

**BACKGROUND DOCUMENT OF THE
GERMAN FEDERAL MINISTRY OF JUSTICE AND THE GERMAN ARBITRATION INSTITUTE
ON THE DIS ADJUDICATION RULES
IN PREPARATION FOR THE 77TH SESSION OF UNCITRAL WORKING GROUP II
(6-10 FEBRUARY 2023, NEW YORK)**

The German Federal Ministry of Justice and the German Arbitration Institute (DIS) welcome the work of UNCITRAL to further accelerate and ensure effective dispute resolution and would like to thank the Secretariat for preparing the Note A/CN.9/WG.II/WP.231 on technology-related dispute resolution and adjudication. The aforementioned Note refers in chapter II. A. para. 9 to the DIS Rules for Expert Determination which were briefly mentioned by a member of the German Delegation during the seventy-sixth session of the Working Group. We take this opportunity to further contribute to and enlarge the discussion by providing in this background document an overview of the DIS Adjudication Rules, which can be seen as complementary to the DIS Rules on Expert Determination and which complete the system of adjudication that the DIS offers for an accelerated and custom-tailored resolution of disputes.

In light of the mandate of the Working Group, this background document gives by way of introduction a brief overview over the two types of DIS adjudication models (I.). It then moves on to present the DIS Adjudication Rules by describing the appointment procedure of adjudicators (II.) and the structure and salient features of the adjudication (III.). Finally, our background document will provide a succinct comparison between the DIS Adjudication Rules and the DIS Rules on Expert Determination (IV.) and will briefly address the use of the DIS Adjudication Rules in practice (V.) before offering some conclusions (VI.).

We trust that this background document will contribute to fruitful discussions at the seventy-seventh session of the Working Group regarding the model clause on multi-tier dispute resolution (model clause B) as prepared by the Secretariat (A/CN.9/WG.II/WP.231, chapter II.C.), thus exploring ways to further expedite dispute resolution proceedings.

I. Overview

The DIS is the leading institution in Germany for the administration of arbitration and other alternative dispute resolution proceedings, including adjudications, for national and international commercial disputes. The DIS provides for two types of decision-oriented “adjudication” models as part of its ADR Rules: The project-accompanying adjudication set out in the DIS Adjudication Rules¹ with an emphasis on early conflict avoidance (“**Standby Adjudication**”) and the adjudication proceedings set out in the DIS Rules on Expert Determination² with an emphasis on acute conflicts (“**Ad hoc Adjudication**”).

While the DIS Adjudication Rules apply where the parties have agreed upon a project-accompanying adjudication for the purpose of settling differences and disputes as they arise (“*in real time*”), the DIS

¹ The DIS Adjudication Rules are in force since 1 July 2010.

² The DIS Rules on Expert Determination are in force since 1 May 2010.

Rules on Expert Determination provide parties with an opportunity to seek an expert determination for a dispute that has already arisen (“*ex post perspective*”)³.

Neither of these two adjudication models is limited to certain industries (such as construction); they are rather intended to provide a valuable set of tools for parties to clarify or settle all types of commercial disputes arising in connection with the performance of a contract.⁴

Decisions rendered in both types of adjudication are final and binding on the parties insofar as they are not set aside or altered by decision of a state court or arbitral tribunal. A review by a court or an arbitral tribunal is contingent on either of the parties submitting a declaration of non-recognition within one month upon receipt of the decision (Section 23 of the DIS Rules on Expert Determination and Section 23 of DIS Adjudication Rules, hereinafter Sections without further reference are from the DIS Adjudication Rules).

Apart from these broad commonalities, both sets of adjudication rules have their advantages and disadvantages upon which we will briefly touch (see *infra* IV.). In this background document, however, we will focus on the salient features of the Standby Adjudication as provided by the DIS Adjudication Rules, as these may prove particularly helpful to users with a view to further expediting proceedings for dispute resolution.

II. Appointment Procedure of Adjudicators

Central to the DIS Adjudication Rules are the dispute adjudication board (DAB) and its members, to which the DIS Rules refer to as “adjudicators”. The appointment procedure of the adjudicators is one of the distinctive features of the Standby Adjudication both with regards to the DAB’s composition (1.) and to the nomination of the adjudicators (2.).

1. Composition of the Dispute Adjudication Board

The parties are free to opt either for a sole adjudicator or for a three-member DAB. The default rule is a three-member board, if the parties have not agreed on a number of adjudicators (Section 3.1). Only natural persons may be nominated as adjudicators (Section 3.2). The chairperson of the DAB or the sole adjudicator shall be a lawyer, unless the parties agree otherwise (Section 3.3). This default requirement is in line with the fact that the DAB shall not decide differences or disputes *ex aequo et bono* or as an *amiable compositeur*⁵ but in accordance with the rules of law chosen by the parties (Section 19). And while technical knowledge is fundamental, especially when it comes to construction or engineering projects, the DAB will generally be required to apply legal parameters to decide the dispute (e.g. through statutory or contract interpretation).⁶ In DIS-administered adjudication proceedings, sole adjudicators are thought to be mainly lawyers, whereas three-member DABs are mainly made up of a mix of lawyers and engineers with the chairperson being a lawyer (cf. Section 3.3).

Granting the parties freedom to select adjudicators of different professions and expertise allows them to pick a perfect fit for the areas of expertise that their project requires. In the end, it is up to the parties to

³ See U. Gantenberg & G. Flecke-Giammarco, “Alternative Dispute Resolution, Dispute Boards Revival: Championing the Use of Dispute Adjudication Boards as Project Managing Tool That Helps to Avoid Disputes” in *Austrian Yearbook on International Arbitration*, Volume 2016, pp. 201-2013, at p. 203.

⁴ See H. Köntges & V. Mahnken, “Die neue DIS-Verfahrensordnung für Adjudikation (DIS-AVO)” [The new DIS Procedural Rules for Adjudication (DIS-AVO)] in *Zeitschrift für Schiedsverfahren/German Arbitration Journal (SchiedsVZ)* 2010, pp. 310-317, at p. 316; however, at the time of drafting, the authors of the rules had the needs of the construction industry in mind.

⁵ See Köntges & Mahnken, *op. cit.*, at p. 314.

⁶ See S. Leupertz, “(Außergerichtliche) Streitbeilegung und Streitentscheidung in der Verantwortung des Bausachverständigen [(Extrajudicial) Dispute Settlement and Dispute Resolution under the Responsibility of the Building Surveyor]” in *Der Sachverständige [The Expert]* 2013, pp. 266-269, at p. 296.

decide which interdisciplinary composition they wish for their DAB. The only requirements that the DIS Adjudication Rules impose on the qualifications of the adjudicators is that they be impartial and independent as well as that they disclose conflicts of interest. Other than that the parties are free to agree on further qualifications of the adjudicators.

2. Joint nomination of the Adjudicators by the Parties

The DIS Adjudication Rules require that adjudicators are nominated jointly by the parties, which is a distinctive feature from the nomination process in other ADR proceedings, e.g. in arbitration, where each party nominates “*its*” arbitrator (Section 4).

Under the DIS Adjudication Rules, the parties ought in principle to agree on the sole adjudicator and, in case of a DAB, to jointly nominate two adjudicators. Once the two “*party-nominated*” adjudicators are confirmed, they in turn will propose a chairperson to the parties. The parties are both required to agree to such proposal. Should the parties fail to jointly nominate the adjudicator(s) or fail to agree on the chairperson, the Appointing Committee of the DIS is the competent body to nominate the missing adjudicator (Section 4.2). The Appointing Committee is also required to decide on challenges to adjudicators (Section 5.2).

Requiring a joint nomination of the adjudicators by the parties takes into account two fundamental aspects. First, it reflects the cooperative nature that is inherent to adjudication⁷, and second, if parties cooperate in the nomination of the adjudicators, they can ensure that all relevant professional sectors are covered in the interdisciplinary composition of the DAB. Rather than choosing “*their*” adjudicator, they might choose the adjudicator that is right for their project.

III. Structure of the Adjudication

1. Standby Mode: Pro-active Information by the Parties and Regular Meetings with Adjudicators and Parties, Informal Settlement of Differences

The DIS Adjudication Rules contemplate the creation and the nomination of the DAB from the very outset (“*the commencement*”) of the Standby Adjudication (Section 2). In practice, the board will be established at the beginning of the project or underlying main contract.⁸ As soon as the DAB is constituted, Section 6.1 requires the parties to ensure that each adjudicator receives a complete text of the original main contract and, where appropriate, further information on the project. This allows the adjudicator(s) to familiarize themselves with the project that they accepted to accompany.

Once the adjudicator(s) have received those documents, they must, without undue delay, agree with the parties on a first meeting to enable the adjudicator/the DAB to obtain a deeper understanding of the project and to determine the details essential to the adjudicators’ work (Section 6.2).

Regular meetings between the parties and the adjudicators shall usually take place every six months and, whenever possible, at the project site (Section 6.5). Whereas the adjudicators have the duty to gain as much knowledge of the project as they possibly can and stay up-to-date on any new developments, it is the obligation of the parties to provide the adjudicators with regular, monthly written reports on the project’s progress, unless otherwise agreed (Section 6.3). In light of this comprehensive access to a wide array of potentially sensible project documents, the obligation of the adjudicators to maintain confidentiality is not surprising (Section 28).

⁷ See Köntges & Mahnken, *op. cit.*, at pp. 312, 313.

⁸ See Köntges & Mahnken, *op. cit.*, at p. 312, c.f. more generally Gantenberg & Flecke-Giammarco, *op. cit.*, at p. 204.

Dispute avoidance is key to the DIS Adjudication Rules.⁹ Parties are encouraged to inform the DAB not only about the progress of the project, but also about existing differences and problems¹⁰, as the case may be. If desired by one of the parties or upon its own initiative, the DAB is granted the authority to support the parties to settle differences amicably, before a dispute arises (Section 6.7). The DIS Adjudication Rules make clear that the DAB should not be constricted in its efforts to contribute to the parties' settlement of differences by the prospect of "*prejudging*" possible subsequent dispute-related adjudication proceedings: Pursuant to Section 6.7, the DAB is not bound in the event of subsequent dispute-related adjudication proceedings by any preliminary view that it may have expressed when settling differences between the parties. Finally, the mere existence of a project-accompanying DAB and the corresponding regular reporting obligations may already have disciplinary effects on the parties.

2. Dispute-Related Adjudication

The DAB's "*standby mode*" is interrupted when the DAB is called to decide a dispute, *i.e.* when one of the parties institutes a dispute-related adjudication by submitting a fully substantiated request to the DAB and the other party (Sections 7 *et seqq.*). Decisions of the DAB in dispute-related adjudication proceedings are, akin to decisions in a DIS Expert Determination — as discussed above in Section I., provisionally binding on the parties (Section 22), unless one of the parties submits a declaration of non-recognition within a month after receipt of the decision (Section 23), which allows for the decision to be reviewed in arbitration or court proceedings.¹¹

The procedural rules for the dispute-related adjudication are streamlined (*e.g.* restrictions on written submissions, by default no oral hearing) and geared towards an expedient resolution of the dispute.¹²

Any decision of the DAB shall be made by majority, unless otherwise agreed by the parties (Section 17.3). Section 17.6 requires the DAB to render its decision "*as quickly as possible*", normally within four weeks after the oral hearing or after receipt of the last party submission, whichever applies, and at the latest five months after commencement of the proceedings, unless both parties have agreed to an extension (Section 26.2). The maximum "*default*" time limit for DAB decisions is thus shorter than the time limit for decisions in DIS expert determination proceedings (six months) and DIS expedited arbitration proceedings (six months).

3. Preliminary Rulings

In addition to binding decisions pursuant to Section 17, the DIS Adjudication Rules (as well as the DIS Rules on Expert Determination) contemplate the possibility for the parties to request a preliminary ruling on a limited number of issues (Section 20).¹³ The preliminary rulings must be related to the subject matter

⁹ A. Roquette stresses with regards to the dispute avoiding role of the DAB under the FIDIC Rules which compares to that under the DIS Adjudication Rules that it might raise questions in terms of impartiality and neutrality of the DAB, which acts as both an "informal consultant" and a "dispute resolver". See A. Roquette, "Am Ende des Regenbogens – Die neuen FIDIC Dispute Adjudication/Avoidance Boards" in SchiedsVZ 2018, pp. 233-238, at p. 236.

¹⁰ In this context, differences and problems are understood as a prior stage to a dispute.

¹¹ On the binding effect in more detail see below at III.7; cf. also Note A/CN.9/WG.II/WP.231, para 9; cf. also FN 1; see generally Gantenberg & Flecke-Giammarco, *op. cit.*, at pp. 203, 204.

¹² Sections 7 to 10 provide that, in general, the parties shall only submit two rounds of submissions (request/reply, comments). Further submissions are only admissible if the DAB expressly requests the parties to file them. Moreover, these briefs shall be complete (Section 11.1) and any briefs filed late may be disregarded by the DAB (Section 12.2). The time limits as set out in Sections 7 to 10 are not subject to any extension, unless otherwise agreed by the parties (Section 12.1). Furthermore, and in contrast to other adjudication rules, the DIS Adjudication Rules only provide for an oral hearing if it is requested by a party or, in absence of such a request, if the adjudicators decide at their discretion to hold an oral hearing (Section 14.1).

¹³ Section 20.1 reads "... (1) *Continuation of works necessary for an orderly performance of the contract;*

of the dispute-related adjudication. The parties are able to ensure that for instance works are continued or partial payments for services rendered are made until the DAB/sole adjudicator renders its decision in the dispute-related adjudication.

In a context of complex engineering or construction projects where time is of essence, the advantages of a project-accompanying adjudication become evident: The DAB is already constituted and acquainted with the case and is thus able to render a preliminary ruling in a very short period of time (almost “*in real time*”), thereby reducing dispute-related delays for the project to a minimum.

The DIS Adjudication Rules also strongly incentivize the parties’ compliance with preliminary rulings. Pursuant to Section 20.6, the non-observance of a preliminary ruling constitutes an intentional and severe breach of the contract. The consequences of the breach are determined by the provisions of the contract which forms the basis of the project. In the event that the non-observance causes a delay of the project, the DIS Adjudication Rules provide that the contractual party obligated to perform shall be in default even if a court or arbitral tribunal confirms a right to refuse performance. Pursuant to Section 20.9, preliminary rulings only lose their effect upon the rendering of the final decision by the adjudicators.

4. Costs

The costs of the adjudication proceedings are calculated on the basis of the Table of Costs for DIS Adjudication Proceedings (Appendix 1 to Section 30 Subsections 1 and 11 DIS Adjudication Rules). The adjudicators’ remuneration consists of a basic monthly fee and a variable fee on an hourly basis. The hourly rate of the variable fee is €300. The basic monthly fee of an adjudicator is eight times the hourly rate. The fees are subject to applicable VAT.

5. Termination

The rationale of a project-accompanying “*standby*” DAB is reflected in the DIS Adjudication Rules in that the adjudicator(s) shall be active for the entire duration of the project. The parties may include a time limit in their Adjudicator Contract.¹⁴ Otherwise, the parties can jointly decide when the activities of the DAB as a whole or of individual adjudicators may be terminated (Section 31). The parties’ freedom of terminating the activity of a single adjudicator at any time (Section 31.2) allows them to replace an adjudicator when the execution of the project makes evident that special areas of expertise are required that were not contemplated at the outset of the project and are thus not covered by the DAB as originally constituted.

6. Binding Effect of DAB Decisions and Declaration of Non-Recognition

Decisions of the DAB are binding on the parties (Section 22.1). The non-observance of a decision by a party constitutes an intentional and severe breach of contract. This breach persists irrespective of whether an arbitral tribunal or (state) court declares the decisions by the DAB to be justified or unjustified (Section 22.2).

(2) *Performance of services necessary for an orderly performance of the contract and over which the parties are in dispute with respect to additional payment obligations;*

(3) *Performance of acceleration measures in order to avoid or reduce delays;*

(4) *Partial payments for services rendered;*

(5) *Prohibition of the liquidation of securities (bonds, guarantees, bails, etc.);*

(6) *In other cases where the effects on the performance of the contract is tantamount to the above-mentioned cases.”*

¹⁴ The DIS Adjudication Rules recommend in Section 4.9 to conclude a written Adjudicator Contract based on the model contained in Appendix 2 to the DIS Adjudication Rules. As Köntges & Mahnken point out, the written form is indeed recommended in light of the usually longer period of time during which the adjudicators render their services to the parties and before the background that the DIS does not administer the dispute-related adjudication but only accompanies the constitution of the DAB (see Köntges & Mahnken, *op. cit.*, at p. 313).

As discussed above, a party wishing to have a decision reviewed in arbitration or court proceedings must send a declaration of non-recognition to the other party and a copy of that declaration to the chairperson of the DAB within one month following receipt of the decision (Sections 23.1 and 23.2). Otherwise the decision becomes final and binding. It is no longer subject to any remedy, not even with the assertion of an obvious inequity or obvious incorrectness or breach of fundamental procedural rights.

Both parties, not only the non-recognizing party, are entitled to file a claim in court or arbitration proceedings in case of a declaration of non-recognition, which can only be withdrawn with the consent of the other party (Section 23.4). Further, in case of non-observance of the binding effect of a DAB decision, the entitled party may seek performance of the obligation established in the decision in state courts even if there is an arbitration agreement.¹⁵ In the event that arbitration proceedings pursuant to the DIS Arbitration Rules are instituted on the basis of an arbitration agreement, the rules for expedited proceedings apply (Annex 4 to the DIS Arbitration Rules).

7. Compliance with Decisions

The binding effect of the decisions is of contractual nature and admittedly lacks an international enforcement mechanism. However, as described above, non-observance of a decision by a party constitutes an intentional and severe breach of contract that may trigger contractual penalties. Furthermore, the breach, resulting from the non-observance, can be claimed in an arbitration or in court.

IV. Comparison between Standby and Ad hoc Adjudication

The DIS Expert Determination Rules provide for proceedings similar to the dispute-related adjudication phase of the DIS Adjudication Rules for projects where parties have not established a "*standby*" DAB.¹⁶

Not all advantages of the dispute-related adjudication phase of a Standby Adjudication in comparison to the Ad hoc Adjudication are as obvious as it seems. In an Ad hoc Adjudication, a dispute between the parties has already arisen and thus the parties meet in an adversarial setting, while the appointment procedure of a "*standby*" DAB follows a rather cooperative approach as there is no dispute (yet). In such cooperative setting, the parties inform the adjudicators of the differences and problems on a regular basis and thus, in the event of a dispute, the DAB does not need any time to familiarize itself with the contract, project progress and the differences that have led to that dispute.

¹⁵ Against this background, the DIS advises all parties wishing to agree on a project-accompanying adjudication by reference to the DIS Adjudication Rules for purposes of the settlement of differences and disputes in connection with one or several contracts to use the model adjudication and arbitration clause as included in Annex 1 to this background document.

¹⁶ Even the numbering of the sections of the DIS Rules for Expert Determination is aligned with the numbering of Sections 9 to 29 of the DIS Adjudication Rules.

	DIS Adjudication Rules (Standby Adjudication)	DIS Rules on Expert Determination (Ad hoc Adjudication)
Standby DAB	Yes	No
Default Number of the Adjudicator(s)/Expert(s)	3	1
Regular Visits of Project Site	Yes	No
Informal Amicable Settlement of Differences	Yes	No
Involvement of the Administering Institution	Supporting Involvement only	Yes
Maximum Time Limit	5 Months	6 Months
Allocation of Costs	Equally between Parties	Following the outcome of the decision
Remuneration of the Adjudicator(s)/Expert(s)	Basic Monthly Fee plus Hourly Rate	Hourly Rate
Binding Decisions	Yes	Yes
Preliminary Rulings	Yes	Yes

Higher costs appear to be the main disadvantage of Standby Adjudication. However, the basic monthly fees of the project-accompanying adjudication are likely to pay-off considering the costs of a full-blown arbitration to resolve disputes that Standby Adjudication proceedings are very successful in avoiding.¹⁷

V. **Use of the DIS Adjudication Rules in practice and lessons learned**

To date, the DIS Adjudication Rules have not been used widely in practice. In several other DIS arbitration proceedings, it became evident that while the DIS Adjudication Rules had been agreed upon, the parties had failed to establish the Standby DAB at the outset of the project but had done so only after a dispute had arisen. In one case, the project ended up failing and, after four unsuccessful dispute-related adjudication proceedings, the dispute had to be solved in an arbitration. It is noteworthy that both parties were of the view that one of the reasons for the failure of the project was that the project-accompanying adjudication had not been used to settle disputes about sums due at an early stage but that they instead let these disputes grow until they affected the entire project.

Therefore, a valuable lesson is that Standby Adjudication will only deliver on cost and time efficiency when a DAB is established at the outset of the project.

¹⁷ See Köntges & Mahnken, *op. cit.*, at p. 316.

VI. Conclusion

The described mechanism of Standby Adjudication is set in a cooperative manner and offers parties to amicably settle differences or problems ideally even before they arise to disputes. Qualified neutral experts accompany the project to support the parties in such endeavour. And even if a dispute arises, the dispute-related adjudication may be swiftly decided by the DAB having full knowledge of the project and without any delay for appointment procedures or time to get acquainted with the project and the dispute. Even within such dispute-related adjudication, preliminary rulings for safeguarding measures are provided for.

As discussed above, the Standby Adjudication, once the DAB is appointed, hardly requires involvement of an institution which makes it more suitable for settings in the context of UNCITRAL Rules. We are convinced that for large scale projects multi-phased, flexible, yet accelerated proceedings, which may be tailored at any stage to the needs of the parties, can prepare the ground for fruitful discussions in exploring and finding an even faster mechanism for the resolution of disputes.

Annex 1 DIS MODEL CLAUSE

The German Arbitration Institute (DIS) advises all parties wishing to agree on a project-accompanying adjudication by reference to the DIS Adjudication Rules for purposes of the settlement of differences and disputes in connection with one or several contracts to use the following adjudication and arbitration clause:

"For purposes of the settlement of all differences and disputes between the parties in connection with the contract (... description of the contract ...) a project-accompanying adjudication shall be conducted pursuant to the Adjudication Rules of the German Arbitration Institute (DIS-AVO).

Upon termination of the adjudication proceedings, all disputes shall be finally settled in accordance with the Arbitration Rules of the German Arbitration Institute (DIS) without recourse to the ordinary courts of law; if the binding effect of a decision under the DIS-AVO is not observed, the Supplementary Rules for Expedited Proceedings shall apply, in which case the entitled party may also have recourse to the ordinary courts of law."

The following points should be considered:

- In the proceedings pursuant to the DIS-AVO, the number of adjudicators is ...;
- The place of arbitration is ...;
- The number of arbitrators is ...;
- The applicable substantive law is ...;
- The language of the arbitral proceedings is