The DIS Rules of Arbitration of 2018

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The new arbitration rules of the German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit – "DIS") will enter into force on 1 March 2018 ("DIS Rules 2018").

It is the first revision of the DIS Rules since the current version was adopted in 1998 ("DIS Rules 1998"). The revision process involved nearly 300 persons sitting in three different commissions, but took only 18 months. The DIS Rules 2018 were drafted concurrently in English and German. The result: The DIS maintained and enhanced those civil law elements which were already decisive for the success of the DIS Rules 1998. But it also adopted new rules to reflect the changes and developments of international arbitration practice of the last two decades.

One of the most prominent features – as under the DIS Rules 1998 – of the DIS Rules 2018 is the promotion of early settlements (I.). Further, a newly founded body, the "Arbitration Council" will enhance the transparency and the integrity of the arbitration process (II.). Next, several new rules have been adopted in order to increase the already high efficiency, quality and expeditious character of DIS arbitration proceedings (III.). Lastly, along with the amendments of several institutional rules, the DIS Rules 2018 contain several new rules for multi-party and multi-contract arbitrations (IV.).

I. Promotion of early settlements

For many medium, small and big-sized companies in Germany and abroad the early settlement of disputes is an important feature of any dispute resolution mechanism which they might chose in their contracts. This tradition is reflected by the different mechanisms which already existed in the DIS Rules 1998 and which have been further strengthened in the DIS Rules 2018. Two of the most salient features are:

o The arbitral tribunal shall encourage an amicable settlement between the parties at every stage of the arbitration (Article 26). Reflecting the long-standing practice, the DIS Rules 2018 provide that arbitral tribunals will seek to do so unless any party objects.

o During the case management conference, the arbitral tribunal must address whether it can give a preliminary legal and factual assessment of the case (Article 27.4(i) and annex 3). The latter is a common feature in civil law proceedings: by identifying disputed and relevant facts and salient legal issues at an early stage of the proceedings, arbitral tribunals can often streamline proceedings, shorten submissions and enhance settlement negotiations between the parties. By not objecting to the arbitral tribunal exercising this power, the parties waive their right to invoke doubts regarding the arbitral tribunal's impartiality or independence.

II. Involvement of the DIS in the arbitration process – Transparency is strengthened

The role and the powers of the DIS as an institution will be strengthened and expanded. In particular, a new body, the “Arbitration Council”, is founded. The purpose is to ensure that many controversial decisions will be taken by an independent body of the DIS and not by the arbitral tribunal itself. The Arbitration Council’s competencies comprise in particular:

o Decision to appoint a sole arbitrator upon request of any party and if the parties did not agree on the number of arbitrators (Article 10.2). The Arbitration Council will decide, after hearing the other party, whether the arbitral tribunal shall be comprised of one or three members.

o Decision on the challenge of an arbitrator (Article 15.4): Under the DIS Rules 1998 the decision on the challenge of an arbitrator was made by the arbitral tribunal itself and not by the DIS. Although it was common practice that at least in three-member tribunals the challenged arbitrator would not participate in the challenge decision, many practitioners criticized that the arbitral tribunal had to make this decision. To shift the competence for this kind of decision to a body embedded within the institution will certainly enhance the acceptance of a challenge decision and reduce the risk that an unsuccessful party will appeal the challenge decision with the state courts.

o Decision on the arbitrator’s removal from office if the Arbitration Council considers that the arbitrator is not fulfilling its duties according to the DIS Rules 2018 or will not be fulfilling its duties in the future (Article 16.2).

o Decision on the arbitrators’ fees in case the arbitration has been terminated prior to the making of a final award or by an award by consent (Article 34.4). Under the DIS Rules 1998 the decision on the fees in these cases was made by the arbitral tribunal itself and not by the DIS.

o Decision to reduce the arbitrators’ fees based upon the time it has taken the arbitral tribunal to issue its final award (Article 37).

o The arbitral tribunal will determine the amount in dispute after consultation with the parties. Based on the amount in dispute the DIS will determine the arbitrators’ fees. Upon request of any party the Arbitration Council can modify or confirm the arbitral tribunal’s determination. This is a feature which in contrast to many institutional rules is unique. It ensures that the arbitrators being closest to the matter in dispute decide upon the amount in dispute. At the very same time it also ensures the integrity of the arbitral tribunal in cases a party appeals the arbitral tribunal’s decision upon the amount in dispute.

o The DIS will now request and administer the deposits for the arbitrators’ fees payable by the parties. This is an important amendment. Under the DIS Rules 1998 the arbitral tribunal had to request and administer the deposits which was heavily criticised by many arbitrators.

o The case management team will review the award with regard to form (Article 37.3).

III. Efficiency, quality and expedition of arbitration proceedings are enhanced

Under the DIS Rules 2018 the DIS has adopted several rules to enhance more expeditious and efficient proceedings than under the DIS Rules 1998. The most prominent amendments are:

o Quicker constitution of a three-member tribunal: Respondent has to nominate its arbitrator within 21 days (instead of 30 days under the DIS Rules 1998) after receipt of the request for arbitration (Article 7.1 (i)) also, the deadline – set by the DIS – for the co-arbitrators to nominate the president was shortened from 30 days to 21 days (Article 12.2).

o Respondent has to file the answer to the request for arbitration within 45 days after receipt of the

request (Article 7.2). The DIS Rules 1998 did not stipulate any deadline for a respondent at all. Instead, the arbitral tribunal had to set respondent the deadline to file its answer. This former procedure was often criticized. Delays in the constitution of the arbitral tribunal often meant that respondent had very long deadlines to submit its answer.

o The DIS Rules 2018 stipulate that a case management conference has to take place, in principle, within 21 days after the constitution of the arbitral tribunal (Article 27.2).

o As regards the agenda of such case management conference the DIS Rules 2018 go one step further than many other institutional rules: Article 27.4 obliges the arbitral tribunal, parties and in-house counsel to address and discuss the adoption of those measures which are listed in annexes 3 and 4 of the DIS Rules 2018. These measures increase the procedural efficiency and reflect the common international arbitration practice. The measures listed in annex 3 are, inter alia, the limitation of rounds and length of submissions, the exclusion or limitation of production of documents by the party not having the burden of proof and the power of the arbitral tribunal to give a preliminary legal and factual assessment of the case.

o Further, the parties, the arbitral tribunal and in-house counsel are also obliged to discuss the application of the rules of expedited proceedings (annex 4) during the case management conference. The DIS Rules 2018 provide for the opt-in system. The revision process of the DIS Rules showed that in-house counsel considered it more appropriate and efficient to evaluate the application of the rules of expedited proceedings at the outset of the arbitration during the case management conference rather than at the stage of concluding the arbitration agreement. At the stage of the case management conference, the amount in dispute, the kind of dispute, and further the availability of counsel, witnesses and experts can be assessed and therefore also the appropriateness of the application of expedited proceedings rules.

IV. Multi-party, multi-contract and joinder of additional parties

The DIS Rules 1998 addressed only the constitution of an arbitral tribunal in case of multiple claimants or respondents (section 13 DIS Rules 1998). Apart from that, the DIS Rules 1998 stipulated that it was within the arbitral tribunal's discretion to decide on the admissibility of multi-party proceedings. The term "multi-party" comprised multi-party and multi-contract proceedings, the consolidation of two or more arbitration proceedings or the joinder of additional parties. The requirements of the admissibility of these different procedural constellations were not set out in the DIS Rules 1998.

The DIS Rules 2018 contain new and multi-faceted provisions for multi-party proceedings, multi-contract proceedings and the joinder of additional parties (Articles 8 and 17-19).

V. What will the future bring?

The revision of the DIS Rules reflect the best practice of a modern set of arbitration rules which meets the expectations of users for cost-efficient, expeditious and transparent arbitration proceedings. Nonetheless, the DIS has consciously chosen to maintain and enhance those distinct features which characterize civil law proceedings. With this, the DIS underlines its role as one of the leading international arbitration institutions, but honours its civil law traditions which have been attractive to parties from all over the world.