

DIS

DIS Supplementary Rules for Corporate Law Disputes

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DIS

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Deutsche Institution für Schiedsgerichtsbarkeit

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INTRODUCTION AND ARBITRATION CLAUSE FOR THE SUPPLEMENTARY RULES FOR CORPORATE LAW DISPUTES*

The parties may agree on the following Supplementary Rules for Corporate Law Disputes (DIS-SRCoLD) supplementing the DIS Arbitration Rules. The DIS Arbitration Rules remain applicable to proceedings conducted under the Supplementary Rules for Corporate Law Disputes to the extent that these Rules do not contain more specific provisions.

The German Institution of Arbitration (DIS) advises all parties wishing to make reference to the Supplementary Rules for Corporate Law Disputes, to include into the articles of incorporation (that may require notarisation) **the following arbitration clause²**:

- „1. All disputes arising between the shareholders or between the corporation and its shareholders in connection with these articles of incorporation or their validity shall be finally settled according to the Arbitration Rules (DIS-SchO) and the Supplementary Rules for Corporate Law Disputes (DIS-SRCoLD) of the German Institution of Arbitration (DIS) without recourse to the ordinary courts of law.**
- 2. The effects of an arbitral award extend also to those shareholders, that have been identified as Concerned Others within the time-limits provided, irrespective whether they have made use of their opportunity to join the arbitral proceedings as a party or as an intervenor (section 11 DIS-SRCoLD).**

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

² The DIS-SRCoLD are especially suitable for limited liability companies (GmbH) under German law. They are generally also suitable for partnerships (Personengesellschaften); however, for partner resolution disputes mainly if the partnership agreement provides that a claim against a partners' resolution shall be filed against the partnership itself. Arbitration agreements in the statutes of a stock corporation (Aktiengesellschaft) listed on the stock exchange are considered inadmissible according to the prevailing view because of the mandatory requirements (Satzungsstrenge) applicable to the statutes of a stock corporation (section 23 subsection 5 German Stock Corporation Act). Whether this also applies for the "small" stock corporation, with a limited number of shareholders and which is not listed on the stock exchange, has not yet been decided by the Federal Court of Justice (Bundesgerichtshof).

Where the DIS-SRCoLD are referred to in partnership agreements, the term "articles of incorporation" is to be construed synonymously with the term "partnership agreement". Accordingly, the term "shareholder" is synonymous with "partner", and "corporation" with "partnership".

The shareholders named as Concerned Others within the time-limits provided, commit to recognize the effects of an arbitral award rendered in accordance with the DIS-SRCoLD.

- 3. Former shareholders remain bound by this arbitration agreement.**
- 4. The corporation shall always raise the existing arbitration agreement as defence against any claim that is filed in the ordinary courts of law and that relates to disputes in the meaning of no. 1.“**

It is recommended that the following provisions be added to the arbitration clause:

- The place of arbitration is**
- The language of the arbitral proceedings is**
- The arbitral tribunal consists of ... (number of) arbitrator(s).**

Further, it is recommended to adopt elsewhere in the articles of incorporation a provision pursuant to which all shareholders are obliged to provide the corporation with a current address of service or a representative for service and that receipt of any written communication at this address will be assumed after the expiry of an adequate time period.

SUPPLEMENTARY RULES FOR CORPORATE LAW DISPUTES

Section 1 Scope of application

- 1.1 The Supplementary Rules for Corporate Law Disputes (*DIS-SRCoLD*) set forth herein shall apply if the parties referred to them in their arbitration agreement within or outside the articles of incorporation or have otherwise agreed on their application.
- 1.2 Unless otherwise agreed by the parties, the *DIS-SRCoLD* in effect on the date of the commencement of the arbitral proceedings apply to the dispute.

Section 2 Inclusion of Concerned Others³

- 2.1 In disputes requiring a single decision binding all shareholders and the corporation and in which a party intends to extend the effects of an arbitral award to all shareholders and the corporation without having been introduced as a party to the arbitral proceeding (*Concerned Others*), the Concerned Others shall be granted the opportunity to join the arbitral proceedings pursuant to the *DIS-SRCoLD* as a party or compulsory intervenor in the sense of section 69 German Code of Civil Procedure (*Intervenor*). This applies mutatis mutandis to disputes that require a single decision binding specific shareholders or the corporation.
- 2.2 In its statement of claim, claimant shall identify the respondent and any shareholders or the corporation itself to which the effects of the arbitral award shall extend, by providing an address of service and requesting the DIS-Secretariat to deliver the statement of claim also to the Concerned Others. In addition to section 4 *DIS-Arbitration Rules*, sufficient copies of the statement of claim shall be filed with the DIS Secretariat in order to allow for delivery to all identified Concerned Others.

³ *Comment:* In disputes requiring a single decision binding all shareholders, in particular those regarding the validity, voidability or invalidity of shareholder resolutions as well as resolutions by the advisory board, supervisory board (*Aufsichtsrat*) or other boards, if the articles of incorporation provide for them or they have been established (shareholder resolution disputes), it is mandatory not only to introduce the corporation as a party but all shareholders as Concerned Others to the arbitral proceedings. In case the introduction of any Concerned Other is omitted, current jurisprudence does not recognize the “arbitrability” of such disputes.

- 2.3 Concerned Others, being identified after the expiry of the time-limit provided in these DIS-SRCoLD for identifying Concerned Others, may join the arbitral proceeding pursuant to section 4.3.

Section 3

Delivery of the statement of claim and invitation to join the proceedings

- 3.1 The DIS Secretariat delivers the statement of claim to the respondent and the identified Concerned Others and requests the Concerned Others to declare vis-à-vis the DIS Secretariat within 30 days after receipt of the statement of claim in writing whether they join the arbitral proceedings on claimant's or respondent's side as party or as intervenor. The DIS Secretariat will inform the parties and all Concerned Others, identified pursuant to section 2.2 or 9.3, of any effected joinder.
- 3.2 Within 30 days after receipt of the statement of claim, the respondent may identify additional Concerned Others, by providing an address of service and requesting the DIS Secretariat to deliver the statement of claim also to those identified Concerned Others; with its request the respondent shall provide a sufficient number of copies of the statement of claim. Section 3.1 applies to additional identified Concerned Others.

Section 4

Joinder

- 4.1 If identified Concerned Others join the arbitral proceedings within the time-limit pursuant to section 3 or pursuant to section 9.3 as a party, they become a party to the arbitral proceedings with all rights and duties pertaining thereto at the moment their declaration of joinder is received by the DIS Secretariat. If they join as an intervenor, they are entitled to the rights of a compulsory intervenor in the sense of section 69 German Code of Civil Procedure. Upon their joinder identified Concerned Others are entitled to identify additional Concerned Others. With regard to these additional identified Concerned Others section 3.2 applies accordingly.
- 4.2 If an identified Concerned Other does not declare its joinder within the provided time-limit, this shall be deemed to be a waiver of participation in the arbitral proceedings. The right to join the arbitral proceedings pursuant to section 4.3 at a later point in time remains unaffected.

- 4.3 Identified Concerned Others may join the arbitral proceedings at any point in time, provided that they refrain from raising objections against the composition of the arbitral tribunal and either accept the arbitral proceedings as it stands at the point in time of their joinder, or the arbitral tribunal approves their joinder at its free discretion. Apart from that, section 4.1 sentence 1 and 2 apply accordingly.

Section 5

Continuous information of Concerned Others

- 5.1 The arbitral tribunal informs identified Concerned Others, which have not joined the arbitral proceedings, on the progress of the arbitral proceedings by delivering copies of written pleadings of the parties or intervenors as well as decisions and procedural orders by the arbitral tribunal to the Concerned Others at their indicated addresses, unless Concerned Others have expressly waived in writing to receive this information. This applies for other communications of the arbitral tribunal to the parties or intervenors only in so far as it can be reasonably assumed that these are significant for the decision of a Concerned Other on its later joinder to the arbitral proceeding.
- 5.2 Concerned Others, that have not joined the arbitral proceedings, are not entitled to participate in the oral hearing.

Section 6

Extension or change of the subject-matter, withdrawal of claim

An extension of claim or a change of the subject-matter (including any possible counterclaims), or in case of a shareholder resolution dispute the extension of the claim to other resolutions, is only admissible with consent of all Concerned Others. The complete or partial withdrawal of claim is admissible without consent of the Concerned Others, unless a Concerned Other objects within 30 days after being informed on the intended withdrawal of claim and the arbitral tribunal acknowledges its legitimate interest in a final decision of the dispute.

Section 7

Sole arbitrator

- 7.1 Where the arbitral tribunal is to consist of a sole arbitrator, the parties and intervenors shall nominate the sole arbitrator within 30 days after receipt of the

statement of claim by the respondent and all Concerned Others or in case of an admissible joinder of a Concerned Other within 30 days after its joinder.

- 7.2 If the respondent and the Concerned Others have received the statement of claim at different points in time, the time-limit shall be calculated by reference to the time of receipt by the party or Concerned Other who last received the statement of claim. If Concerned Others join the arbitral proceedings at different points in time, the time-limit shall be calculated by reference to the last joinder.
- 7.3 Where the parties and the intervenor do not reach agreement on the person of the sole arbitrator within the time-limits pursuant to section 7.1 and 7.2, the DIS Appointing Committee nominates the sole arbitrator upon request of the claimant, respondent or intervenor.

Section 8

Arbitral tribunal with three arbitrators

- 8.1 If the arbitral tribunal is to consist of three arbitrators, the statement of claim in deviation from section 6.2 (5) DIS Arbitration Rules does not need to contain a nomination of an arbitrator; a nomination made notwithstanding thereof shall be deemed to be a proposal.
- 8.2 Within 30 days upon receipt of the statement of claim by the respondent and all Concerned Others, or in case of an admissible joinder within 30 days after joining, the parties and intervenors on claimant's respectively respondent's side shall jointly nominate an arbitrator vis-à-vis the DIS Secretariat. Section 7.2 applies accordingly.
- 8.3 Where claimant's or respondent's side do not reach an agreement within the time-limit of section 8.2, the DIS Appointing Committee nominates two arbitrators upon request of the claimant, respondent or intervenor pursuant to section 13.2 DIS Arbitration Rules.

Section 9

Combination of jurisdiction in case of parallel proceedings

- 9.1 Where multiple arbitral proceedings with a subject-matter have been initiated, requiring a single decision binding the parties and the Concerned Others, sections 9.2 – 9.4 apply.

- 9.2 The arbitral proceedings that have been initiated first (*leading arbitral proceedings*) preclude the conduct of arbitral proceedings initiated at a later point in time (*subsequent arbitral proceedings*). Subsequent arbitral proceedings are inadmissible.
- 9.3 The priority of multiple statements of claim is determined by the point in time of their receipt by the DIS Secretariat. To prove the exact time of the day at which the statement of claim was received by the DIS Secretariat, the statement of claim (not necessarily with exhibits) shall always also be transmitted by fax or e-mail. In case of doubt the DIS Secretariat determines the priority at its free discretion. If the DIS Secretariat *prima facie* determines that a case of section 9.1 exists, it should inform the parties and the identified Concerned Others of the initiated arbitral proceedings accordingly.
- 9.4 If the claimant of the subsequent arbitral proceedings filed its statement of claim within the time-limit of section 3.1, in which it may join the leading arbitral proceedings as identified Concerned Other, the filing of the claim shall be deemed to be a joinder in the leading arbitral proceedings as an identified Concerned Other. It will become an additional claimant in the leading arbitral proceedings, unless it objects within the time-limit provided for the joinder in section 3.1. It may participate in the constitution of the arbitral tribunal pursuant to sections 7 or 8 and identify further Concerned Others in the leading arbitral proceedings pursuant to section 4.1. In so far as sections 7 and 8 for the calculation of time-limits make reference to the point in time of the joinder of an identified Concerned Other, for the purpose of section 9.4 it shall be deemed that the joinder occurred on the day the time-limit for joining the proceeding pursuant to section 3.1 expires. In case claimant of the subsequent arbitral proceedings expressly consents to join the leading arbitral proceedings prior to the expiry of the time limit of section 3.1, the point in time of the declaration of consent is decisive. In case of a timely objection or if the claim was not filed within the time-limit of section 3.1, it will be treated as if it has not become party of the leading arbitral proceedings. Irrespective thereof the subsequent arbitral proceedings remain inadmissible. Its rights pursuant to section 4.3 remain unaffected.

Section 10

Time-limits

The DIS Secretariat may extend the time-limits provided for in the DIS-SRCoLD upon reasoned application of a party, an intervenor or an identified Concerned Other, exercising its best judgment.

Section 11

Extension of effects of the arbitral award

The effects of an arbitral award extend to those Concerned Others that have been identified as Concerned Others within the provided time-limits, regardless of whether they made use of their opportunity to join the arbitral proceeding as party or intervenor. The shareholders identified as Concerned Others within the provided time-limits, commit to recognize the effects of an arbitral award rendered in accordance with the DIS-SRCoLD.

Section 12

Costs

- 12.1 Section 35 DIS Arbitration Rules shall apply for the decision on costs, whereas Concerned Others that have not joined the arbitral proceedings as a party or intervenor are not entitled to reimbursement of costs.
- 12.2 The costs shall be calculated pursuant no. 11 of the appendix to section 40.5 DIS Arbitration Rules, whereas an identified Concerned Other shall be treated as a party.

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