission in relation to the arbitration is excluded "unless such act or omission constitutes willful misconduct or gross negligence." **3**

[1] This Explanatory Note on Article 30 is based on *Steindl* in VIAC Handbook (2019) Art 46. The author was contacted and his approval obtained to use passages of the respective commentary in these Explanatory Notes.
[2] Art 5 para 5 Vienna Rules 2001.

2. Scope of limitation of liability

2.1 Persons subject to limitation of liability

4 Cf. *Steindl* in VIAC Handbook (2019) Art 46 mn 5.

2.2 Individual expansion of limitation of liability

5 Cf. *Steindl* in VIAC Handbook (2019) Art 46 mns 6-8.

2.3 Permissibility of limitation of liability

6 The wording of Article 46 under the Vienna Rules 2018 limited liability to the extent "legally permissible",[3] inter alia because Austrian law does not permit a *full* exclusion of liability.[4] For this reason, the disclaimer provision was amended following the Rules Revision 2021, now stating that liability of the arbitrator, the tribunal secretary (added), the Secretary General, the Deputy Secretary General, the Board and its members, as well as the Austrian Federal Economic Chamber and its employees, for any act or omission in relation to the arbitration is excluded "unless such act or omission constitutes willful misconduct or gross negligence." The same change was made in the Vienna Mediation Rules and in the Vienna Investment Rules.

2.4 Ways to prevent damage and liability

7 Cf. *Steindl* in VIAC Handbook (2019) Art 46 mns 11-12.

3. Liability of arbitrators

8 Cf. *Steindl* in VIAC Handbook (2019) Art 46 mns 13-20.

4. Liability of the arbitral institution

9 Cf. *Steindl* in VIAC Handbook (2019) Art 46 mns 21-31.

[3] The limitation of liability under Article 31 of the ICC Rules 2021 reads "*except to the extent such limitation of liability is prohibited by applicable law*".
[4] *Krejci* in *Rummel/Lukas* I[4] Sec 879 *ABGB* mns 122 et seq.

5. Waiver of immunity (para 2)

A new paragraph was added to Article 46 in the course of the Rules Revision 2021. According to Article 46 para 2, by submitting the dispute to arbitration under the Vienna Rules, a party is deemed to have waived any right of immunity from jurisdiction in respect of proceedings relating to the arbitration to which the party might otherwise be entitled (Article 4). It also clarifies that a waiver of immunity relating to the *enforcement* of an arbitral award must be expressed *separately*. This provision mirrors Article 4 of the Vienna Investment Rules 2021 (cf. VIAC Explanatory Notes Vienna Investment Rules (2022) Art 4). **10**

TRANSITIONAL PROVISION

Article 47

This version of the Vienna Rules, which enters into force on 1 July 2021, shall apply to all proceedings that commence after 30 June 2021.

EXPLANATORY NOTE

1. Introduction

1 Cf. *Steindl* in VIAC Handbook (2019) Art 47 mns 1-4.

The Vienna Rules 2021 entered into force on 1 July 2021, and apply to all proceedings that commence after 30 June 2021.

2. Interpretation of the transitional provision

2 Cf. *Steindl* in VIAC Handbook (2019) Art 47 mns 5-11.

3. Transitional provision and schedule of fees

3 Cf. *Steindl* in VIAC Handbook (2019) Art 47 mns 12-14.

PART II
VIAC RULES OF MEDIATION

APPOINTMENT OF THE MEDIATOR

Article 7

(1) Absent an agreement of the parties regarding the identity of the mediator or the manner of appointment, the Secretary General shall set a time limit and invite the parties to jointly nominate a mediator and indicate his name, address, including electronic mail address, and contact details.

(2) The Secretariat may assist the parties in the joint nomination of the mediator in particular by proposing one or more persons from which the parties may jointly nominate one or more mediators. If the parties fail to jointly nominate a mediator, the Board shall appoint the mediator. In so doing, the Board shall give due consideration to the parties' preferences regarding the attributes of the mediator.

(3) Prior to the appointment of the mediator by the Board or the confirmation of the nominated mediator, the mediator shall sign and submit to the Secretary General a declaration confirming his (i) impartiality and independence, (ii) availability, (iii) qualification, (iv) acceptance of office, and (v) submission to the Vienna Mediation Rules. The mediator shall disclose in writing all circumstances that could give rise to doubts as to his impartiality or independence or that conflict with the agreement of the parties. This duty of the mediator continues to apply throughout the proceedings. The Secretary General shall forward a copy of these statements to the parties for comment.

(4) If there are no doubts as to the impartiality and independence of the mediator and his ability to duly carry out his mandate, the Board shall appoint the mediator or the Secretary General shall confirm the nominated mediator. If deemed necessary by the Secretary General, the Board shall decide whether to confirm a nominated mediator. Prior to the decision of the Board, the Secretary General may request comments from the mediator to be confirmed and from the parties. All comments shall be communicated to the parties and the mediator. Upon confirmation, the nominated mediator shall be deemed appointed.

(5) If the confirmation of a mediator is rejected or if the replacement of a mediator becomes necessary, paragraphs 1 to 4 shall apply *mutatis mutandis.*

EXPLANATORY NOTE[1]

1. Introduction; purpose of the provision

1 Relevant commentary: *Fremuth-Wolf/Mattl* in VIAC Handbook (2019) Art 7 Vienna Mediation Rules, pp. 415-424.

As far as the provisions remain unaltered, the relevant parts of the commentary are still applicable and are referenced below; if the passages are replicated, they are marked with ▌ on the side.

2 ▌ Mediation proceedings are voluntary in nature. It follows that the appointment and the manner of appointment of a mediator are based on the principle of party autonomy. Article 7 regulates the method of appointing a mediator which is not mandatory and only applies if the parties do not or have not made arrangements themselves.

3 This provision is identical to Article 7 Vienna Mediation Rules in the 2018 version except for a clarification regarding the confirmation procedure in para. 4. It mirrors the change made in Article 19 Vienna Rules, reflecting the well developed practice of confirming third-party neutrals.

4 With regard to the confirmation of arbitrators, cf. VIAC Explanatory Notes Vienna Rules (2022) Art 19 mn 3 et seqq. The same considerations apply for the amendment of Article 7 para 4 Vienna Mediation Rules.

2. Nomination of the mediator by the parties (para 1)

5 Cf. *Fremuth-Wolf/Mattl* in VIAC Handbook (2019) Art 7 Vienna Mediation Rules mns 3-6.

[1] This Explanatory Note on Article 7 is based on *Alice Fremuth-Wolf / Christine Mattl* in the VIAC Handbook (2019) Art. 7 Vienna Mediation Rules and *Günther Horvath / Rolf Trittmann* in the Handbook Vienna Rules (2014). The authors were contacted and their approval obtained to use passages of their respective commentary in these Explanatory Notes.

3. Appointment of the mediator by the board (para 2)

Cf. *Fremuth-Wolf/Mattl* in VIAC Handbook (2019) Art 7 Vienna Mediation Rules mns 7-9. 6

4. Declaration of the mediator (para 3)

Cf. *Fremuth-Wolf/Mattl* in VIAC Handbook (2019) Art 7 Vienna Mediation Rules mns 10-17. 7

The Mediator's Acceptance of Office form as well as the Guidelines for Mediators are available on the VIAC website.[2]

5. Confirmation of the mediator (para 4)

After the submission of the declaration of the mediator and any comments by the parties, the Secretary General checks if there are any doubts regarding the mediator's impartiality or independence or his ability to duly carry out his mandate. If there are no such doubts, the Secretary General confirms the mediator nominated by the parties. The Secretary General will – as is the case in arbitral proceedings – inform the Board on such confirmation. 8

9

If the Secretary General considers it necessary, the Board should decide whether to confirm a mediator, in accordance with Article 7 para 4 Vienna Mediation Rules. According to the identically worded regulation of the Vienna Rules, the Secretary General will consider a decision by the Board necessary if and when she herself has doubts about the confirmation (cf. *Riegler/Petsche* in VIAC Handbook (2019) Art 19 mn 7-11).

This is particularly the case whenever the Secretary General intends to deny a confirmation. The same applies in mediation proceedings. Much like the Secretary General, the Board verifies whether there are doubts as to the mediator's impartiality, independence or his ability to duly carry out his mandate and will then decide on the confirmation. 10

[2] Documents for Mediators: https://www.viac.eu/en/mediation/documents-for-mediators

11 The party nominated mediator is deemed appointed after the Secretary General or the Board confirms his nomination.

12 The confirmation is not required in cases in which the mediator is directly appointed by the Board (cf. mn 9 *supra*). After having obtained the mediator's declaration and any comments by the parties thereto, the Board conducts a review that is governed by the same criteria applied by the Secretary General and immediately decides upon the appointment of the mediator. The mediator is then informed of the decision.

13 The new addition in para 4 foreseen by the Rules Revision 2021 provides the following amendment to the procedure: Prior to the decision of the Board, the Secretary General may request comments from the mediator to be confirmed and from the parties. If the Secretary General requests such comments, then the comments shall be communicated to the parties and the arbitrator.

6. Qualification

14 Cf. *Fremuth-Wolf/Mattl* in VIAC Handbook (2019) Art 7 Vienna Mediation Rules mns 22-36.

7. Rejecting the confirmation and exchange of the mediator (para 5)

15 Cf. *Fremuth-Wolf/Mattl* in VIAC Handbook (2019) Art 7 Vienna Mediation Rules mns 37-39.

8. Mediator's contract

16 Cf. *Fremuth-Wolf/Mattl* in VIAC Handbook (2019) Art 7 Vienna Mediation Rules mns 40-44.

ADVANCE ON COSTS AND COSTS

Article 8

(1) The Secretary General shall determine a preliminary advance on costs for the prospective administrative fees of VIAC, the down payment on the mediator's fees (plus any value-added tax) and the anticipated expenses (such as travel and subsistence costs of the mediator, delivery charges, rent, etc). This first part shall be paid by the parties prior to the transmission of the file to the mediator and within a time limit set by the Secretary General.

(2) Unless the parties have agreed otherwise in writing, the advance on costs shall be borne by the parties in equal shares, and in case of multiparty mediation, they are shared pro rata. If the advance on costs allocated to one party is not received or is not received in full within the time limit specified, the Secretary General shall inform the other party/parties. The other party/parties is/are at liberty to bear the outstanding share of the advance on costs. If this share is not paid within the time limit specified, the mediator may suspend the proceedings in whole or in part, or the Secretary General may declare the proceedings terminated (Article 11 paragraph 1.5).

(3) If an additional advance on costs is necessary and determined accordingly by the Secretary General, in particular to cover the mediator's fees and anticipated expenses, paragraph 2 of this Article shall apply.

(4) Upon termination of the proceedings, the Secretary General shall calculate the administrative fees and the mediator's fees and fix these fees together with the expenses.

(5) The administrative fees shall be calculated on the basis of the schedule of fees (Annex 3) according to the amount in dispute. In fixing the amount in dispute, the Secretary General may deviate from the parties' determination if the parties clearly undervalued it or assigned no value to it. If more than two parties are involved in the proceedings, the amount of administrative fees listed in Annex 3 shall be increased by 10 percent for each additional party, up to a maximum increase of 50 percent.

(6) The amount of the mediator's fees shall be calculated according to the actual time spent on the basis of hourly or daily fee rates. The fee rates shall be fixed by the Secretary General at the time of the mediator's appointment or confirmation following consultation with the mediator and the parties. The Secretary General shall consider the proportionality of the fees and take into account the complexity of the dispute. There shall be no separate fee arrangements between the parties and the mediator.

(7) Unless otherwise agreed in writing, the parties shall bear their own costs, including the costs of legal representation.

(8) If arbitral proceedings under the Vienna Rules are commenced before, during, or after proceedings under the Vienna Mediation Rules between the same parties and concerning the same subject matter, the administrative fees of the preceding proceedings shall be deducted from the administrative fees in the subsequently commenced proceedings.

EXPLANATORY NOTE[1]

1. Introduction; purpose of the provision

1 Relevant commentary: *Fremuth-Wolf/Rogge* in VIAC Handbook (2019) Art 8 Vienna Mediation Rules, pp. 425-434.

As far as the provisions remain unaltered, the relevant parts of the commentary are still applicable and are referenced below; if the passages are replicated, they are marked with ▌ on the side.

2 ▌ In mediation proceedings as in arbitral proceedings, the advance on costs to be paid at the start of the proceedings is primarily intended to ensure that the total expected procedural costs will be fully paid in advance. Which party finally has to bear the costs in the end is not regulated in this provision as this typically forms part of the settlement agreement. Prior to the transmission of the file to the mediator, the registration fee as well as the preliminary advance on costs have to be paid in full. It consists of the prospective administrative fees of VIAC, a down payment on the fees for the mediator and the anticipated expenses. In the course of the revision of the rules, this provision was simplified and systemized (for example, para 11 old version was moved to the Rules of Arbitration).

3 This provision in the Vienna Mediation Rules 2021 is identical to Article 8 Vienna Mediation Rules in the 2018 version except for a clarification regarding multi-party proceedings in para 2.

4 Cf. VIAC Explanatory Notes Vienna Rules (2022) Art 42 mn 25 regarding multiparty proceedings and the payment of advance on costs. The same considerations apply for the amendment in para 2 of Article 8 Vienna Mediation Rules, i.e. that in case of multiple parties the advance on costs can also be split in pro-rata shares among the parties. For further comments on Article 8 Vienna Mediation Rules, cf. *Fremuth-Wolf/Rogge* in VIAC Handbook (2019) Art 8 Vienna Mediation Rules mns 1-40.

[1] This Explanatory Note on Article 8 is based on *Alice Fremuth-Wolf / Sonja Rogge* in VIAC Handbook (2019) Art 8 Vienna Mediation Rules. The authors were contacted and their approval obtained to use passages of their respective commentary in these Explanatory Notes.

CONDUCT OF THE PROCEEDINGS

Article 9

(1) The Secretary General shall transmit the file to the mediator if:

- a request in accordance with Article 3 has been submitted;
- the mediator has been appointed; and
- the preliminary advance on costs in accordance with Article 8 paragraph 1 has been paid in full.

(2) The mediator shall promptly discuss with the parties the manner in which the proceedings shall be conducted. The mediator shall assist the parties in finding an acceptable and satisfactory solution for their dispute. In conducting the proceedings, the mediator shall be in control of the proceedings while letting himself be guided by the wishes of the parties insofar as they are in agreement and in line with the purpose of the proceedings.

(3) The proceedings may be conducted in person or by other means. Having due regard to the circumstances of the case and after consultation with the parties, the mediator may decide to utilize any technological means as it considers appropriate to conduct proceedings remotely. In any case, the mediator shall seek to maintain fair treatment of the parties.

(4) The parties are free to select their mediation team. The mediator may offer guidance in this respect. Each party shall personally participate in a session with the mediator, or be represented by a duly appointed and authorized person having the authority to settle the dispute. The name, address and function of such persons shall be communicated to all parties and to the mediator in advance of the mediation or without delay. This communication shall also indicate the intended role of such person in the mediation.

(5) Throughout the proceedings, the parties shall act in good faith, fairly and respectfully.

(6) Sessions with the mediator are not public. Only the following individuals shall be permitted to attend:

- the mediator;
- the parties; and
- persons whose attendance was announced to the mediator and the other party in a timely manner before the respective session (paragraph 4 of this Article) and who have signed a written confidentiality agreement in accordance with Article 12.

(7) If the mediator considers it appropriate, the mediator may meet with a party in the absence of the other party (*caucus*). The mediator shall keep confidential the information given by one party in the absence of the other party, unless the party giving the information expressly waives such confidentiality vis-à-vis the other party and the mediator agrees to pass on such information.

EXPLANATORY NOTE[1]

1. Introduction

1 Relevant commentary: *Grill* in VIAC Handbook (2019) Art 9 Vienna Mediation Rules, pp. 435-443.

As far as the provisions remain unaltered, the relevant parts of the commentary are still applicable and are referenced below; if the passages are replicated, they are marked with ▌on the side.

2. Transmission of the file to the mediator (para 1)

2 Cf. *Grill* in VIAC Handbook (2019) Art 9 Vienna Mediation Rules mn 5-8.

3. The role of the mediator in the proceedings (para 2)

3 Cf. *Grill* in VIAC Handbook (2019) Art 9 Vienna Mediation Rules mn 9-12.

4. The role of the parties in the proceedings (paras 3 and 4)

4 ▌Article 9 para. 2 sets out basic principles for the conduct of the mediation. These principles are further defined with a particular view to the parties in Article 9 para 3 and 4. Again, bolstering the efficiency of the proceedings plays an important role. In order to ensure sufficient flexibility of the proceedings, the principle of party autonomy is firmly embedded in those two paragraphs of Article 9.

4.1. Conducting the proceedings

5 Pursuant to Article 9 para 3, proceedings under the Vienna Mediation Rules may be conducted in person or by other means (the previous wording of "virtual means" was aligned with the new wording in Article 30 para 1 Vienna

[1] This Explanatory Note to Art 9 is based on *Anne-Karin Grill* in VIAC Handbook (2019) Art 9 Vienna Mediation Rules. The author was contacted and her approval obtained to use passages of the respective commentary in these Explanatory Notes.

Rules following the Rules Revision 2021). Having due regard to the circumstances of the case and after consultation with the parties, the mediator may decide to utilize any technological means as he considers appropriate to conduct proceedings remotely. In any case, the mediator shall seek to maintain fair treatment of the parties.

Experience shows that the use of technical means of communication in the conduct of the proceedings is less suitable for the first mediation session. Rather, it is recommendable where the mediation is to be continued at a later and more progressed stage of the discussions. However, to conduct the mediation by virtual means may even be advisable if it serves to avoid high travel expenses or where the parties do not see any other possibility of communicating with each other, particularly if such communication is to occur on relative short notice. It is the express purpose of Article 9 para 3 to point out to the parties the general possibility of conducting proceedings under the Vienna Mediation Rules also through other means. **6**

4.2. Mediation team

The composition of the mediation team is now expressly contained in para 4 as a separate provision due to its overall importance in the planning of the mediation in the broader sense. **7**

The Vienna Mediation Rules leave no doubt about the fact that the parties are free to select their mediation team – i.e. the team of individuals who will act and decide for each party. If they wish, the parties may refer to the mediator for guidance on this matter. It is not only admissible but highly recommendable that the parties who shall participate in person are represented or at least accompanied during the mediation by legal counsel. The decision regarding this detail, however, ultimately lies with the parties (cf. VIAC Handbook (2019) Art. 9 mns 20 et seqq.). **8**

4.3. Authorised persons

Article 9 para 4 provides that each party shall personally participate in a session with the mediator or (if this is not possible) be represented by a duly appointed and authorized person who must also be vested with the express authority to settle. **9**

10 With this provision, the Vienna Mediation Rules pick up an aspect that is very relevant in the practice of international commercial mediation. Whether a particular mediation ultimately turns out to be successful depends to a large degree on whether or not the diverging perceptions of the parties change during the course of the proceedings in such manner that an agreement becomes possible. In order for such a change in perception to occur, intense dialogue is of the essence. If the ultimate decision-maker does not himself sit at the negotiation table, he will usually not have the same level of information as a direct participant. This simple fact can lead to a situation where the authorization of an outcome negotiated during the mediation is denied. It must therefore not surprise that the rejection of a settlement by the absent decision-maker will create frustration on the part of the negotiators. Viewed from that angle, the absence of a decision-maker will only help a party that abuses the proceedings for the purpose of gathering information or as a delay tactic. Article 9 para 4 seeks to prevent such scenarios.

11 Corporate entities are well advised to be represented in mediation by a person that is vested with the authority to represent as well as the required deal-making authority simply on the basis of his or her role in the organization (e.g. a member of the board of directors of a stock corporation or a managing director of a limited liability company). If the competent member of the board of directors or managing director is prevented from personally attending the mediation, they should ensure that a suitable person vested with the required authorities participates in their stead. At times, the question of whether or not a person disposes of a sufficient power of attorney to conclude a settlement agreement may not be verifiable without further effort. Therefore, the aspects of decision-making power and deal-making authority should be clarified by the mediator at the very beginning of every mediation session.

12 In order to facilitate communication, Article 9 para 4 also provides that the name, address and function of such persons shall be communicated to all parties and to the mediator in advance of the mediation or without delay. This communication shall also indicate the intended role of such person in the mediation.

4.4. Conduct of the parties during the proceedings

One further, rather programmatic, clarification is now contained in Article 9 para 5 (former para 4): the parties must act in good faith, fairly and respectfully throughout the proceedings. Even though this provision is by far no enforceable rule of conduct, it nevertheless seemed expedient to include it in the Vienna Mediation Rules if only as a guideline directed at the parties. The provision defines the general mindset with which proceedings under the Vienna Mediation Rules should ideally be conducted. The parties are reminded to keep, at all times, a certain fundamental standard as regards the procedural aspects of the mediation. 13

The additional requirement that was contained in the former para 4, namely that each party assumes the obligation to participate in at least one session with the mediator, was dropped in the course of the Rules Revision 2021. The motivation for removing this provision was to ease the burden if one party is not willing to participate or even obstructs the initiation of mediation proceedings. The Secretary General may now upon application of a party terminate proceedings in such a case which enables initiation of ensuing litigation or arbitration proceedings (cf. VIAC Explanatory Notes Vienna Mediation Rules (2022) Art 11 mns 5 et seqq.). Even though it is true that if the parties are obliged to participate in at least one session with the mediator, they are usually more inclined to engage in the process with the required degree of seriousness, mandatory participation should not serve as an undue burden or encourage delay tactics. 14

5. Attendance at sessions with the mediator (para 6)

Cf. *Grill* in VIAC Handbook (2019) Art 9 Vienna Mediation Rules mn 20-23. 15

6. Confidential private meetings with the mediator (para 7)

Cf. *Grill* in VIAC Handbook (2019) Art 9 Vienna Mediation Rules mn 24-28. 16

TERMINATION OF PROCEEDINGS

Article 11

(1) Proceedings shall be terminated by way of a written confirmation by the Secretary General to the parties and upon occurrence of the earliest of the following circumstances:

1.1 an agreement of the parties to settle the entire dispute;
1.2 the notification in writing by any party to the mediator or the Secretary General that it does not wish to continue the proceedings;
1.3 the notification in writing by the mediator to the parties that the proceedings will, in his opinion, not resolve the dispute between them;
1.4 the notification in writing by the mediator to the parties that the proceedings are terminated;
1.5 the notification in writing by the Secretary General regarding the failure
i. to appoint a mediator in accordance with Article 7 paragraphs 1 to 4;
ii. to comply with a payment order (Articles 4 and 8) in a timely manner.

(2) The proceedings may also be terminated in part if one of the grounds for termination listed under paragraph 1 applies to only a part of the dispute.

(3) In the cases listed under paragraphs 1.1 to 1.4 and paragraph 2, the mediator shall immediately inform the Secretary General of the circumstance of the termination.

EXPLANATORY NOTE[1]

1. Introduction; purpose of the provision

1 Relevant commentary: *Huber-Starlinger/Baier* in VIAC Handbook (2019) Art 11, pp. 452-457.

As far as the provisions remain unaltered, the relevant parts of the commentary are still applicable and are referenced below; if the passages are replicated, they are marked with ▌ on the side.

2 Article 11 governs the termination of proceedings commenced pursuant to the Vienna Mediation Rules.

[1] This Explanatory Note to Article 11 is based on *Amelie Huber-Starlinger / Anton Baier* in VIAC Handbook (2019) Art 11 VMR. The authors had been contacted and their approval was obtained to use passages of their respective commentaries in these Explanatory Notes.

One sentence was deleted in Article 11 para 1.2 during the course of the Rules Revision 2021 . 3

2. Formal termination of the proceedings (para 1)

Cf. *Huber-Starlinger/Baier* in VIAC Handbook (2019) Art 11 Vienna Mediation Rules mn 4. 4

3. Circumstances of termination (para 1)

The circumstances, which, upon occurrence, may lead to the termination of the proceedings are listed in Article 11 paras 1.1 to 1.5, namely: 5

- an agreement of the parties for the settlement of the entire dispute (para 1.1);
- the notification in writing by any party that it does not wish to continue the proceedings (para 1.2);
- the notification in writing by the mediator that the proceedings will, in his opinion, not resolve the dispute between them (para 1.3);
- the notification in writing by the mediator that the proceedings are terminated (para 1.4);
- the notification in writing by the Secretary General that a mediator could not be appointed or that payment orders were not complied with in a timely manner (para 1.5).

3.1 Agreement of the parties/mediation settlement (para 1.1)

Cf. *Huber-Starlinger/Baier* in VIAC Handbook (2019) Art 11 Vienna Mediation Rules mn 6-8. 6

3.2 A party's wish not to continue the proceedings (para 1.2)

The proceedings may also be terminated by a party's notification in writing, if this party does no longer wish to continue the proceedings. Due to the definition of the term in Article 2 (cf. *Huber-Starlinger/Baier* in VIAC Handbook (2019) Art 2 mns 7 et seq.) such a notification can be submitted by one, more or all of the parties. 7

8 The written notification is to be addressed to the mediator or the Secretary General. Upon receiving such a notification, the mediator shall immediately inform the Secretary General of the party's wish to terminate the proceedings (Article 11 para 3).

9 Cf. *Fremuth-Wolf/Grill* in VIAC Handbook (2019) Annex 1, 5.1.2, 5.1.3., 5.1.4. and 5.2.4 and *Frauenberger-Pfeiler* in VIAC Handbook (2019) Art 10, mn 4 regarding obligatory mediation clauses and their impact on subsequent state court or arbitration proceedings.

10 In the course of the Rules Revision 2021, the requirement that at least one session has taken place, that the grace period of two-months upon the appointment of the mediator or any other agreed-upon time-frame has expired was dropped. The purpose of the deletion of this provision was to ease the burden on a party, in cases where one party is not willing to participate in the mediation proceedings or even obstructs the initiation of said proceedings. In such a case, the Secretary General may now, upon application of a party, terminate the proceedings, facilitating the initiation of subsequent litigation or arbitration proceedings.

11 The original purpose of the above-mentioned requirement was two-fold; first, to prevent a party from making decisions without due consideration and second, to motivate the parties to engage in the proceedings. However, this purpose was not fulfilled in practice, hence the amendment.

12 There are many reasons why a party may choose not to continue the proceedings. Among others, this includes that to the opinion of one of the parties the dispute cannot be resolved in these proceedings or, to the opinion of the informing party, the other party is not properly taking part in the proceedings. The party is not obliged to disclose any reasons and may do so even without expressing any reasons. The sole requirement is that the information clearly expresses that the party does not wish to continue the proceedings any further.

3.3 Dispute cannot be resolved in the opinion of the mediator (para 1.3)

Cf. *Huber-Starlinger/Baier* in VIAC Handbook (2019) Art 11 Vienna Mediation Rules mn 14-15. **13**

3.4 Notification by the mediator that the proceedings are terminated (para 1.4)

Cf. *Huber-Starlinger/Baier* in VIAC Handbook (2019) Art 11 Vienna Mediation Rules mns 16-17. **14**

3.5 Impossibility to appoint a mediator and failure to comply with a payment order (para 1.5)

Cf. *Huber-Starlinger/Baier* in VIAC Handbook (2019) Art 11 Vienna Mediation Rules mns 18-21. **15**

4. Termination of the proceedings in part (para 2)

Cf. *Huber-Starlinger/Baier* in VIAC Handbook (2019) Art 11 Vienna Mediation Rules mn 22. **16**

5. Information of the Secretary General by the mediator (para 3)

Cf. *Huber-Starlinger/Baier* in VIAC Handbook (2019) Art 11 Vienna Mediation Rules mn 23. **17**

DISCLAIMER

Article 13

The liability of the mediator, the Secretary General, the Deputy Secretary General, the Board and its members, as well as the Austrian Federal Economic Chamber and its employees for any act or omission in relation to the proceedings under the Vienna Mediation Rules is excluded, unless such act or omission constitutes willful misconduct or gross negligence.

EXPLANATORY NOTE[1]

1. Introduction; purpose of the provision

1 Relevant commentary: *Grill* in VIAC Handbook (2019) Art 13, pp. 472-477.

As far as the provisions remain unaltered, the relevant parts of the commentary are still applicable and are referenced below; if the passages are replicated, they are marked with ▌ on the side.

2 ▌ The disclaimer provision of Article 13 has been modelled on Article 46 of the Vienna Rules 2018. Provisions of this kind, which serve to protect both the institution and the neutral third party conducting proceedings under its rules, are quite common in an institutional context. Similar provisions are found in the ADR rules of other leading arbitral institutions.

3 ▌ Even if due care and diligence were observed at all times, it would be simply impossible to administer and conduct such institutional proceedings, especially considering the, at times, quite high amounts in dispute. There would always be a concern that the independence of the neutral third party (and of the institution) could be compromised if they were exposed to claims for damages without any safeguards whatsoever.

[1] This Explanatory Note is based on *Anne-Karin Grill* in VIAC Handook (2019) Art 13 Vienna Mediation Rules. The author had been contacted and her approval was obtained to use passages of her respective commentaries in these Explanatory Notes.

2. Scope of limitation of liability

Article 13 Vienna Mediation Rules now states that liability for any act or omission in relation to the mediation proceedings is excluded "*unless such act or omission constitutes willful misconduct or gross negligence*." This provision mirrors the disclaimer as amended in Article 46 para 1 Vienna Rules. **4**

Cf. VIAC Explanatory Notes Vienna Rules (2022) Art 46 para 1, which outlines the reasons the wording was adapted. The same considerations apply to the change made in Article 13 Vienna Mediation Rules.

TRANSITIONAL PROVISION

Article 14

This version of the Vienna Mediation Rules, which enters into force on 1 July 2021, shall apply to all proceedings that commence after 30 June 2021.

EXPLANATORY NOTE

1. Introduction; purpose of the provision

Cf. *Fremuth-Wolf/Rogge* in VIAC Handbook (2019) Art 14 mns 1-4 and *Nikolaus Pitkowitz / Tobias Birsak* in Handbook Vienna Mediation Rules (2016) Art 14 . **1**

2. Entering into force and application of the Vienna Mediation Rules

Pursuant to Article 14, the Vienna Mediation Rules 2021 entered into force on 1 July 2021, and apply to all proceedings that commence after 30 June 2021. **2**

Should the parties express interest in a "mediation window" in the course of pending arbitration proceedings after 1 July 2021, the Vienna Mediation Rules 2021 will be applicable. **3**

For a commentary on this provision cf. *Fremuth-Wolf/Rogge* in VIAC Handbook (2019) Art 14 Vienna Mediation Rules and *Nikolaus Pitkowitz / Tobias Birsak* in Handbook Vienna Mediation Rules (2016) Art 14. **4**

PART III
ANNEXES TO THE VIAC RULES OF ARBITRATION AND MEDIATION

Explanatory Notes in relation to Annexes 1-6

Annex 1

Annex 1 has remained largely the same except for minor linguistic changes. It was also expanded upon by the addition of the following model clauses: 1

- Arb-Med-Arb-Clause
- Model Clause for VIAC as Appointing Authority (Annex 4)
- Model Clause for VIAC as Administering Authority (Annex 5)
- Model Clause for Disputes Relating to Succession (Annex 6)

For a commentary on Annex 1 and the remaining model clauses (Model Arbitration Clause, Model Mediation Clauses), cf. *Fremuth-Wolf/Grill* in VIAC Handbook (2019) Annex 1. 2

Annex 2

Annex 2 on the internal rules of the Board remained the same, except for the addition of a footnote stipulating the status of the internal rules ("*Status as of 1 July 2021*"). 3

For a commentary on Annex 2, cf. *Baier/Heider* in VIAC Handbook (2019) Annex 2. 4

Annex 3

5 The schedule of fees in Annex 3 was slightly adjusted. While the registration fee and the administrative fees for lower amounts in dispute remained unchanged, the administrative fees for amounts in dispute above EUR 100,000 and the arbitrators' fees for amounts in dispute above EUR 200,000 have been raised. The increase reflects the often higher complexity of proceedings with a higher value as well as the extended electronic services of VIAC (new file sharing platform, electronic case management database, etc.).

6 For a commentary on the scope of the schedule of fee and its binding nature, cf. *Baier/Heider* in VIAC Handbook (2019) Annex 2 mns 2-3.

Annex 4

7 In practice, VIAC has been requested to act as an appointing authority. This was possible under Article 1 para 3 Vienna Rules 2018 and Annex 4 2018. There was a general consensus that the framework for such requests should be regulated in more detail. The last version of Annex 4 contained only one paragraph, whereas the revised 2021 version contains the following four articles relating to:

1. VIAC as appointing authority and the services it offers
2. Requests: submission and required content
3. Costs: EUR 3,000 for each service requested (with the possibility for VIAC to deviate in exceptional circumstances)
4. Disclaimer: this provision mirrors the respective provisions in the Vienna Rules and the Vienna Mediation Rules.

8 This Annex 4 was also incorporated in the VIAC Rules for Investment Arbitration and Mediation 2021.

Annex 4 with its detailed text is self-explanatory. For further information, please also refer to the commentary on Annex 4 to the Vienna Rules 2018, wich is partially still applicable.[1] 9

Annex 5

VIAC is sometimes requested to act as an administering authority. This was not regulated under the Vienna Rules 2018. Therefore, a new Annex 5 was developed by the Secretariat and incorporated in the course of the 2021 Rules Revision. Annex 5 also contains four Articles on: 10

1. VIAC as an administering authority and the services it offers (support services; administration of costs; services as an appointing authority)
2. Requests – submission and required content
3. Costs – dependent upon the administrative services requested (*see* Article 3 in Annex 5)
4. Disclaimer – this provision mirrors the respective provisions in the Vienna Rules and the Vienna Mediation Rules and is identical to the one in Annex 4.

This Annex 5 was also incorporated in the VIAC Rules for Investment Arbitration and Mediation 2021. 11

Annex 6

Annex 6 contains supplementary rules for disputes relating to succession, taking into account the unique characteristics of arbitration proceedings foreseen in a disposition of property upon death. A special model clause was also added to the set of model clauses in Annex 1. 12

For a commentary in German on the new Annex 6 cf. *Werner Jahnel/Christian Koller* (2021) "Ergänzende Regeln für erbrechtliche Streitigkeiten – Anhang 6 der VIAC Schieds- und Mediationsordnung 2021" in *Der Gesellschafter GesRZ – Zeitschrift für Gesellschafts- und Unternehmensrecht 3/2021*, pp. 142-146. 13

[1] Fremuth-Wolf/Vanas-Metzler in VIAC Handbook (2019) Annex 4 – in particular mns 1-4.

VIAC