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International Arbitration Alert

Revision of the DIS Arbitration Rules

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The German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit, or "DIS") has revised its Arbitration Rules ("Rules"). The new Rules came into effect on 1 March 2018 and replace the 1998 DIS Rules. The revision introduces major changes to the existing arbitral procedure under the DIS Rules and is the result of an extensive consultation process which lasted for almost two years.

This first revision in twenty years aims to modernize the DIS Rules and bring them into line with current best practices in international arbitration. The revision focusses on institutional changes, as well as the need for increased time- and cost-efficiency in arbitration proceedings. The new Rules are published in German and will also be published in English to reflect the growing international outlook of the DIS. At the same time, the DIS has deliberately chosen to maintain certain core elements of its Rules that are associated with civil law proceedings.

The revised Rules will apply to both domestic and international proceedings (Article 1.1) which are commenced on or after 1 March 2018 (Article 1.2).

Key amendments in the new Rules are discussed below. A non-final version of the full English text of the Rules can be found here.

I. Amendments to Increase Efficiency of the Arbitration Proceedings

One particular focus of the revised Rules is to increase the efficiency of DIS arbitrations. The theme of efficiency is contained in Article 2.1, which refers to the DIS providing support to the parties and the arbitral tribunal "for the efficient conduct of the arbitration," and Article 27.1, which explicitly stresses that "[t]he arbitral tribunal and the parties shall conduct the proceedings in an efficient manner taking into account the complexity and economic importance of the dispute."

Shortened Deadlines

In order to promote time efficiency, the deadlines for the initiation of the proceedings and the constitution of the arbitral tribunal have been shortened. Thus, to allow for a quicker constitution of the tribunal, Article 7 stipulates that the respondent shall notify the nomination of its arbitrator (if required under the Rules) in writing to the DIS within 21 days (compared to 30 days under the 1998 DIS Rules) after receipt of the claimant's Request for Arbitration. The respondent's Answer to the Request for Arbitration (and its counterclaims, if any) shall be filed within 45 days after receipt of the Request for Arbitration (Article 7.2). By contrast, the previous DIS Rules did not contain any firm deadlines for the submission of the Answer, which were instead to be determined by the arbitral tribunal after its constitution.

Similarly, where there is a three-member tribunal, the co-arbitrators must jointly nominate the president of the arbitral tribunal within 21 days (compared to 30 days under the 1998 DIS Rules) after being requested to do so by the DIS (Article 12.2).

The revised rules also set an indicative time limit for the rendering of the award. Thus, while the 1998 DIS Rules only required an award "within a reasonable period of time," Article 37 now requires the arbitral tribunal to finalize the draft award "in principle within three months after the last hearing or the last authorized Submission." If the time taken by the arbitral tribunal to issue its final award is unreasonably long, the Arbitration Council of the DIS (which is discussed below), at its discretion, can reduce the fee of one or more arbitrators, thus creating a monetary incentive for arbitrators to issue awards in a timely manner.

Case Management Conference

Similar to the current ICC Rules, the revised Rules now explicitly require the arbitral tribunal and the parties to hold an early case management conference (Article 27.2). The revised Rules clarify that the arbitral tribunal should convene the case management conference "as soon as possible after its constitution, in principle within 21 days," and that, in addition to the parties' outside counsel (where applicable), the parties themselves should participate in person or with an in-house representative. Moreover, the revised Rules go further than, for example, the ICC Rules in that they set forth a specific agenda to be discussed at the case management conference (Article 27.4). The tribunal is required to discuss with the parties:

- The procedural rules to be applied in the proceedings as well as the procedural timetable.

- Each of the measures set forth in Annex 3 of the Rules (Measures for Increasing Procedural Efficiency) in order to determine whether any of them should be applied.

  This includes, for example, the requirement to discuss with the parties whether document production by the party that does not carry the burden of proof should be excluded or at least limited. While this feature may appear unusual to a common law practitioner, it reflects the generally more restrictive approach to document disclosure taken by most civil law jurisdictions. Another distinctive civil law feature to be discussed at the case management conference is the possibility for the tribunal to give a preliminary factual or legal assessment of the case, if none of the parties objects. The purpose of such an assessment is to encourage the streamlining of the proceedings and encourage settlement discussions. Other measures to be discussed include, for example, the rendering of partial awards or decisions and limiting the length of submissions or potential witness statements and expert reports.

- The provisions of Annex 4 (Expedited Proceedings) in order to determine whether they should be applied. Under the provisions for expedited proceedings, the final award shall be made at the latest six months after the conclusion of the case management conference (Article 1 of Annex 4). In addition to the Request for Arbitration and the Answer to the Request, each party will be allowed to file only one further written submission (Article 3 of Annex 4).

- The possibility of using mediation or any other method of alternative dispute resolution to seek amicable settlement of the dispute or of individual disputed issues.

- Whether experts should be used and if so, how the expert procedure can be efficiently conducted (Article 27.7).

Number and Form of Submissions

Under the 1998 DIS Rules, unlike the rules of many other institutions, introductory submissions such as the Request for Arbitration and Answer to the Request were not required. Instead, the arbitration commenced with the first main submission by the claimant (comparable to the Statement of Claim under many other rules) and often there were only two rounds of submissions (*e.g.*, Statement of Claim, Statement of Defense, Statement of Reply, Statement of Rejoinder in case there are no counterclaims).

While the revised Rules do not explicitly provide for a specific number of submissions, the non-final English version of the revised Rules refers to the initial submission by the claimant as "Request for Arbitration" and to the initial submission by the respondent as "Answer to Request for Arbitration." This

appears to suggest a three-round system similar to, for example, the procedure often followed under the ICC Rules. However, the German version of the new Rules still refers to the initial submission by the claimant as "Schiedsklage" (Statement of Claim) and to the initial submission by the respondent as "Klageerwiderung" (Statement of Defense). It therefore remains to be seen if tribunals and parties will take this as a suggestion to continue to generally limit the number of main submissions by the parties to two rounds as under the previous Rules. In any case, as previously, the number of submissions is subject to party agreement and will vary between cases.

The revised Rules also require the parties and the arbitral tribunal to send their submissions to the DIS solely in electronic form, either by email, on a portable storage device or by any other means of electronic transmission that have been authorized by the DIS (Article 4.1). In addition, the parties are required to send certain submissions – for example, Requests for Arbitration, counterclaims, additional claims prior to the constitution of the arbitral tribunal – also in paper form. The new Rules further clarify that the arbitral tribunal determines the form of the submissions between the parties and the arbitral tribunal (Article 4.4).

Number of Tribunal Members

Under the revised Rules, the arbitral tribunal will no longer automatically be comprised of three arbitrators if the parties have not agreed upon the number of arbitrators. Instead, any party can submit a request to the DIS that the arbitral tribunal be comprised of a sole arbitrator (Article 10.2).[1] This amendment is meant to increase the number of sole arbitrators.

Financial Incentives to Increase Efficiency

The revised Rules also contain financial incentives to conduct the proceedings in an efficient manner for both the parties and the arbitral tribunal. Thus, the arbitral tribunal can, in its cost submission, take the efficiency of a party during the proceedings into account (Article 33.3). Similarly, the newly established Arbitration Council (which is discussed below) can take efficiency into account when setting the arbitrators fees in cases where the proceedings are terminated without a final award or where there is a consent award (Article 34.4).

II. Amendments to Promote Settlements

A further focus of the revised Rules is the promotion of (early) settlement agreements. Similar to the 1998 DIS Rules, the revised Rules explicitly require the arbitral tribunal to seek to encourage an amicable settlement of the dispute or of individual disputed issues, unless any party objects (Article 26). This feature will be more familiar to parties with a civil law background than to common law parties.

As mentioned above, the arbitral tribunal is also required to discuss with the parties during the case management conference whether the parties agree to use mediation or a similar dispute resolute mechanism to facilitate a settlement agreement. The arbitral tribunal also must discuss the possibility of giving the parties a preliminary factual or legal assessment of the case at the case management conference if none of the parties object.

III. Amendments to Increase the Integrity and Transparency of Administrative Decisions During the Arbitral Proceedings

In order to increase transparency and independence, the revised Rules generally aim to transfer to the DIS certain cost-sensitive decisions which relate to the arbitral tribunal. In particular, whereas under the 1998 DIS Rules the arbitral tribunal itself would request and administer any deposit for its own fees and expenses, the Case Management Team of the DIS will now be responsible for these tasks.

[1] As is the case under the 1998 version of the Rules, the DIS can also appoint a Dispute Manager pursuant to Annex 6 of the Rules if at least one party requests such an appointment (Article 2.2). The Dispute Manager can be appointed in addition to the appointment of the arbitral tribunal. Article 27.3 confirms that the Dispute Manager may, with the authorization of the arbitral tribunal, attend the case management conference. The Dispute Manager's role is to assist the parties in deciding on the appropriate dispute resolution mechanism, taking into account economical, legal and other points of view.

Another significant change in the revised Rules is the introduction of an additional institutional committee, the Arbitration Council. The Arbitration Council will be responsible for specific administrative tasks which, under the previous version of the DIS Rules, had been largely handled by the arbitral tribunal itself. Prof. Dr. Maxi Scherer, Special Counsel at Wilmer Cutler Pickering Hale and Dorr and Professor at Queen Mary University of London, is one of the members of the Arbitration Council.

The newly-constituted Arbitration Council will be competent to take decisions on a variety of issues. For example:

- ***Number of arbitrators (Article 10.2)***: The Arbitration Council will decide on the request by any party that the arbitral tribunal shall be comprised of a sole arbitration in case the parties have not agreed upon the number of arbitrations. The Arbitration Council will have to consult the other party before deciding on the party's request.

- ***Arbitrator challenges (Article 15.4)***: Under the 1998 DIS Rules, the arbitral tribunal decided on any challenge to an arbitrator. Under the revised Rules, that authority has been transferred to the Arbitration Council. This is aimed at addressing concerns of a potential lack of independence of the body deciding on the challenge, thereby increasing the parties' acceptance of the decision on the challenge.

- ***Removing an arbitrator from office (Article 16.2)***: If the Arbitration Council considers that an arbitrator has not fulfilled his or her duties under the DIS Rules or if the arbitrator is not, or will not be, in a position to fulfil those duties in the future, the Arbitration Council can remove that arbitrator. The specific procedure for the arbitrator's removal from office is set forth in the Internal Rules (Annex 1).

- ***Fixing arbitrators' fees (Article 34.4)***: The Arbitration Council will fix the arbitrators' fees when the arbitration has been terminated prior to the making of the final award or by an award by consent. The decision will be discretionary, but will follow consultations with the parties and the arbitral tribunal. Under the 1998 Rules, the arbitral tribunal fixed its own fees under such circumstances. The decision to transfer this competency from the tribunal to the DIS is again meant to strengthen the independence of the body deciding on the fees and avoid decisions which might appear inherently biased.

- ***Reducing arbitrator fees (Article 37)***: As noted above, the Arbitration Council can also reduce the fees of one or more of the arbitrators based on the time taken by the arbitral tribunal to issue its final award. The Arbitration Council will reduce such fees at its own discretion, but will consult with the arbitral tribunal and take into consideration the circumstances of the specific case.

Somewhat similar to the scrutiny provisions under the ICC Rules, the revised Rules now also require the arbitral tribunal to send the draft award to the DIS for review before signing the award (Article 39.3). However, the DIS is only allowed to make observations with regard to form and to suggest other non-mandatory modifications to the award to the arbitral tribunal. The arbitral tribunal remains exclusively responsible for the substantive content of the award. The DIS estimates that this review will take between 48 and 72 hours per award.

IV. Amendments Concerning Complex and Multi-Party Arbitrations

The revised Rules now contain more detailed provisions concerning multi-party and multi-contract arbitrations. In particular, the revised Rules follow the example of other institutions (such as the ICC, LCIA, and SIAC) and address joinder of additional parties and consolidation of parallel proceedings.

- ***Multi-contract arbitrations (Article 17)***: The revised Rules provide that claims arising out of or in connection with more than one contract can be decided in a single arbitration, if all of the parties to the arbitration have agreed thereto. The same applies if the claims are made in reliance on more than one arbitration agreement, if the arbitration agreements are compatible (Article 17.2). Any dispute as to whether such a multi-contract arbitration is admissible will be decided by the arbitral tribunal.

- ***Multi-party arbitrations (Article 18)***: The revised Rules provide that claims made in an arbitration with multiple parties can be decided in one arbitration if there is an arbitration agreement that binds all parties or if the parties have agreed to such a multi-party arbitration in some other form. As with multi-contract arbitrations, any dispute as to whether such a multi-party arbitration is admissible will be decided by the arbitral tribunal.

- ***Joinder (Article 19)***: The revised Rules provide that any party who wishes to join an additional party to the arbitration can file a Request for Arbitration against such a party, but only before any of the arbitrators have been appointed. The additional party then must file its own Answer and provide comments regarding the constitution of the arbitral tribunal within a time period set by the DIS (Article 19.3). The arbitral tribunal decides on any dispute as to whether such a joinder is admissible.

- ***Consolidation (Article 8)***: The revised Rules provide that, upon the request of a party, the DIS can consolidate two or more parallel arbitrations conducted under the Rules into a single arbitration, but only if all parties to all of the arbitrations consent to the consolidation. The arbitrations will be consolidated into the arbitration that was first commenced, unless the parties have agreed otherwise (Article 8.2).

- ***Appointment of arbitrators (Article 20)***: The revised Rules also contain detailed provisions on the specific appointment procedure for a three-member tribunal in a multi-party arbitration.

Notably, and unlike the provisions contained in the ICC Rules, the arbitral tribunal's decision concerning the admissibility of joinders, multi-contract or multi-party proceedings will not be based on a *prima facie* test. Instead, the arbitral tribunal will have to determine whether there is consent and/or an arbitration agreement that binds all parties (depending on the specific requirements as set out above).

V. Features That Were Not Implemented

Many of the changes in the revised Rules reflect recent revisions of other leading arbitration rules. There are, however, certain notable features included in many recent revisions of other rules that have not been adopted in the DIS's revised Rules. For example:

- ***No emergency arbitrator***: While emergency arbitrator provisions have become a common feature in many institutional arbitration rules in recent years (*see, e.g.*, Appendix V of the ICC Rules, Article 9B of the LCIA Rules, and Schedule 1 of the SIAC Rules), the revised DIS Rules do not provide for the possibility for parties to seek relief from an emergency arbitrator.

  Similar to the 1998 DIS Rules, the revised Rules only provide that the arbitral tribunal – after its constitution – can, at the request of a party, order interim relief or conservatory measures and may amend, suspend or revoke any such measure (Article 25.1). Additionally, and as before, the Rules confirm that the parties may request interim or conservatory measures from any competent court at any time (Article 25.3).

- ***No expedited formation of tribunal***: Unlike the LCIA Rules, the revised Rules do not provide for an expedited formation of the arbitral tribunal, whereby the appointing committee may, for the purpose of forming the arbitral tribunal, abridge any period of time under the arbitration agreement or other agreement of the parties (*see* Article 9.3 of the LCIA Rules).

- ***Opt-in system for expedited procedures***: The revised Rules do not provide for automatically expedited procedures in cases where the amount in dispute does not exceed a certain amount, unlike, for example, the ICC Rules or ICDR Rules. Instead, Annex 4 of the Rules (Expedited Proceedings) provides for an opt-in system under which the parties can, during the case management conference, agree that the proceedings should be expedited. This mechanism is meant, in particular, to reflect the feedback of in-house counsel that it is difficult to assess the parties' desire for expedited proceedings when drafting the arbitration agreement and that it would be more appropriate to discuss such measures during the case management conference.

VI. Conclusion

In sum, the revised DIS Rules contain substantive changes that bring the Rules more into line with contemporary arbitration practice. They reflect the DIS's goal to have a modern, efficiency-orientated set of rules, while at the same time maintaining some distinctive features of the old rules, that reflect a civil law approach to certain issues. As such, the revised Rules should offer an interesting alternative for parties and practitioners from both civil and common law backgrounds.

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