

DIS

DIS Conflict Management Rules

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(in force as from May 1, 2010)

DIS

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INTRODUCTION*

Many companies would like to settle their disputes out of court, or at least try to do so, in order to save time and money compared to (arbitration) court proceedings. Consequently, out-of-court dispute resolution proceedings have become increasingly important, whereby the major focus so far has been on conciliation and mediation.

However, out-of-court dispute resolution in Germany, usually referred to as ADR (Alternative Dispute Resolution), is not limited to mediation but rather increasingly evolves into a conflict management system. Along with mediation, as amicable settlement procedure, the system encompasses proceedings where a third party or a body issues an individual decision with varying factual or temporal binding effect. This decision is meant to serve the parties as a basis for their conflict resolution. The means of dispute resolution thus used extend beyond traditional German methods of conciliation and expert determination and include for example Dispute Boards or adjudication proceedings.

There is no shortage of means. The problem is to assign the suitable dispute resolution procedure to the individual conflict. The question of which dispute settlement agreement to include into a contract was until now unresolved. The ex-ante allocation of a suitable dispute resolution procedure is impossible, since at the contract's conclusion it is still unknown which conflict may arise. Only those who in principle consider mediation as universally applicable ADR procedure will include a mediation clause into their contracts. However the opinion that no particular ADR procedure is capable of solving every conflict becomes widely accepted. It is the other way around: for every conflict there is one suitable ADR procedure, which shall be found and actively chosen. However, how to make the right choice in practice? How shall a dispute resolution clause be formulated in the contract?

A DIS Working Group composed of university lecturers, attorneys-at-law and in-house lawyers as well as construction specialists dealt with these issues. This Working Group developed a **conflict clarification procedure**, where a conflict manager, nominated by the DIS within as few days as possible after the commencement of a conflict, together with the parties clarifies the issue of how and with the help of which neutral third party a dispute should be resolved.

Such foregoing conflict clarification procedure needs its own procedural rules so that the parties are aware of its course and are able to agree upon a clear, regulated proce-

* Translation from German. Only the German text is authoritative.

cedure in the contract. The DIS Conflict Management Rules (DIS-KMO) have been drafted for this purpose.

The German Institution of Arbitration had already offered an instrument for out-of-court dispute resolution at an early stage with its Conciliation Rules.

With the help of a new type of conflict clarification procedure and the accompanying procedural rules, the DIS hopes to offer advanced, optimized means, which allow for a rapid, cost-effective and interests reflecting conflict resolution.

The following procedural rules may be chosen for a dispute resolution procedure:

- Conciliation Rules (DIS-SchIO), in which no specific guidelines for procedural principles of the conciliator are named;
- Mediation Rules (DIS-MedO) for cases where the parties wish to resolve an individual dispute in the course of amicable proceedings;
- Rules on Expert Determination (DIS-SchGO) for cases where the parties seek a decision of a third person for a specific disputed issue with a preliminary (or finally) binding effect with respect to a particular dispute;
- Rules on Expertise (DIS-GO) for cases where the parties seek a decision of a third person as well, which however shall not be binding, i.e. it “only” constitutes an expert assessment and a recommendation for the dispute resolution;
- Adjudication Rules (DIS-AVO) for cases where the parties, already at the project’s commencement, appoint a Dispute Board, usually consisting of 3 persons, which shall be in charge of all conflicts arising during the project development. It decides provisionally binding in accordance with the DIS-SchGO Rules, however, it shall, as a rule, strive to settle the disputes amicably.

The parties may agree, if they wish so, to reduce the involvement of the DIS to the substitute nomination of adjudicators (or experts etc) or to reduce the scope of activity of the DIS as foreseen in the Rules otherwise.

The parties may choose any of the procedural rules also without having conducted the foregoing conflict management proceedings.

Berlin/Cologne, May 1, 2010

CONFLICT MANAGEMENT AGREEMENT

The German Institution of Arbitration (die Deutsche Institution für Schiedsgerichtsbarkeit e.V.) advises all parties wishing to select a dispute resolution procedure for future disputes and for this purpose wishing to agree upon conducting the conflict management proceedings pursuant to the DIS Conflict Management Rules already at the conclusion of the contract, to use the following conflict management agreement:

“With respect to all disputes arising out of or in connection with the contract (... description of the contract ...) and for whose resolution the parties have not yet agreed on a dispute resolution procedure, conflict management proceedings pursuant to the Conflict Management Rules of the German Institution of Arbitration (DIS) (DIS-KMO) shall be conducted with the purpose of selecting a dispute resolution procedure.”

It shall be noted that an agreement on the conflict management proceedings pursuant to the DIS Conflict Management Rules may be concluded any time, also with regard to already existing disputes.

DIS CONFLICT MANAGEMENT RULES

Section 1

Scope of application

- 1.1 The Conflict Management Rules set forth herein apply where the parties wish to select a dispute resolution procedure for existing or future disputes and for this purpose have agreed upon conducting the conflict management proceedings pursuant to the Conflict Management Rules of the German Institution of Arbitration (DIS).
- 1.2 The Conflict Management Rules set forth herein further apply where one party initiates the conflict management proceedings without prior agreement of the other party and the other party agrees in writing to the conduct of the proceedings.
- 1.3 Unless otherwise agreed by the parties, the Conflict Management Rules in effect on the date of commencement of the conflict management proceedings shall apply.

Section 2

Subject-matter and purpose

The parties shall discuss the dispute resolution procedure they wish to conduct and its details in the course of the conflict management proceedings, promptly after the rise of the dispute in order to resolve it, taking into account economical, legal and other considerations. The parties shall thereby be consulted and assisted by the conflict manager. The conflict manager may make proposals regarding the dispute resolution procedure to the parties but has no decision-making power.

Section 3

Initiation and commencement

- 3.1 The party wishing to initiate the conflict management proceedings (applicant) shall file a written request with the DIS Main Secretariat. The request shall contain the names and contact details of the parties and their counsel, if available, a short summary of the dispute, the facts and circumstances which gave rise to the dispute, asserted claims and, if possible, the amount in dispute. The request shall be submitted in a number of copies sufficient to provide one copy for the other party, the conflict manager to be confirmed and the DIS. If the number of copies is insufficient, the DIS

Main Secretariat requests the applicant to make a corresponding supplementation and sets a time-limit for compliance.

- 3.2 When the proceedings are initiated pursuant to section 1 subsection 1, the applicant shall enclose with the request a copy of the agreement to conduct the conflict management proceedings. If the agreement is not concluded in writing, the applicant shall demonstrate its conclusion.
- 3.3 When the proceedings are initiated pursuant to section 1 subsection 2, the DIS Main Secretariat together with the delivery of the request to the other party shall ask that party for its written consent to conduct the proceedings. The other party shall give its consent to the DIS Main Secretariat; the DIS Main Secretariat shall notify the applicant without undue delay. If the other party does not give its consent to the DIS Main Secretariat within two weeks after receipt of the request, the consent shall be deemed not given. The DIS Main Secretariat shall notify the applicant without undue delay.
- 3.4 Upon filing the request, the applicant shall pay the DIS procedural fee and a provisional advance on the conflict manager's fee in accordance with the schedule of costs (appendix to section 11 subsection 1) in force on the date of receipt of the request by the DIS Main Secretariat. The DIS Main Secretariat invoices the applicant for the DIS procedural fee and the provisional advance and, if the payment has not already been made, sets a time-limit for payment.
- 3.5 The DIS Main Secretariat delivers the request to the other party without undue delay. It may make the delivery of the request contingent on having received the number of copies of the request required pursuant to subsection 1 as well as payment required pursuant to subsection 4.
- 3.6 The conflict management proceedings commence upon receipt of the request (section 3 subsection 3) by the DIS Main Secretariat, or upon receipt of the other party's consent by the DIS Main Secretariat in the case foreseen under section 3 subsection 3, provided that the number of copies of the request required pursuant to subsection 1 has been received by the DIS as well as the DIS procedural fee pursuant to subsection 4 has been paid within the time-limit set by the DIS, which may be subject to reasonable extension. The DIS informs both parties about the commencement of the proceedings without undue delay.

Section 4

Confirmation of the conflict manager

- 4.1 The DIS Secretary General confirms an independent and impartial conflict manager after informal consultation with the parties without undue delay after commencement of the proceedings and receipt of the payment pursuant to section 3 subsection 4; the matching proposals of the parties shall be taken into account.
- 4.2 The DIS Main Secretariat delivers one copy of the request to the conflict manager and informs the parties in writing about the confirmed conflict manager without undue delay.

Section 5

Preparation of discussion

- 5.1 The conflict manager shall without undue delay, at the latest within one week after his confirmation, contact the parties in order to determine a place and a time for a discussion meeting. The conflict manager shall grant the other party the opportunity to comment on the request pursuant to section 3 subsection 1.
- 5.2 The conflict manager shall prepare the discussion meeting. He may make preparative remarks or suggestions to the parties.

Section 6

Joint discussion

- 6.1 The conflict manager shall advise and assist the parties in their decision about the choice of the dispute resolution procedure in the course of the joint discussion meeting.
- 6.2 The conflict manager shall specifically discuss with the parties the following:
 - (1) whether the parties wish an amicable settlement of the dispute through assistance of a neutral third party or whether an opinion of a neutral expert or a decision of a(n) (arbitration) court will be more appropriate;
 - (2) whether the aspired opinion
 - should be of an advisory character only,
 - should be provisionally binding until one party files a claim with the (arbitration) court or the (arbitration) court modifies the preliminary opinion,

- should be finally binding and to what extent a(n) (arbitration) court may review this opinion for gross inaccuracy/inequity and/or for serious procedural irregularities;
- (3) whether the parties wish a settlement of the dispute on the basis of a legal assessment and evaluation or whether non-legal standards should/may also be applied;
- (4) which time frame for the settlement of the dispute the parties strive for;
- (5) which costs likely to arise for the different dispute resolution procedures.

Section 7

Conflict management plan

- 7.1 The parties strive to develop a conflict management plan with the assistance of the conflict manager during or immediately after the joint discussion.
- 7.2 The conflict management plan shall arrange for:
- (1) the procedure for the dispute resolution;
 - (2) the applicable procedural rules for the dispute resolution.
- 7.3 The conflict management plan may arrange for:
- (1) the nomination of a neutral third party which should assist the parties in the amicable settlement of the dispute or resolve the dispute in whole or in part;
 - (2) the time schedule for the settlement of the dispute;
 - (3) an agreement on how to resolve the dispute if the initially chosen dispute resolution procedure does not lead to a final resolution;
 - (4) other issues which the parties consider important.
- 7.4 If the joint discussion does not lead to a conflict management plan, the parties shall agree on how, if any, the proceedings be continued for example through a meeting or a telephone or video conference.
- 7.5 The conflict management plan shall be signed by the parties and a copy shall be sent to the DIS Main Secretariat by the last signing party.

Section 8

Termination of proceedings

- 8.1 The conflict management proceedings are terminated if:
- (1) the parties have agreed on a conflict management plan;
 - (2) one party informs the DIS and the other party in writing about termination of the proceedings, because no discussion meeting was held pursuant to section 6 within a month after confirmation of a conflict manager pursuant to section 4 subsection 1 or during the discussion meeting no conflict management plan was agreed upon;
 - (3) the conflict manager informs the DIS and the parties in writing about termination of the proceedings, because no discussion meeting was held within three months after commencement of the proceedings or no conflict management plan was agreed upon by the parties within three months after a discussion meeting was held.
- 8.2 The proceedings shall terminate on the day the last participating party signs the conflict management plan (section 7 subsection 5) or on the day the DIS receives the termination declaration of one of the parties or of the conflict manager. The DIS informs the parties about termination of the proceedings without undue delay.

Section 9

Statute of limitations, temporary waiver of action

- 9.1 The period of limitation is suspended for claims stated in the request from the commencement of the conflict management proceedings (section 3 subsection 6).
- 9.2 The suspension ceases at the earliest three months after the conflict management proceedings have been terminated pursuant to section 8 subsection 2.
- 9.3 During the conflict management proceedings, none of the parties may apply to a(n) (arbitration) court for a decision on the subject-matter of the dispute. This does not affect the right of the parties to apply for interim measures of protection.

Section 10

Confidentiality

- 10.1 The parties, the conflict manager and the persons at the DIS Main Secretariat involved in the administration

of the conflict management proceedings shall maintain confidentiality about the proceedings and, in particular, the parties involved and the documents exchanged.

- 10.2 The parties undertake not to call the conflict manager as witness in proceedings which relate and/or related to the subject-matter of the conflict management proceedings. The parties may agree otherwise.
- 10.3 Contractual confidentiality or secrecy obligations remain unaffected.
- 10.4 Each party undertakes not to involve the conflict manager as a party nominated arbitrator, expert or party's counsel and/or party's consultant in (arbitration) court proceedings or in an out-of-court dispute resolution procedure, which relate and/or related to the subject-matter of the conflict management proceedings without consent of the other party.
- 10.5 The DIS may publish information on conflict management proceedings in a compilation of statistical data, provided such information excludes identification of the persons involved.

Section 11

Costs

- 11.1 The costs of the conflict management proceedings (DIS procedural fee, fee and expenses of the conflict manager) shall be determined pursuant to the table of costs (appendix) in force. The flat fee of the conflict manager stated therein compensates for preparation and consultation in the first discussion hearing. The conflict manager may also claim the flat fee if, for reasons outside his control, the discussion hearing was not conducted.
- 11.2 If the parties wish to continue the discussions with the conflict manager after the first discussion hearing, the conflict manager shall be entitled to an additional fee for this continuous activity. The parties and the conflict manager shall conclude a separate agreement in this respect.
- 11.3 The parties shall pay the expenses of the conflict management proceedings pursuant to subsection 1 in equal shares and are severally liable for them.

Section 12

Liability

The conflict manager, the DIS and its officers and employees are only liable for intentional misconduct.

Table of Costs for the DIS Conflict Management Proceedings

1. DIS procedural fee

The procedural fee of the DIS amounts to € 500.00.

2. Conflict manager's fee

The fee of the conflict manager amounts to € 2,500.00.

Necessary expenses, in particular travel and accommodation costs, shall be reimbursed against submission of receipts for the expenses.

3. Provisional advance

The advance on the conflict manager's fee charged by the DIS Main Secretariat from the applicant pursuant to section 3 subsection 5 corresponds to the fee pursuant to no. 2.

4. VAT

The fees specified in nos. 1 and 2 are subject to the applicable VAT.

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