Strengthening power, striving for efficiency

German Institution of Arbitration (DIS) Rules 2018 enacted

By Dr. Mark C. Hilgard

The DIS Rules 2018 are aimed at strengthening the power of the institution and shifting certain responsibilities formerly assigned to the arbitrators onto the DIS.

Introduction

Arbitral institutions are under considerable pressure to provide a mechanism for quick dispute resolution. There is considerable competition between arbitral institutions and courts, but also between different arbitral institutions, including the DIS, the ICC, the LCIA and others. For this reason, in March 2018, the German Institution of Arbitration (DIS) released updated arbitration rules. The new rules (DIS Rules 2018) replace those originally enacted in 1998 (DIS Rules 1998). These updated rules now apply to domestic and international parties in arbitration before the DIS.

The following comprises the key amendments to the DIS Rules 1998:

- The DIS Rules 2018 are aimed at simplifying and unifying the transmission of submissions. Consequently, all written submissions by the parties and by the arbitral tribunal to the DIS shall be sent in electronic form, either by email or on a storage device. However, the request for arbitration, as well as counterclaims or extensions of claims and their attachments, must be submitted in both paper and electronic form until the arbitral tribunal is constituted.

- The DIS Rules 2018 set out a number of new deadlines aimed at making arbitration faster and more efficient:

  - The respondent shall notify the DIS of any proposals regarding the seat of the arbitration, the language of the proceedings, and the rules of law applicable to the merits of the dispute within 21 days of receipt of the request for arbitration.
  - If the tribunal consists of three arbitrators, the respondent shall also nominate its co-arbitrator within 21 days.
  - In its submission, the respondent may also request an extension of the deadline to submit its answer to the request for arbitration ("answer").
  - In general, the deadline for the respondent's answer is within 45 days of the respondent's receipt of the request for arbitration. The respondent may also request that the deadline be extended by up to a maximum of 30 days.
  - The DIS will request that the co-arbitrators, once appointed, jointly nominate the president of the arbitral tribunal ("president") within 21 days (instead of 30 days under the DIS Rules 1998). If they fail to do so, the DIS Appointing Committee will select and appoint the president.

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Efficiency is a main goal

The DIS Rules 2018 establish new measures for more efficiency in arbitration. For example, a case management conference has to be held within 21 days of the constitution of the arbitral tribunal. In that conference, the tribunal shall discuss with the parties the procedural timetable, the measures that should be applied in the proceedings, whether expedited rules should be applied, and the possibility of using mediation or any other method of amicable dispute resolution.

The DIS Rules 2018 furthermore provide for an increased involvement of the DIS institution in arbitration by strengthening the competences of the institution. Thus, in order to enhance efficiency in the proceedings and ensure the application of the new provisions, the DIS Rules require the tribunal to keep the DIS informed by transmitting to the DIS, inter alia, a copy of the procedural timetable and all procedural orders.

The DIS Rules 2018 also set out provisions for arbitration proceedings involving more than two parties and arbitration proceedings based on multi-contract claims, as well as joinder.

- Claims arising out of or in connection with multiple contracts may be decided in a single arbitration (multi-contract arbitration), provided that all parties to the dispute have agreed thereto. If such an agreement is disputed, the burden lies with the arbitral tribunal to decide the admissibility of such a multi-contract arbitration.

- Also, claims between more than two parties may be decided in a single arbitration (multi-party arbitration) if there is an arbitration agreement that binds all of the parties to have their claims decided in a single arbitration, or if all of the parties have so agreed in a different manner. The burden lies with the arbitral tribunal to decide the admissibility of a multi-party arbitration if a dispute arises as to whether the parties have agreed on such an arbitration.

- Furthermore, the DIS Rules 2018 allow a party to submit a request for arbitration to the DIS in order to join as an additional party after an arbitration has started. The party can only do so prior to the appointment of any arbitrators. Again, the burden lies with the arbitral tribunal to decide the admissibility of such a joinder if a dispute arises as to whether claims made by or against the additional party may be resolved in the pending arbitration.

- Upon the request of one party and if all parties agree, the DIS may consolidate several arbitration proceedings into a single arbitration proceeding.

If an arbitrator is challenged, the DIS will inform the arbitrators and the other party of the challenge and will set a reasonable time limit for comments from the challenged arbitrator, the other arbitrators and the other party. Under the DIS Rules 1998, the other arbitrators did not comment on the challenge, as they were the ones who made the decision regarding the challenge of the arbitrator. Under the DIS Rules 2018, this competence has now shifted to the DIS, and a newly established body, the Arbitration Council, will decide a challenge once the arbitrators and the other party have submitted their comments.

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The DIS Rules 2018 are furthermore aimed at enhancing the neutrality of arbitral tribunals. If the co-arbitrators do not nominate the president within the set time limit, the DIS Appointing Committee will elect and appoint an arbitrator of a different nationality than the parties, unless the parties are of the same nationality or have agreed otherwise.

The DIS Rules 2018 now allow the co-arbitrators to consult with the parties regarding the selection of the president.

Furthermore, the DIS Rules 2018 now contain a more elaborate provision on interim measures. The DIS Rules 1998 stated that unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any interim measure of protection as the arbitral tribunal may consider necessary in respect to the subject matter of the dispute. The DIS Rules 2018 explicitly state that the arbitral tribunal may also amend, suspend or revoke any such measure. They also set out the procedure once a party has requested an interim measure. In general, the arbitral tribunal submits the request to the other party for comments. The arbitral tribunal may refrain from doing so if submitting the request for interim relief and hearing the other party would risk frustrating the purpose of the →

measure. However, in such a case, the arbitral tribunal has to notify the other party of the request no later than when ordering the measure. The arbitral tribunal shall promptly grant the other party a right to be heard. Thereafter, the arbitral tribunal has to confirm, amend, suspend or revoke the measure.

Satisfying the needs of domestic and international users

Overall, the DIS Rules 2018 are aimed at increasing the efficiency of arbitration procedures and satisfying the needs of domestic and international users. They oblige the tribunal and the parties to discuss and agree on the procedure at an early stage in the arbitration. They furthermore offer a wide range of measures that can lead to faster and less expensive proceedings, if the parties make use of them. The deadlines set out in the DIS Rules 2018 also help increase efficiency. The consolidation of multiple disputes into a single arbitration, multi-party or multi-contract arbitration proceeding, as well as joinder, are considered progress in respect to the efficiency of arbitration proceedings. In light of this – and given the fact that, due to the growing complexity of business relationships, the prevalence multi-party and multi-contract arbitration situations has increased significantly in recent years – it is a welcome development that the DIS Rules 2018 now set out provisions for these kinds of procedures.

Furthermore, by obliging the parties to make their submissions only in electronic form once the arbitration tribunal has been constituted, the DIS follows recent trends. German state courts are currently undergoing improvements that will oblige lawyers to file their submissions only electronically.

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Overwhelming acceptance rate

A close look at the legal literature dealing with the introduction of the new rules might bring the observer to the conclusion that the arbitration community is entirely content with the DIS Rules 2018. This might also be because the proposed rules were widely discussed for a number of months within the community, and most lawyers active in the arbitration industry have been given the opportunity to provide their input and criticism. Thus, the acceptance rate among the arbitration community can be said to be overwhelming. The authors of this article would have preferred that the competence and authority of the arbitral tribunal had not been affected by shifting core responsibilities onto the arbitration institution. However, as this is true of the arbitral rules at several institutions with which the DIS competes (in particular the rules of the ICC), there is probably no way back. ←

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