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The Danish Institute of Arbitration Updates Its Arbitral Rules

Gary B. Born (Wilmer Cutler Pickering Hale and Dorr LLP) · Tuesday, May 28th, 2013 · WilmerHale

The Danish Institute of Arbitration ("DIA") revised its rules effective May 1, 2013, an overhaul from the prior 2008 iteration of its rules that brings the DIA rules into line with those of leading arbitral institutions. As part of these revisions, the DIA has both reorganized the structure of its rules and updated various key provisions. Among other changes, notable amendments include new provisions for the consolidation of cases and joinder of parties, new guidelines for arbitrator independence, and new provisions for the appointment of interim and emergency arbitrators.

Overall, the DIA has clearly made an effort to make its arbitral rules friendlier to international disputes. The institution's caseload has had a distinctively Danish leaning to date. According to the DIA website, of the 117 cases received in 2011 (the most recent year for which statistics are available), 56 were domestic arbitrations and 29 were international arbitrations, with the remainder being a variety of other types of disputes. The DIA also reports that in terms of the nationality of parties as of 2011, the substantial majority were Danish, at 221 parties, with the next closest being just seven parties from the United Kingdom.

The harmonization of the new DIA rules with the prevailing rules of leading international arbitral institutions may contribute to internationalizing the DIA's caseload and generally increasing its case traffic. The key changes in the rules are discussed in more detail below.

Commencement of an Arbitration

Articles 4 and 5 of the new DIA rules cover the commencement of an arbitration. Among other things, Article 4 provides the minimum information that must be contained within a statement of claim. The prior version of Article 4 called for arbitration to be commenced by the DIA's receipt of a request for arbitration, which, if not accompanied by a statement of claim, had to contain certain minimum information. The new Article 4 now requires a party seeking to commence proceedings to submit a statement of claim (eliminating the "request for arbitration" language) and requires a party both to submit more information in the first instance regarding the substance of the dispute and administrative information about the parties, such as value-added tax and company registration numbers.

The new Article 4 also requires a statement of the relief or remedy sought, together with the amounts of any quantified claims and, to the extent possible, an estimation of the monetary value of any other claim. The former provisions governing requests for arbitration and statements of claim did not require this.

Article 5 governs the registration fee, which is €1,300 or the equivalent in Danish kroner, a slight increase from 7,500 Danish kroner or €1,000 under the 2008 rules. A minor but notable indication of the increasing internationalization of the DIA rules and a move away from specifically Danish processes is that the new rules set the registration fee in Euros and provide for the corresponding Danish equivalent subject to prevailing exchange rates rather than the reverse.

Security for Costs

Article 6 contains new provisions with respect to the cash deposit made as security for the estimated costs of the arbitration. At Article 6(2), where one party refuses to pay its share of the security for costs and the other party has to pay the security in full in order for the arbitration to proceed, the paying party can now request the tribunal to render a separate award for reimbursement by the defaulting party of its share of the deposit.

Under Article 6(8), upon demand by one party, the tribunal may decide that the other party must provide security for costs that the tribunal may impose on that party in a final award. If the party fails to provide the security, the tribunal can close or stay the proceedings on that party's claims save for claims for dismissal.

Consolidation and Joinder

Article 9 addresses consolidation and joinder, issues that were not previously addressed under the 2008 DIA rules. Under the new Article 9(1), where a new statement of claim is submitted between parties that are already involved in arbitral proceedings under the DIA rules, a party may request that the cases be consolidated. The Chairman's Committee then decides the request after consulting with the other parties and any confirmed arbitrators in either of the two cases.

Likewise, under Article 9(2), the DIA can now also consolidate proceedings where a new statement of claim is submitted in connection with a dispute already proceeding before the DIA, but where the parties in the second proceeding are not identical to those involved in the first proceeding (e.g., a new subsidiary or a different subsidiary might be a respondent in one proceeding but not the other). In rendering its decision, the Chairman's Committee is to take various factors into consideration, including the connections between the cases and the parties and the progress of the already pending case. When cases are consolidated, the parties are deemed to have waived their right to an arbitrator, and the Chairman's Committee may revoke the appointment of arbitrators already confirmed in order to confirm new arbitrators in the consolidated case.

Under Article 9(3), if a third party makes a request to join an arbitration or a party requests that a new third party be joined, the tribunal will decide the request, taking into account whether the arbitration agreement covers all of the parties, the connections between the cases and the parties, and the progress of the already pending case.

Appointment of Arbitrators

Article 10 covers arbitrator appointments and now provides that where the parties have not agreed upon the number of arbitrators, the dispute will be decided by a sole arbitrator. This approach is the opposite of what was provided under the 2008 rules, where, in the absence of an agreement on the number of arbitrators, the dispute would be decided by three arbitrators. While establishing a sole arbitrator as the default presumption, the new Article 10 goes on to provide that the Chairman's

Committee may ask the parties to comment on the number of arbitrators to be appointed (in the absence of an agreement) and, after weighing various factors (e.g., the amount in dispute and the complexity of the case), the Chairman's Committee may determine that a panel of three arbitrators should be assembled.

This revision of the arbitrator appointment default rule brings the DIA rules into line with Article 12 of the ICC rules, which provides that, in the absence of the parties agreeing on the number of arbitrators, the ICC's International Court will appoint a sole arbitrator except where the dispute appears to the Court to warrant the appointment of three arbitrators.

DIA's new Article 11 provides that "all appointments of arbitrators are subject to confirmation by the Chairman's Committee." The 2008 rules provided for the appointment of all arbitrators by DIA after it heard the parties' nominations. The prior provisions were similar to Article 5.5 of the LCIA rules, while the revised rule, under which the institution confirms rather than appoints where the parties have nominated arbitrators, is more consistent with Articles 12 and 13 of the ICC rules.

Qualifications of Arbitrators

Domicile vs. Nationality

Article 11(7) provides that if the parties are of different nationalities, the tribunal president (or the sole arbitrator if this is the case) must be of a nationality and be domiciled in a country different from those of the parties and the other arbitrators unless agreed by the parties or the Chairman's Committee decides otherwise and there are no objections. This approach is similar to Article 13(5) of the ICC rules and Article 6.1 of the LCIA rules.

The 2008 rules addressed only the parties' domiciles, not their nationalities. The emphasis in the new rules on nationality rather than domicile reflects the increased internationalization of arbitration practice.

Availability, Impartiality, and Independence

Article 12(1) provides that "[a]ny person appointed arbitrator shall be available, impartial, and independent." The availability requirement is a new addition that did not appear in the 2008 rules.

Under Article 12(2), an appointed arbitrator must sign a declaration of impartiality and independence and "shall disclose in writing any circumstances which might give rise to reasonable doubts as to the arbitrator's availability, impartiality, or independence" prior to confirmation. Under the 2008 rules, the arbitrator had to disclose "any circumstances which, in the opinion of either party to the arbitration case, may give rise to justifiable doubt as to the arbitrator's impartiality or independence" (but not availability).

As such, the standard has changed from circumstances viewed as problematic "in the opinion of either party" (i.e., a subjective standard) to circumstances "which might give rise to reasonable doubts" (i.e., an objective standard). This new standard is in line with Article 5.3 of the LCIA rules, which requires an arbitrator to "sign a declaration to the effect that there are no circumstances known to him likely to give rise to any justified doubts as to his impartiality or independence, other than any circumstances disclosed by him in the declaration." In contrast, Article 11(2) of the ICC rules incorporates both a subjective and an objective standard: an appointed arbitrator must disclose "facts or circumstances which might be of such a nature as to

call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality."

Educational Qualifications

Article 10(2) provides that the tribunal president or sole arbitrator must have a law degree but is silent on whether the other members of the tribunal must have one. The 2008 rules required the other members to "have a law degree, unless the parties propose otherwise and this is deemed by [the DIA] to be adequate in view of the nature of the case." The move away from making a law degree the default for the other members of the tribunal is presumably in recognition of the potential benefits of having non-legal technical experts serve as arbitrators in disputes in certain industries where technical expertise is beneficial.

Arbitrator Challenges

Article 13 addresses arbitrator challenges. A provision that appeared in the 2008 rules providing that an arbitrator can challenge the appointment of another arbitrator if he finds that circumstances giving rise to justifiable doubts about impartiality or independence exist or if the arbitrator does not possess agreed upon qualifications, has been removed.

Confidentiality

Article 18(7) is a new provision stating that "upon the request of a party, the Arbitral Tribunal may make decisions concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and take measures to protect trade secrets and confidential information." A similar provision is found in Article 22(3) of the ICC rules. The change is a move away from the 2008 DIA rules, which provided that "[t]he members of the arbitral tribunal and [the DIA] shall treat all matters relating to the arbitration case as confidential." Under the new rule, the arbitral tribunal can now impose confidentiality requirements on the parties.

Tribunal-Appointed Experts

Article 20(1) allows the tribunal to appoint an expert without a party requesting the appointment where previously the tribunal could do so only at the request of a party.

At Articles 20(2), (3), and (4), the rules now provide that a tribunal-appointed expert must be available, impartial, and independent, i.e., the same criteria as an arbitrator. The expert also has to sign a declaration of acceptance and of impartiality and independence and to disclose all circumstances that might give rise to reasonable doubts about his or her availability, impartiality, and independence. This obligation is an ongoing one and is the same for the arbitrators as discussed above.

Interim Measures

Article 21 is an entirely new provision that provides for interim measures. Upon the request of a party, the tribunal may order another party to take such interim measures as the tribunal considers necessary regarding the subject matter of the dispute, including an order for the party to provide appropriate security in connection with that matter.

Witness Testimony

Under Article 22(2), the tribunal can now decide at the request of a party that testimony be given by "telecommunication" if appropriate. It is not clear whether videoconferencing would be included in the term "telecommunication," but presumably it would.

Article 22(3), like its 2008 predecessor, provides that the parties must, well in advance of the oral hearing but, in any event, no later than eight days before the hearing, inform each other and the tribunal of the witnesses they intend to call and provide copies of any new documents. The new rule also states that in addition to identifying the witnesses that they intend to call, the parties must also inform the other party and the tribunal of "the subject matter and the most important themes of the witness testimony." This requirement is similar to that set forth in Article 20.1 of the LCIA rules.

Scrutiny of the Award

Under Article 24, a tribunal must submit a draft version of the arbitral award to the Secretariat for review as soon as possible after conclusion of the oral hearing and "if possible, not later than six months from the referral of the case to the Arbitral Tribunal" so that the Secretariat can "scrutinize" the award pursuant to Article 28 of the new rules. Article 28 provides that, before the award is rendered, "the Secretariat shall scrutinize the draft award" and "may propose modifications as to the form of the award and without affecting the Tribunal's jurisdiction, draw its attention to other issues, including issues of importance to the validity of the award and its recognition and enforcement." A less exacting standard appeared in the 2008 rules under which the DIA was given the power to "peruse" the award rather than "scrutinize" it. The new rule is in line with ICC practice under Article 33 of the ICC rules.

Interim Arbitrator/Emergency Arbitrator

Article 32 is new and provides that "[w]here the taking of evidence or interim measures cannot await the confirmation of the arbitrators under the Rules, it may be done with assistance from an interim arbitrator or an emergency arbitrator in accordance with the provisions contained in Appendices 2 and 3." Similar provisions are found in Article 29 of the ICC rules. The DIA rules distinguish between an interim arbitrator who serves "to resolve any disputes between the parties regarding the taking of evidence" (Appendix 2) and an emergency arbitrator who serves to "grant any interim measure that he or she deems to be necessary in view of the nature of the case" (Appendix 3). The ICC rules make no such distinction.

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