THE NEW 2018 DIS ARBITRATION RULES

The German Institution for Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit e.V.*, "**DIS**"), Germany's most important arbitration institution, has completely overhauled its arbitration rules ("**2018 DIS Arbitration Rules**"). The new rules apply, as of 1 March 2018, to all DIS arbitration proceedings, and replaces the version from 1998. Rather than just a revision of the old rules, the completely new set of rules introduces several key changes aimed at improving procedural efficiency (time/cost efficiency), including streamlining deadline rules and a complete revision or introduction of various procedural provisions.

The intention is to secure the transparency and integrity of DIS proceedings via a number of means, including DIS as an institution playing a much more active role in procedural administration than before. It will take on a number of roles and activities which were previously dealt with by the arbitral tribunal or which were not provided for at all in the DIS rules so far.

Compared to the old DIS rules from 1998, the 2018 DIS Arbitration Rules are much more comprehensive and some of the new provisions and mechanisms are reminiscent of the rules used by the International Court of Arbitration of the International Chamber of Commerce in Paris ("**ICC**"). For instance, the DIS now makes provision for proceedings involving several parties and/or several agreements for the first time, as well as for consolidating separate sets of arbitration proceedings. The reform also aims to make the DIS more attractive for international arbitration proceedings.

Amendments and updates have been made to virtually all of the areas covered by the previous set of rules in order to provide DIS users with state of the art arbitration rules. This newsletter provides an overview of the key provisions of the 2018 DIS Arbitration Rules.

The complete version of the new rules may be viewed online at http://www.disarb.org/upload/varia/180122_DIS_NewRules_DE.pdf (German version) and at http://www.disarb.org/upload/varia/180119_DIS_NewRules_EN.PDF (English version).

Key issues

Efficiency improvements and time savings in DIS arbitrations:

- Accelerated constitution of the arbitral tribunal
- Accelerated initiation of proceedings
- Increased use of sole arbitrators
- Mandatory case management conference requiring the discussion of efficiency measures at an early stage
- Encouraging amicable settlements
- Considering the procedural efficiency of the parties and the arbitral tribunal
- Digitalisation: more electronic communication and document management

Provisions for multi-party and multi-contract arbitrations: drafting considerations

Enhanced administrative role for the DIS

SCOPE

The 2018 DIS Arbitration Rules apply to all national and international DIS arbitration proceedings commencing as of 1 March 2018, irrespective of when the arbitration agreement was concluded. According to the wording of Article 1 2018 DIS Arbitration Rules and the official DIS notes on the new rules (published as an insert to issue 1/2018 of *Zeitschrift für Schiedsverfahrensrecht*, see page 44 thereof), the choice available to parties

as to which set of rules apply should specifically be "limited to the version applicable as at commencement of the arbitration proceedings". It remains to be seen whether the DIS will only apply the 2018 DIS Arbitration Rules to those proceedings commencing as of 1 March 2018, even where the parties specifically ask for them to be administered under the 1998 rules.

EFFICIENCY IMPROVEMENTS, TIME SAVINGS AND QUALITY ASSURANCE

A large proportion of the amendments to and the new provisions of the 2018 DIS Arbitration Rules are an attempt to make DIS arbitration proceedings more efficient by making time and cost savings and by streamlining processes generally. Key examples of this are:

Accelerated constitution of the arbitral tribunal

One way in which the 2018 DIS Arbitration Rules will accelerate proceedings is the fact that the new provisions enable the arbitral tribunal to be constituted more quickly. For instance, the respondent is now required to nominate its arbitrator within 21 days (previously within 30) of the arbitration claim being served (Art. 7.1 2018 DIS Arbitration Rules). The deadline for the arbitrators to nominate the chair of the arbitral tribunal (in the case of a three-person tribunal) has also been reduced from 30 to 21 days (Art. 12.2 2018 DIS Arbitration Rules). Under the new rules, the arbitral tribunal needs to have been constituted within six weeks (previously it was only within two months).

Accelerated initiation of proceedings

One of the other key changes in the 2018 DIS Arbitration Rules is that arbitration proceedings will now be initiated much more quickly. The old rules stated that the arbitral tribunal is responsible for setting a deadline for the respondent to file an answer to the request for arbitration. This was based on the logical assumption that the arbitral tribunal had to have been constituted first. In practice, this frequently led to delays of weeks or even months since it was common for nothing to happen between the claim being filed and the arbitral tribunal being constituted and the proceedings only really got underway following the constitution of the tribunal.

The 2018 DIS Arbitration Rules state, however, that this deadline will no longer be set by the arbitral tribunal and will instead generally be 45 days from the request for arbitration being sent to the respondent (regardless of when the tribunal is constituted). The respondent may submit a request to the DIS (not to the arbitral tribunal) for a 30-day extension, making the general long-stop deadline for filing a reply to the claim 75 days (Art. 7.2 2018 DIS Arbitration Rules). A longer period may only be granted by the tribunal (which will have been constituted by such time) in those cases where the respondent is able to demonstrate the existence of "exceptional circumstances" (Art. 7.3 2018 DIS Arbitration Rules).

This (potentially three-tier) deadline ensures that it is now much quicker to initiate arbitration proceedings, while still recognising cases where the respondent has a legitimate interest in "equality of arms" *vis-à-vis* the claimant who may have spent months, or even years, preparing its claim. This can be of considerable advantage, particularly in complex and large-scale cases. Ideally, the combination of these tighter deadlines for appointing arbitrators and filing a reply should mean that both the request for arbitration and the

answer will have been submitted by the time the arbitral tribunal has been fully constituted.

Increased use of sole arbitrators

Under the old rules, arbitral tribunals "automatically" consisted of three arbitrators, unless the parties agreed otherwise. Under the new rules, there will only be a three-member tribunal if the parties expressly agree this. If, however, no such agreement on the number of arbitrators has been reached, which is a fairly common occurrence in practice, each of the parties is now entitled to make a request to DIS that the arbitral tribunal comprise one arbitrator. The newly introduced DIS Arbitration Council (see below) will decide on this request after having heard submissions from the other party (Art. 10.2 2018 DIS Arbitration Rules). The only time a three-member tribunal will be appointed without any express agreement between the parties is where no such request has been submitted or that request has been refused.

An even more radical approach, such as sole arbitrators being compulsory in any proceedings up to a specific amount in dispute (or even regardless of the amount in dispute), was rejected by the corporate representatives approached during the consultation process on the new rules. Despite this, the new provisions are likely to increase the use of sole arbitrators, thereby leading to considerable cost savings.

Mandatory case management conference requiring the discussion of efficiency measures at an early stage

Another change with the aim of improving efficiency and reducing costs is the requirement of holding a case management conference between the parties at the early stages of any proceedings. This meeting should be held "as soon as possible" after the arbitral tribunal has been constituted and "generally within 21 days" (Art. 27.2 2018 DIS Arbitration Rules) and should be used by the tribunal and the parties to discuss which efficiency measures could be applied. The new Annex 3 to the 2018 DIS Arbitration Rules specifies a list of such measures which the tribunal and the arbitration parties are required to discuss. Both Annex 3 and the new rules themselves state that it is particularly important to discuss whether to use the expedited DIS proceedings and whether it is possible to reach a full amicable settlement or a partial settlement on individual issues via alternative means (Art. 27.4 2018 DIS Arbitration Rules). During or as soon as possible after the case management conference, the arbitral tribunal shall issue a procedural order and a procedural timetable based on the outcome of that conference (Art. 27.5 2018 DIS Arbitration Rules).

This type of case management conference is nowadays standard practice in international arbitration proceedings, but was not mandatory under the old DIS rules so that the parties had to rely on being able to convince the tribunal of the need for such a meeting.

The following examples of efficiency measures are taken from the list specified in Annex 3 to the 2018 DIS Arbitration Rules: discussion of restricting the number and length of written submissions and oral hearings, the potential of splitting proceedings into a number of stages and, above all, the issue of whether and to what extent document production should be allowed. The last suggestion is a response to the recently commonly expressed criticism that there is a tendency in arbitration proceedings to use this expensive and time-consuming instrument as standard without considering

whether it is really necessary. The new rules aim to ensure that the parties also include this consideration in their decisions on maximising the efficiency of any proceedings.

Unlike other more recent sets of arbitration rules (such as the ICC's 2017 Arbitration Rules), the 2018 DIS Arbitration Rules deliberately fail to automatically require expedited proceedings in view of the fact that, according to the DIS, the amount in dispute does not necessarily indicate whether or not it might be possible to resolve the issues involved within six months (i.e. via expedited proceedings). The idea is more that the parties should think about whether expedited proceedings are appropriate in any particular case as early on as possible. The suitability of this approach in a situation where conflict has already arisen will only become evident in practice. In any case, the parties are free to choose expedited proceedings in the arbitration agreement, either generally or for specific cases.

Encouraging amicable settlements

Lengthy arbitration proceedings tend to be expensive, making conflict resolution at an early stage a particularly good way of reducing costs. The old DIS rules already allowed for the arbitral tribunal to seek to encourage the parties at every stage of the arbitration to reach an amicable agreement. This was an uncommon approach compared to arbitration rules in other jurisdictions. The new rules also contain this provision, but now also with the requirement (in line with current practice) that it only applies unless any of the parties object thereto (Art. 26 2018 DIS Arbitration Rules).

The tribunal should also use the case management conference to discuss with the parties the possibility of using mediation or any other method of alternative dispute resolution to seek the amicable settlement of the dispute or of individual disputed issues (Art. 27.4 (iii), 2.2 and 27.3 2018 DIS Arbitration Rules and the Dispute Management Rules, Annex 6 to the 2018 DIS Arbitration Rules).

Considering the procedural efficiency of the parties and the arbitral tribunal

If any of the parties should act in a manner contrary to ensuring that the arbitration proceedings are conducted as efficiently as possible, the 2018 DIS Arbitration Rules state that this may have considerable consequences at the end of those proceedings. The tribunal may consider the extent to which the parties conducted the proceedings efficiently when allocating costs, thereby allowing it to penalise any party which sought to delay proceedings (Art. 33.3 2018 DIS Arbitration Rules).

If the tribunal itself is responsible for any delay in the final award being issued, the new rules state that the fees of one or more arbitrators may be reduced. The tribunal is generally required to transmit the final award to the DIS three months after the final submission has been made or the final oral hearing held (Art. 37 2018 DIS Arbitration Rules).

Digitalisation

The old DIS rules had been in force without any changes for almost twenty years. It does not therefore come as much of a surprise that the new rules attempt to take account of the effect that digitalisation will have on arbitration proceedings. The DIS will, for example, favour electronic communications with the parties to any proceedings (Art. 4.1 2018 DIS Arbitration Rules). This

applies to the transmission of all submissions between the DIS, the arbitral tribunal and the parties, with the exception of any key procedural documents which need to be served in paper form due to their importance in terms of any potential enforcement measures. Such documents might include the request for arbitration, submissions supporting the claim or the final award. The DIS will also introduce its own electronic document management system.

NEW PROVISIONS FOR MULTI-PARTY AND MULTI-CONTRACT ARBITRATION

Increasingly complex commercial and contractual relationships have recently led to a sharp increase in multi-party and multi-contract arbitration. Virtually all leading arbitration institutions therefore now make provision for such proceedings in their rules. The old DIS rules only contained very basic provisions, which meant that the key factors in practice were consistent provisions between the parties and the decisions made by the arbitral tribunal. The new rules attempt to close this loophole. The following principles now apply to both types of arbitration: the DIS does not make any *prima facie* preliminary decisions on issues of jurisdiction and this remains solely the preserve of the tribunal. In terms of any decisions made by the tribunal, the understanding reached between the parties is the only factor to be taken into account, with any considerations of expediency not being relevant.

Multi-contract arbitration

In terms of multi-contract arbitration, i.e. in those cases where arbitration claims arise from or in connection with more than one contractual agreement, the new rules apply the principle that those claims may only be dealt with in one individual set of arbitration proceedings in the event that all of the parties have agreed to this. In the event of any dispute (particularly those cases where no explicit agreement has been reached), the arbitral tribunal will issue a decision on this (Art. 17.1 2018 DIS Arbitration Rules) and not the DIS.

It is also the case, where claims are filed on the basis of more than one arbitration agreement, that those claims may only be dealt with in the same proceedings if the arbitration agreements are compatible with one another (Art. 17.2 2018 DIS Arbitration Rules). The tribunal is responsible for ruling on whether this is the case in the event of any dispute.

This is essentially a very "cautious" provision, where the efficiency considerations of dealing with a set of similar cases in one individual arbitration must always be subordinate to party autonomy. This is likely to mean in practice that one party will generally be able to prevent multi-contract arbitration in the event of any lack of explicit agreements. The only way to avoid this is to ensure a certain amount of forward-planning when drafting any contracts. In order to maximise cost-efficiency, contracting parties should ideally take into account during any contractual negotiations (and not simply once any dispute arises!) the issue of whether the contract forms part of a multi-contract arrangement, or may do so in future, and consider including a provision allowing for multi-contract arbitration as and where this may be appropriate. It is then important to ensure that any parallel or subsequent agreements also contain the same arbitration clause.

Multi-party arbitration

The same applies to multi-party arbitration, i.e. arbitration proceedings involving more than two parties. The new DIS rules again state that any such

dispute may only be dealt with in a single arbitration if the arbitration agreement for all parties states that their claims may be dealt with in this way, or if the parties have otherwise agreed on this. Should any dispute arise as to whether this has been agreed, it is down to the arbitral tribunal, and not the DIS to make a decision thereon (Art. 18.1 2018 DIS Arbitration Rules). A multi-party arbitration is therefore only "guaranteed" in those cases where the parties have agreed that this is to be the case (ideally by signing a joint arbitration agreement). Experience shows that this tends to work only when it is agreed at the time the contract is entered into and that it tends to no longer be an option once any form of dispute has arisen. This means that the best approach is to discuss the potential of a multi-party situation arising during the negotiation and drafting phase and to agree the inclusion of suitable provisions at any early stage.

It is also important to note that, for the first time, the new DIS rules contain provisions for multi-party arbitration arising on an ex post basis: the "consolidation" of two or more arbitrations (Art. 8 2018 DIS Arbitration Rules) where all parties agree to this, and the joinder of additional parties, which is possible at any time prior to the appointment of an arbitrator (Art. 19 2018 DIS Arbitration Rules).

The final change relates to the constitution of tribunals in multi-party arbitration, specifically for those cases where several parties (either claimants or respondents) are not able to agree on a joint arbitrator. Under the new rules, the DIS Appointing Committee has two options – either to take into consideration the arbitrator chosen by the other party (and to therefore only appoint the arbitrator for the party which cannot agree) or to choose and appoint the arbitrator for both sides. The old rules only provided for the latter option.

ENHANCED ROLE FOR THE DIS

Unlike a lot of other arbitration institutions, the DIS has tended to play more of a backseat role in the arbitrations it deals with. Under the new rules, however, it is now responsible for a number of tasks and activities which were previously handled by the arbitral tribunal, such as decisions on rejecting and dismissing arbitrators (Art. 15.4 und 16.2 2018 DIS Arbitration Rules), decisions on fees payable when the arbitration has been terminated prior to the making of a final award (Art. 34.4 2018 DIS Arbitration Rules and fee rules) and the determination of the amount in dispute (Art. 36.3 2018 DIS Arbitration Rules) and the content of the final award (Art. 39.3 2018 DIS Arbitration Rules).

This shift of responsibilities from the tribunal onto the DIS has led to the creation of a new body, the DIS Arbitration Council. The existing DIS Appointing Committee will continue to exist, but its role will be limited to decisions on choosing and appointing arbitrators.

The DIS Case Management Team will take over the management of advances on costs (Art. 34.3, 35 *et seq*. 2018 DIS Arbitration Rules), something which the arbitral tribunal had previously been responsible for.

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