

New DIS Arbitration Rules as of March 1, 2018

February 21, 2018

The German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit e.V.*, or “DIS”), Germany’s most important arbitration institution, has adopted new arbitration rules: The 2018 DIS Arbitration Rules will come into effect on March 1, 2018 and will replace the DIS Rules that have been in effect since 1998.¹ In light of a series of fundamental amendments, the new DIS Arbitration Rules deserve careful attention and may well be considered as “true reform.”

The 1998 DIS Arbitration Rules have been in force for 20 years. This is notable, considering that statutory procedural law is usually subject to continuous legislative development – either by way of individual amendments or through largescale reform. The nearly 20-year history of the 1998 DIS Arbitration Rules is also remarkable in that the DIS Rules, due to the non-public nature of arbitration proceedings, have not been continuously “modernized” by publicly available *case law* of “DIS tribunals.”

Considering extensive developments in other fields of law since 1998, and also taking into account amendments to other institutional arbitration rules such as those most recently promulgated by the International Chamber of Commerce (“ICC”) in 2017² and 2012, it may not come as a surprise that the DIS reform committee is now offering a truly reformed set of rules.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors:

FRANKFURT

Dr. Thomas Kopp
+49 69 97103 246
tkopp@cgsh.com

Matthias Schrader
+49 69 97103 237
mschrader@cgsh.com

Dr. Johannes Schmidt
+49 69 97103 275
joschmidt@cgsh.com

Main Tower, Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE

Rüdiger Harms
+49 221 80040 125
rharms@cgsh.com

Patrick Gerardy
+49 221 80040 135
pgerardy@cgsh.com

Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

¹ The 1998 DIS Arbitration Rules are available online at [the DIS website](#), and the 2018 DIS Arbitration Rules can be accessed [here](#).

² See Cleary Gottlieb [Alert Memorandum](#) of March 2, 2017.



1. The 1998 DIS Arbitration Rules: “Polite Restraint” of the DIS

The 1998 DIS Arbitration Rules were adopted in the context of the comprehensive reform of the Tenth Book of the German Code of Civil Procedure (*Zivilprozessordnung*, or “ZPO”) through the enactment of the German Arbitration Act.³ Since this reform, the ZPO provisions on arbitral proceedings have corresponded closely to the UNCITRAL Model Law.⁴ The ZPO reform and the revision of the DIS Arbitration Rules in 1998 – the first since 1992 at the time – led to DIS arbitration being utilized more frequently by international actors. The “internationalization” of DIS arbitration, along with other factors, has led to the number of proceedings administered by the DIS increasing since 1998, and totaling 172 proceedings in 2016.⁵

The 1998 DIS Arbitration Rules vest the DIS with a rather reserved role as administrative body over DIS proceedings. The 1998 DIS Rules are of a “liberal spirit,” and they afford the arbitral tribunal and the parties far-reaching flexibility to structure the proceeding.

This “polite restraint” of the DIS may be attributable to its close affinity to German procedural law, as the ZPO regime adopts the view towards *ad hoc* arbitration where no arbitration institution exists. The restrained role of the DIS under the 1998 DIS Arbitration Rules set it apart from other institutional arbitration rules, such as the ICC or the London Court of International Arbitration (“LCIA”).

International players tend to view the procedural aspects of a DIS arbitration as being rather difficult to predict. Besides the inherent liberalism of the DIS Rules, this viewpoint might also be attributable to the fact that no official repository of “DIS awards” exists. As a consequence, in comparison to the ICC Arbitration Rules, a less sophisticated body of *soft law* has evolved around the DIS Rules. Altogether, the DIS was prompted to adopt reforms not merely due to the “age” of the current DIS Rules,

but also due to the DIS’s desire to offer international actors an attractive set of rules in order to compete with other international arbitration institutions.

2. The New 2018 DIS Arbitration Rules: The Reform Committee Provides True Reform

The 2018 DIS Arbitration Rules clearly address the affinity of the previous DIS Rules to German procedural law, and attempt to more closely align with prevailing international practice including with respect to the depth of detail of the rules and the role of the arbitration institution. Following the preparation phase which included interactive and transparent discussions with stakeholders, the DIS reform committee has achieved an innovative set of reformed rules which strengthen the power of the DIS.

The creation of the Arbitration Council is particularly notable, as a body empowered to hear and decide upon various procedural issues. By way of illustration: In the future, the Arbitration Council – and not the arbitral tribunal – will hear and decide on arbitrator challenges.

Also, arbitral tribunals will be required to first present draft awards to the DIS, prior to notifying the parties.

Furthermore, the 2018 DIS Arbitration Rules introduce multi-party arbitration and multi-contract arbitration. This change makes it easier to join third parties to arbitration proceedings, and to resolve complex legal disputes within a *single* proceeding.

In addition, the DIS Arbitration Rules provide a series of rules which are designed to serve the interests of procedural efficiency. This includes shorter time limits for both the nomination of arbitrators and also for the submission of the respondent’s Answer to the Request for Arbitration.

Although the revised 2018 DIS Arbitration Rules demonstrate a commitment to improved procedural economy, *i.e.*, by streamlining proceedings and promoting cost efficiency, the new rules still do not reach the same level as the innovations introduced by the 2017 ICC Arbitration Rules. This is because,

³ *Gesetz zur Neuregelung des Schiedsverfahrensrechts* of December 22, 1997 (BGBl. I 1997, 3224).

⁴ The DIS provides a German translation of the *United Nations Commission on International*

Trade Law – Model Law on International Commercial Arbitration at its [website](#), along with the English [amended version of 2006](#).

⁵ See the data provided at the [DIS website](#).

unlike the 2017 ICC Arbitration Rules,⁶ the 2018 DIS Arbitration Rules do not introduce a “standardized” expedited procedure for relatively small amounts in dispute. Indeed, even under the new 2018 Rules, it remains that the DIS only provides the parties with a separate set of rules – now contained in Annex 4 (*Expedited Proceedings*) – which the parties must specifically agree upon, as was the case under the old regime.⁷

The 2018 DIS Arbitration Rules will be effective as of March 1, 2018 and will be applied to all arbitrations commenced by Requests for Arbitration submitted to the DIS as of this date. Unless otherwise agreed by the parties, this also applies to Requests for Arbitration relying on “old” arbitration clauses that may have been agreed upon, as the case may be, long before the new DIS Rules became effective.

3. **The Reform: Increased Power of the DIS and Increased Procedural Efficiency**

The changes brought by the 2018 DIS Arbitration Rules include the following:

a. New Arbitration Council and New DIS Responsibilities

While the DIS will still maintain a rather reserved role as compared to other arbitration institutions, some new provisions – such as the creation of the new Arbitration Council – will strengthen its institutional role in specific areas, partly to the detriment of the arbitral tribunal’s competences:

- the Arbitration Council will consist of various three-member panels, and will assume responsibility for certain aspects of the administration of the proceedings;
- the DIS will administer the deposits for fees and expenses paid by the parties (Art. 34 *et seq.*);
- the DIS will decide on arbitrators’ fees, and in particular on fee increases in case of complex proceedings (Art. 35.6), and the Arbitration

Council will decide on fee reductions in case of early termination of the proceedings (Art. 34.4);

- the Arbitration Council will have authority to reconsider an arbitral tribunal’s determination of the amount in dispute (Art. 36.3);
- the Arbitration Council will decide on challenges and the removal of arbitrators (Art. 15.4 and Art. 16.2); and
- the arbitral tribunal will be required to send a draft of the award to the DIS for scrutiny (Art. 39.3).

Overall, the DIS and the Arbitration Council will see enhanced decision rights on issues regarding the amount in dispute and costs, pursuant to Art. 33 *et seq.*, which will also serve to limit the arbitral tribunal’s authority in these areas.

The newly established Arbitration Council will decide, in particular, on challenges against members of the arbitral tribunal (Art. 15.4). In keeping with the ZPO (Sections 42 *et seq.* of the ZPO, in particular Section 45(1) of the ZPO), the previous rule provided that the arbitral tribunal itself was competent to decide such challenges, while the unsuccessful challenging party could only seek subsequent judicial relief before a state court (Section 1037(3) of the ZPO). Under the new regime, the DIS avoids the model of “judging on one’s own case,” a practice which is disconcerting for international actors. Further, Art. 16.2 now entitles the Arbitration Council to remove an arbitrator from office if he is “*not fulfilling*” or is “*not in a position to fulfill*” the duties pursuant to the DIS Arbitration Rules.

The introduction of a “review” of the draft award by the DIS is also notable. However, the DIS has restricted its formal review to one of “soft scrutiny.” Pursuant to Art. 39.3, the DIS may “*make observations with regard to form*” and “*may suggest other non-mandatory modifications*.” It remains to be seen how receptive arbitral tribunals will be to such recommendations coming from the DIS. However,

⁶ The ICC provides for such an expedited proceeding (Art. 30(2)(a) of the 2017 ICC Arbitration Rules in connection with the ICC Expedited Procedure Rules), if the parties do not actively opt out from this default expedited proceeding.

⁷ To date, the old *DIS Supplementary Rules for Expedited Proceedings* (“**DIS SREP**”) have gained only modest acceptance and use since their enactment. Based on [information provided by the DIS](#), in 2016 only five DIS arbitration proceedings were conducted under the DIS SREP.

the new DIS Rules are likely to be widely accepted in this respect – particularly by international actors who are familiar with even broader forms of “*scrutiny*.”

b. Multi-Party Arbitration; Participation of Third Parties, and Multi-Contract Arbitration

The 2018 DIS Arbitration Rules include new provisions on Multi-Party Arbitration (Art. 18), Consolidation of Arbitrations (Art. 8), and on arbitrations arising from multiple contracts (Multi-Contract Arbitration, Art. 17). In addition, the respondent is now granted the right to join additional parties to the arbitration (Art. 19) – a procedural means of extending the tribunal’s jurisdiction over third parties only the claimant was previously entitled to exercise.

While the 2018 DIS Arbitration Rules are therefore more receptive to particularly complex arbitrations, the prerequisites under which multiple arbitrations can be consolidated remain rather strict. Pursuant to the new rule, such consolidation of arbitrations must be agreed upon by “*all parties to all of the arbitrations*.”

That said, the new DIS Rules reflect the penchant of the DIS to provide a clear set of rules respecting the tribunal’s competence even in complex cases, and to enable and entitle the parties to expand this competence beyond their own legal dispute.

c. Streamlined Course of Proceedings and Increased Procedural Efficiency

Institutionalized arbitration has been criticized for not offering the parties any (substantial) gain in efficiency or cost savings as compared to state court proceedings. The DIS reform committee has also confronted this criticism. As a result, the overall trait that best describes the spirit of the 2018 reform appears to be one of “efficiency” – as was also true for the 2017 revised ICC Arbitration Rules.⁸ In an effort to make DIS arbitrations faster and less expensive, the DIS reform committee has introduced Article 27 (*Efficient Conduct of the Proceedings*), as well as several other new provisions, precisely for this purpose:

- the imperative addressed at all parties to conduct the proceeding in an efficient manner (Art. 27.1);
- a reduction of the time limit for nominating arbitrators and the chairman of the tribunal (Art. 7(i) and Art. 12.2 sent. 1);
- a reduction of the time limit for the respondent to file its Answer to the Request for Arbitration (Art. 7.2);
- the introduction of a case management conference and the preparation of a procedural timetable (Art. 27.2-8);
- the introduction of an electronic records and filing system that also aims to accelerate the proceedings; and
- the introduction of sanctioning mechanisms – *e.g.*, the efficiency of the conduct of the arbitration can be taken into consideration when determining the arbitrators’ fees (Art. 34.4 sent. 2 and Art. 37 sent. 2) and in the context of the arbitral tribunal’s decision on costs (Art. 33.3 sent. 3).⁹

Art. 27.1 now obligates both the arbitral tribunal and the parties to “*conduct the proceedings in a time- and cost-efficient manner taking into account the complexity and economic importance of the dispute*.” In the 1998 DIS Arbitration Rules, the requirement for efficiency only applied expressly to the arbitral tribunal and obligated it to render the award “*within a reasonable period of time*.”

The time limit for the respondent to nominate its arbitrator has also been reduced under the new DIS Rules. Pursuant to Art. 7(i), the respondent shall now nominate its arbitrator no later than 21 days after receipt of the Request for Arbitration. Under the old rules, the time limit was 30 days.

Further, in cases where the tribunal consists of three members, the new DIS Rules provide for a shorter time limit for nominating the chairman of the tribunal; now 21 days instead of 30 days (Art. 12.2 sent. 1). In this context, notably, the 2018 DIS Arbitration Rules now expressly allow the parties and co-arbitrators to

⁸ See [ICC press release](#) on the coming into effect of the new 2017 ICC Arbitration Rules.

⁹ For details see *d.* below.

discuss the appointment of the chairman of the tribunal – a new rule which will be a welcome addition: Pursuant to Art. 12.2, the parties and the co-arbitrators “*may consult* [with each other] *regarding the selection of the President.*” In the future, the appointment of a substitute chairman of the arbitral tribunal pursuant to Art. 12.3, for which the DIS Appointing Committee maintains competence, will also be conducted more quickly. This is because the revised rule no longer requires that a request by the parties be received as a threshold, but rather permits the DIS to initiate a substitute appointment “*ex officio.*”

The new DIS Rules establish another noteworthy means of expediting the proceedings in that the time limit for filing the Answer to the Request will in the future commence prior to the constitution of the arbitral tribunal. Pursuant to Art. 7.2 sent. 1, the new 45-day time limit for the Answer to the Request commences upon the respondent’s receipt of the Request for Arbitration. Upon request by the respondent, the DIS may extend the time limit up to a maximum of 30 additional days.¹⁰ This revision addresses reservations which existed toward the previous regime: Pursuant to the 1998 DIS Rules, *the arbitral tribunal* would set a time limit for the respondent’s Answer to the Request but – logically – only *after* the tribunal had been constituted. This afforded the respondent a procedural advantage over the claimant, which one should not underestimate, stemming from two aspects: With a three-arbitrator tribunal, the respondent was in a position to influence the nomination of the chairman benefiting from full knowledge of claimant’s claims and its own envisaged defenses and objections – a position the claimant does not enjoy when filing the Request for Arbitration. Further, the respondent did not have to file its first memorial, the Answer to the Request for Arbitration, until it had learned of the identity of all three arbitrators. This procedural inequality will be mitigated by the 2018 DIS Arbitration Rules in that the time limit for submitting the Answer to the Request will commence before the respondent may

benefit from knowledge of the composition of the tribunal.

Within 21 days after its constitution, the arbitral tribunal shall hold a case management conference (Art. 27.2), a mechanism also provided for in ICC arbitrations. The parties themselves (and not merely their counsel) may attend this conference, and the attendees may discuss and agree upon which measures should be adopted in order to increase the efficiency of the proceedings, including whether the *Rules for Expedited Proceedings* (Annex 4) should apply, and whether the arbitral tribunal should assist in finding an amicable resolution.

In this context, Annex 3 (*Measures for Increasing Procedural Efficiency*) of the new rules encourages the arbitral tribunal to take the opportunity to discuss with the parties the issue of *document production* during this conference, and in particular which restrictions should apply in this respect and whether document production can be requested also *from a party that does not bear the burden of proof* for a fact in dispute.

Further, the parties can also opt for an expedited proceeding pursuant to Annex 4 of the 2018 DIS Arbitration Rules; such expedited proceeding is governed by separate rules and should be completed within six months. Additional measures for the improvement of the efficiency of the proceedings are listed in Annex 3, which the parties and the arbitral tribunal can consider as a “source of further inspiration.”

The DIS has also introduced a mechanism for the Closing of Proceedings by a Procedural Order (Art. 31). This instrument serves to ensure that proceedings are more transparent and predictable in terms of time – especially in cases where the arbitral tribunal fixes the date of its Closing Order early in the procedural timetable. Finally, the 2018 DIS Arbitration Rules have streamlined the conclusion of proceedings: Art. 37 sent. 1 now provides that the tribunal shall send the final award to the DIS “*in principle*” within three months, with this

¹⁰ If the respondent argues that, due to exceptional circumstances, the period of 75 days is insufficient for him to file the Answer to the Request, the arbitral tribunal may grant a longer time limit. If

the arbitral tribunal has not yet been constituted, the DIS shall temporarily extend the time limit until the tribunal has been constituted, Art. 7.3.

time limit commencing upon the last hearing or the “last authorized Submission.”

Notwithstanding the DIS’s new emphasis on procedural efficiency and the streamlining of proceedings, the parties still remain “masters of the proceeding”: The arbitral tribunal is bound by party agreements regarding the course of the proceeding unless such agreements violate mandatory statutory law (Section 1042(3) of the ZPO). This obligation to respect the parties’ autonomy also applies if such party agreements are inefficient or considered inefficient by the tribunal.

d. Disciplining and Sanctioning – Relevance of the Efficiency of the Conduct of the Arbitration

Knowing that even a sophisticated set of rules striving for efficiency would remain an empty shell if subordinated to the parties’ convenience and the tribunal’s usage, the 2018 DIS Arbitration Rules equip its regime on procedural efficiency with new means of sanctioning:

- Pursuant to Art. 33.3 sent. 3, the arbitral tribunal may now explicitly consider whether the parties conducted the arbitration in an efficient manner when deciding on the costs of the arbitration: This leads to cost decisions being, to a great extent, detached from the principle that the “*loser pays*” or “*costs follow the event*.” Under the new rule, the outcome of the proceeding is only *one of the circumstances* that the arbitral tribunal will take into account. The new rule resembles Art. 38(5) of the ICC Arbitration Rules.
- If the arbitrators delay the preparation of the final award, the DIS may in the future use this as a reason to reduce their fees (Art. 37 sent. 2). This means of sanction is also reminiscent of the corresponding rule from the ICC Arbitration Rules.
- Finally, when determining the arbitrators’ fees following an (early) end of the proceedings, the DIS shall take into consideration the efficiency of the arbitrators (Art. 34.4 sent. 2).

By way of introducing all these means, the 2018 DIS Arbitration Rules provide a balanced

system of incentives and sanctions – both with the aim of increasing the efficiency of DIS arbitrations.

e. Interim Relief Now Friendlier Towards Applicants

The new rules governing interim relief are aligned with the familiar ZPO provisions (Sections 916 *et seq.*) and indeed have been strengthened. Art. 25.2 now provides that the tribunal may grant interim relief without first hearing the responding party, *i.e.*, *ex parte*. This renders an application for interim relief under the new regime a sharper procedural measure as, in an *ex parte* proceeding, the responding party is not placed in the position to defend itself until it has been notified of the decision, which only allows for subsequent defenses.

f. Reform of the “Dogma” of Amicable Dispute Resolution

Following Section 278(1) of the ZPO – which encourages courts to promote an amicable resolution of the dispute throughout the course of the proceedings – the 2018 DIS Arbitration Rules also promotes active conflict management and amicable dispute resolution. An international actor may have considered the earlier rule on amicable resolutions disconcerting in light of the contentious character of DIS proceedings. The new Art. 27 on *Amicable Settlements* reflects these reservations, while adopting an improved approach: While the arbitral tribunal’s imperative to encourage an amicable settlement is still in place, the new provision subordinates the tribunal’s responsibility to promote settlement to the consent of both parties. As soon as one party rejects the promotion of an amicable settlement, the tribunal may no longer actively work towards an amicable settlement.

4. Conclusion: Contribution to the Promotion of Germany as a Forum for Arbitrations

The reforms in the 2018 DIS Arbitration Rules tie in with recent developments and trends in the arbitration community, many of which radiated from international arbitration standards to the German DIS practice. For some time, there has been an ever increasing international trend towards increased efficiency, greater transparency, and better predictability of institutional arbitrations. The

2018 DIS amendments address these issues, too, and achieve notable innovations.

Users of DIS arbitration – be it parties that have agreed upon a DIS arbitration clause in the past or those who are contemplating doing so in the future – should carefully review the present reform package. This is advisable not only in order to best benefit from the new features, but also to avoid unexpected surprises when confronted by potentially “unpleasant” innovations arising from the reform.

Leaving aside that the new DIS Arbitration Rules provide disadvantageous as well as beneficial rules (depending on the role of the relevant party and its perspective), the 2018 DIS Arbitration Rules stand a good chance of further increasing the attractiveness of institutional DIS arbitrations.

In light of the importance of the DIS for German arbitration as a whole, the new DIS Rules will contribute to the promotion of Germany as a forum for international arbitrations. This underscores the increased need to carefully familiarize oneself with the DIS reforms.

...

CLEARY GOTTlieb