DIS Launching the New Rules

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Liberty of Arbitrators[1]

1. Introduction:

The new DIS Rules are made to make arbitration effectively work without being drowned in bureaucracy.

The role and position of arbitrators as members of an arbitral tribunal sitting in view of at least two parties presenting their case is commonly determined in comparison with state judges in the light of independence, both subjective and objective. However, there is another term which may change the angle from which the position of the arbitrator can be seen: liberty.

The liberty of arbitrators is an important argument for practising lawyers to make them available for the position of an arbitrator. It also provides a counter concept against the state judge being bound to a strict and well-organized bureaucratic organisation working under a detailed set of compelling rules. The liberty of arbitrators complies with the perception of arbitration being a private dispute resolution method where parties are supposed to have control on their proceedings and each to be free to choose a person as an arbitrator whom they trust. Generally spoken, freedom being the underlying political and theoretical concept of arbitration must be extended to the freedom or liberty of arbitrators.

On the other hand, there is the interest of the Parties to have a reliable and speedy dispute resolution method. This entails the need for structuring the procedures, establishing practicable instruments for the arbitrators as well as limitations to activities where arbitrators may step into the trap of their own financial and other subjective interests. In other words, to make arbitration an

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attractive "good" for the participants in the market, its quality and reliability needs to be shaped. This is what the DIS Rules try to achieve.

2. Relationship between liberty and independence of arbitrators:

As a matter of principle, independence is not equal with liberty. However, liberty may play a role as to the subjective independence of an arbitrator. The arbitrator has to observe a sensitive balance between a free minded approach to the substance of the case and the bureaucratic needs of managing the case and bringing it to an award. Making use of his/her liberty, which includes the freedom of speech and science such as

- Previous publications as a reason for exclusion or apprehension of bias
- Disclosure of thoughts when promoting amicable settlement
- Disclosure of thoughts when appointing an expert or witness

belongs to the identity of the profession of an arbitrator.

As a model of alternative dispute resolution with a commercial and private character, Arbitration is challenged by growing efficiency of state courts in a number of countries.

This challenge is tried to be met by changes in the rules of institutional arbitration, that mainly aim at:

- Increasing the speed of procedures
- Increasing interference of institutions
- Providing additional procedures such as "express arbitration"
- More costs efficiency
- More transparency

However, many of such efforts endanger the very fundamentals of arbitration: the liberty of arbitrators as a major asset to the advantage of party interests.

The DIS Rules have found a feasible balance between the liberty of the arbitrator and the need for giving arbitration a structure, remaining restrictive as administrative interference is concerned and to set a couple of rules to support and give a certain shape to the substantial work of the arbitrator.

The DIS Rules prove that a well dosed administration does not necessarily challenge the liberty of an arbitrator.

3. What are the new DIS Rules about in this respect?

- The DIS Rules focus on "early settlement" which need to be highlighted in view of:
    - Difference to "adjudication": no formal adjudication procedure but a flexible foundation for amicable settlement, following traditional German practice
    - To enter into "early settlement", the judge/arbitrator needs to have examined the file and come to some solutions and make a preliminary assessment of facts and law. In the eyes of many practitioners worldwide, this entails the danger of challenge of an arbitrator. By putting such provision in the DIS Rules, parties will be precluded from challenging an arbitrator just for having expressed his/her view on the case, due to their rendering the DIS Rules applicable in their arbitration clause.
    - The express provision to support settlement efforts is a clear signal to the arbitration community that initiating settlement negotiations by the arbitral tribunal does not entail doubts on the subjective independence of arbitrators, as the German tradition of early settlement also includes the arbitral tribunal's obligation to change its mind according to the course of the proceedings.
    - **Ergo**: The DIS Rules on early settlement are an important step to improve the arbitrator's liberty to decide on how he/she deems a dispute to be resolved.
- More transparency by involvement of the DIS Administration in the process:
    - The Arbitration Council is not a copy of the ICC Court of Arbitration. Its tasks are restricted to some bureaucratic issues which are more likely to support the arbitrators than to put pressure on the substantial work for the making of an award.
    - The Council supports the Parties in making their decision as to the start of the arbitration process.
    - The Council decides on challenge applications. This brings a limitation to the arbitral tribunal's making a decision to this respect. However, this is not a matter of liberty of the arbitrators, but to prevent a conflict in which an arbitral tribunal may fall when deciding itself on a party's challenge application.
    - The Council interferes in the issues of amount in dispute and remuneration of the Arbitral Tribunal. This does not touch the liberty of the arbitrator but avoids his spending time on calculation issues.

  - The Council does in no way interfere in the award-making itself. The DIS Case Management has (only) obtained the power to review the award in respect of its form.
  - **Ergo:** The DIS Rules make a new determination of the balance between the liberty of arbitrators and the interest of parties in control and integrity of the Tribunal.
- Expedited procedure
  - Case management conference must be made – in principle – within 21 days after the constitution of the Arbitral Tribunal. This provision puts pressure on Arbitrators. On the other hand, speed of process is needed to comply with the interests of the parties. However, there is no sanction and the possibility to scope with problems that prohibit a tribunal to comply with the ("in principle").
  - The new Rules provide instruments to the Arbitral Tribunal to put pressure on the Parties to make efforts to support speedy proceedings, by setting time limits.
  - The Rules make the transition from ordinary arbitration to expedited arbitration proceedings easier.
  - **Ergo:** More pressure on the Arbitral Tribunal, less liberty to let the arbitration run its own way. In the same time better instruments for the Tribunal to make Parties do their homework and put shape to it.
- Appointment of experts
  - The DIS Rules provide the appointment of experts on the own initiative of the Arbitral Tribunal. This instrument extends the possibilities to accelerate arbitration.
  - This provision can be seen as enhancing the liberty of the arbitrators to the advantage of the Parties.
- Time Limit of the Award
  - The Arbitral Tribunal shall "in principle" deliver the award three months after the final hearing. Not always easy to achieve, especially where three arbitrators at different places have to come to common decisions on various issues, almost impossible in larger construction cases. The positive aspect is, however, that arbitrators are forced to work on upcoming issues substantially right from the start and to have a well-founded idea as to the outcome of the case at the end of the final hearing. However, by adding the term "in principle", the Rules restrain from causing any sanctions on the failure of a Tribunal to finalize the award within three months.

- **Ergo:** The DIS Rules provide a sensitive balance between the need for more speed and the need of arbitrators to contemplate and discuss issues within "appropriate" time.

4. Summary:

The new Rules provide increased power of the DIS administration.

However, the new DIS Rules establish a sensitive balance between the preservation of the liberty of the arbitrator and the need for a concise conduction of the arbitral proceedings. The new Rules provide less interference of bodies of the institution than other sets of rules, such as the ICC Rules.