ARBITRATION & ADR - GERMANY

2018 DIS Arbitration Rules – one year on

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Introduction

On 1 March 2018 the German Arbitration Institute's (DIS's) new arbitration rules (the 2018 DIS Arbitration Rules) came into force. The highly anticipated rule reform was the first in 20 years and replaced the DIS 1998 Arbitration Rules. The reform process was thorough and well thought out.

Under the initiative of long-time DIS General Secretary Dr Francesca Mazza, German and foreign practitioners, academics and in-house counsel took a highly active role in shaping the new rules, developing the English and German versions concurrently. The resulting rules are well-balanced and up to date, incorporating two decades of developments in international arbitration while maintaining and further developing their own distinct features.

Over the past year, commentators and users in particular have applauded the 2018 DIS Arbitration Rules. Further, the DIS has continued to interact closely with the new rules' users, holding regular informal events to seek their feedback and keep them apprised of new developments.

Applicability

Like the 1998 rules, the 2018 DIS Arbitration Rules provide that if a dispute is initiated based on DIS rules, the set of rules in force at the time of initiating the arbitration will apply. Therefore, whether intended or not by the parties, all contracts with DIS arbitration clauses now provide for arbitration under the 2018 DIS Arbitration Rules, unless the parties agree otherwise.

Level playing field with other arbitral institutions

As a result of the reform, the DIS rules are now on a level playing field with the arbitration rules of other arbitral institutions, including:

- the International Chamber of Commerce (ICC);
- the Arbitration Institute of the Stockholm Chamber of Commerce; and
- the Singapore International Arbitration Centre (SIAC).

In particular, the 2018 DIS Arbitration Rules provide detailed provisions regarding multi-contract and multi-party arbitrations and the joinder of third parties. In line with other arbitral institutions, the new rules also introduced a more active and prominent role for the DIS. For example, if arbitrators are challenged, this will no longer be decided by the arbitral tribunal, but by the newly created Arbitration Council. Notably, despite the DIS' more active role – such as providing a certain level of scrutiny of arbitral awards – an arbitration under the 2018 DIS Arbitration Rules is still considerably cheaper, on average, than an ICC or SCC arbitration.

Distinctive features

Confidentiality

Throughout the reform process, the 2018 DIS Arbitration Rules retained several distinctive features, such as providing for strict confidentiality. Unlike most other sets of rules, the 2018 DIS Arbitration Rules bind the parties, counsel, arbitrators and institution to strict confidentiality obligations.

Article 44 of the 2018 DIS Arbitration Rules provides that disclosures may be made:

- only to the extent required by applicable law or by other legal duties; or

- for purposes of recognising and enforcing or annulling an arbitral award.

Any party with a particular interest in confidentiality can use the 2018 DIS Arbitration Rules without compromising on the modern features of arbitration rules.

Increased efficiency

Like the 1998 rules, the 2018 DIS Arbitration Rules provide for efficient proceedings. Under applicable civil law, the 1998 rules requested that the arbitral tribunal seek to encourage an amicable settlement of the dispute or of individual issues in the dispute at every stage of the proceedings. The reform has bolstered that pro-settlement approach and introduced many other features intended to increase efficiency. In particular, the time limits for appointing an arbitrator and for submitting a response to the request for arbitration were shortened.

The 2018 DIS Arbitration Rules also include specific directions for the case management conference and an annex listing further measures to increase efficiency, such as:

- limiting the length or number of written submissions, any written factual witness statements and any expert reports provided by the parties;
- dividing the proceedings into multiple phases;
- regulating whether the production of documents can be requested from a party that does not bear the burden of proof, as well as possibly limiting document production requests generally; and
- providing the parties with a preliminary non-binding assessment of factual or legal issues in the arbitration, provided all of the parties consent thereto.

These features respond to market concerns about a lack of efficiency in arbitration which concerns have also led to the Rules on the Efficient Conduct of Proceedings in International Arbitration (the Prague Rules) being published in December 2018. Comparing the Prague Rules and the 2018 DIS Arbitration Rules, it is obvious that the latter addresses the major concerns voiced by the former. Parties toying with the idea of agreeing on the Prague Rules may conclude that they will not need them if they agree to apply the 2018 DIS Arbitration Rules instead.

Multi-party arbitration strictly according to parties' will

While the inclusion of specific rules on multi-party arbitration is no distinctive factor *per se*, but rather a necessary element of modern arbitration rules, the way the DIS has structured these rules is noteworthy. In contrast to other sets of rules, the admissibility of joinder, multi-party and multi-contract arbitrations depends solely on the will of the parties. Where the existence of such a common will to arbitrate is in dispute, the arbitral tribunal – not the DIS – will decide. In doing so, the arbitral tribunal must determine the parties' will without considering arguments such as efficiency or expeditiousness. The DIS will make a decision in such cases only where:

- a multi-contract arbitration has been initiated;
- an arbitral tribunal is not yet in place; and
- the DIS considers that an incompatibility of the arbitration agreements with respect to their provisions on the constitution of an arbitral tribunal prevents the constitution of an arbitral tribunal.

No emergency arbitrator

A final distinctive factor is the lack of provisions for an emergency arbitrator. Even though emergency arbitrators have become commonplace in the rules under most arbitral institutions, the DIS and the many practitioners, academics and in-house counsel involved in the process of drafting the 2018 DIS Arbitration Rules made the conscious decision not to introduce emergency arbitrator provisions. This may be seen as a (justified) sign of trust in the German judiciary, as injunctive relief will always be available from state courts.

Comment

The 2018 DIS Arbitration Rules are a good choice in almost every potential setting. The new rules offer competitive fees for arbitrators and institutions and provide a modern and efficient arbitration framework that preserves and expands on the distinctive features of the previous DIS rules. These unique factors are particularly appealing to in-house counsel.

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