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Back to the roots of arbitration--the Court of Innovative Arbitration

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Arbitration analysis: As arbitration users continue to perceive high costs and delay as significant problems with international arbitration today, the newly-established Court of Innovative Arbitration (COIA) seeks to turn back the clock to simplify the arbitral process. Dirk-Reiner Martens and Heiner Kahlert, attorneys at Martens Rechtsanwälte in Munich, explain the main features of the project launched by their law firm.

What prompted you to launch a new court of arbitration?

Today's arbitral process has reached a very high level of complexity. While this can be justified for truly complex cases and/or very high amounts in dispute, there are many cases in which the time and costs that come with this level of complexity are obstacles to parties choosing to file requests for arbitration.

In the 2015 edition of the International Arbitration Survey conducted by Queen Mary University (page 7), 68% of all participants mentioned cost as one of the three worst characteristics of international arbitration, which made this the most frequent answer by a significant margin of 22%. Lack of speed was ranked fourth, with still 36% of the participants mentioning it among the three worst characteristics. This is remarkable given that some decades ago arbitration was valued as a simple, inexpensive and speedy dispute resolution mechanism compared to court litigation, even in highly developed jurisdictions.

It is also notable that steps taken by many of the established arbitral institutions in recent years to tackle the issues of time and cost (eg fast track procedures, increased used of sole arbitrators) have quite obviously not been regarded as sufficient by the users of arbitration.

The idea behind COIA is to offer a true alternative to today's standard international arbitral process by taking a more radical approach towards simplifying the procedure, thus going back a little to the roots of arbitration.

This idea was fostered by the success enjoyed by a similar project of Martens Rechtsanwälte--the Basketball Arbitral Tribunal (BAT), which operates on the niche market of financial disputes in the world of international basketball, has received about 750 cases since its creation in 2007 and now receives a steady flow of around 150 cases per year. One noteworthy aspect of the BAT is that it receives both multi-million Euro claims and very small claims with low four-digit amounts in dispute. COIA seeks to offer a similar service to the wider commercial community.

How is COIA structured?

COIA is a company incorporated in Munich and is a subsidiary of the law firm Martens Rechtsanwälte. In line with the objective of keeping everything as simple as possible, there is only one body which is responsible for the administration of COIA arbitral proceedings--the COIA Secretariat.

The COIA Secretariat is headed by the COIA President, and this position is currently held by Professor Bruno Simma (who is among other roles, Professor of Law at Munich University and University of Michigan Law School in Ann Arbor, judge at the Iran-US Claims Tribunal, former judge at the ICJ, and a very active arbi-

trator). Under his leadership, attorneys and assistants from Martens Rechtsanwälte are responsible for the day-to-day management of COIA.

What are the main features of COIA's arbitral process?

There are two 'pillars'. First, the COIA Arbitration Rules provide for a simple procedure that is designed to avoid, to the extent possible, procedural pitfalls that are responsible for major costs and delays in standard arbitration proceedings. Second, the COIA Arbitration Rules and the model arbitration clauses strongly encourage ex aequo et bono arbitration (ie according to what is fair and equitable).

As to the first pillar, the most important features are:

- all cases are decided by a sole arbitrator, who is appointed by the institution from a list of (currently) eight arbitrators. The parties may agree on one of those arbitrators within a short time limit, otherwise COIA will appoint one. The arbitrators on the list are independent from and have been carefully selected by COIA with a view to safeguard integrity, quality of work, responsiveness and experience in ex aequo et bono adjudication
- the COIA Arbitration Rules purposefully refrain from regulating the arbitral procedure in too much detail, thus granting the arbitrators the freedom to adopt the suitable procedure for each case
- time limits will be as short as reasonably possible, and parties commit themselves under the COIA Arbitration Rules to appoint only counsel who are able to meet such short time limits
- there will be no document production phase unless ordered by the arbitrator on the basis of exceptional circumstances
- the COIA Arbitration Rules provide for one exchange of submissions--after receipt of the request for arbitration and answer (if any), the arbitrator will decide whether further written submissions or a hearing (in person or otherwise) are needed. Unless deemed necessary by the arbitrator, a hearing will be conducted only if both parties so request
- if one party does not pay its share of the advance on costs, the arbitrator may issue an award without reasons if the other party so requests--in all other cases, the award will be reasoned
- the language of the arbitration is English unless agreed otherwise by the parties, the arbitrator and COIA
- the arbitration is paperless to the furthest extent possible
- apart from exceptional circumstances, the arbitrator will deliver the final award within six months of receipt of the full advance on costs

All of these features are aimed at reducing time and cost, in particular in areas that are widely regarded as the main contributors to delays and excessive cost in today's arbitral process (as identified in the 2006 edition of the International Arbitration Survey conducted by Queen Mary University):

- discovery
- constitution of the tribunal
- overly lengthy and too numerous written submissions and complicated proceedings

With respect to the second pillar of COIA arbitration, the COIA model arbitration clauses expressly empower the arbitrator to decide ex aequo et bono. If there is no express agreement on the applicable law (or on ex aequo et bono), the COIA Arbitration Rules allow the arbitrator to decide ex aequo et bono unless they find it more appropriate to apply the law most closely connected to the dispute. Hence, while ex aequo et bono is not a mandatory feature of COIA arbitration, the COIA does have a 'bias' towards this approach.

Why does COIA encourage parties to have the arbitrator decide ex aequo et bono?

In standard international arbitration, arbitrators usually have to apply national laws. However, they often have not been trained in the jurisdiction whose laws they are to apply. Hence, arbitrators frequently have to rely on the parties' submissions on the applicable law.

In some cases, both parties submit expert opinions on foreign law. More often than not, both opinions sound perfectly reasonable but reach different results. In other cases, only one party is in a position to submit an expert opinion, while the other party may rely on its own research or not submit anything. Still in other cases, neither party makes any (helpful) submission on the applicable law. None of those situations is particularly desirable, and none of them helps saving time and costs.

Ex aequo et bono does away with the need for researching foreign law or providing expert testimony on this issue. Consequently, this approach can save parties significant time and costs.

But does ex aequo et bono not make the outcome of the dispute more unpredictable?

At first sight, one might think that this is the case. Indeed, it sounds like a very broad and vague concept to apply general considerations of equity and justice (ie ex aequo et bono). However, from our experience based on about 750 cases conducted ex aequo et bono at the BAT, we cannot confirm that in practice lack of predictability is a bigger concern than it is in standard international commercial arbitration.

The reasons behind this are mainly that:

- irrespective of whether an arbitrator applies a national law or decides ex aequo et bono, they are in principle obliged to apply the parties' contract--accordingly, in the vast majority of the cases arbitrated ex aequo et bono before the BAT, the arbitrator simply applied the relevant contractual provisions. Only in rare cases would that have been so grossly unfair and inequitable that the arbitrator decided they could not apply the contractual provision in question. In such case, however, most national laws would likewise have required the arbitrator not to apply the clause. Therefore, in our experience, decision-making ex aequo et bono leads to a fairly reliable application of the parties' contractual arrangements
- in international arbitration, at least one party is very often unfamiliar with the legal system stipulated in the contract. In fact, it is quite usual that the applicable law has been agreed upon only after most of the contract had already been drafted. This can lead to unpleasant surprises when the governing law contains unknown provisions that lead to a result different from what the parties actually wanted and stipulated in their contract
- arbitrators frequently are not trained in the jurisdiction whose laws they have to apply in an international arbitration. Many users have voiced the opinion that in such cases, arbitrators tend to simply take a decision that they deem fair and sensible as long as, on the face of it, the foreign law appears to allow for such outcome. If that observation is correct, it means that agreeing on a certain applicable law in international arbitration does not necessarily make the outcome that much more predictable

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