

# The German Media Arbitral Tribunal

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Since 1 January 2017, national and international media companies can initiate arbitration proceedings with the German Media Arbitral Tribunal (*Deutsches Medienschiedsgericht* – “DMS”). The DMS, which was established in 2016 in Leipzig, is a specialized arbitral institution that exclusively deals with media law disputes. In addition to arbitration proceedings, the DMS offers conciliation proceedings and expert determinations.

### **Background**

Media-related disputes frequently involve publishing houses, broadcasting and internet enterprises, media companies as well as copyright collecting societies. These disputes often deal with complex legal issues of intellectual property, copyright, film, music and press law, as well as with difficult technical questions which may require special expertise. In many cases, proceedings before national courts take place over several years. Therefore, and as expressed by the DMS on its website, there is a risk that such proceedings may become obsolete due to technical development.

By taking into account the special needs of media companies, the DMS aims at providing a faster and more economical alternative to litigation proceedings. It offers an alternative dispute settlement mechanism which allows for flexibility and confidentiality, and provides also for tailored services to meet the requirements of the evolving area of media law.

### **The DMS Rules of Arbitration in a Nutshell**

Parties that wish to have their dispute administered by the DMS may use the model arbitration clause provided on the DMS website. Arbitration proceedings are conducted on the basis of the DMS Rules of Arbitration (“DMS Rules”). The DMS Rules include provisions that deal with the organization of arbitration and conciliation proceedings, as well as with expert determinations. Some of the most important aspects of the DMS Rules are analyzed in this post:

### **The Jurisdiction of the DMS: Media Law Disputes**

Article 3(1) of the Rules stipulates that the DMS only deals with media law disputes. According to the definition provided in Article 3(2) of the DMS Rules,

“[a] media law dispute shall be deemed given if at least one of the parties directly involved in the proceedings creates, utilises, uses or markets media and the dispute focuses on such an activity. Media within the meaning of sentence 1 comprise means of communication that are disseminated by way of technical duplication and disseminated

to users by word, pictures or sound content. These include, in particular, the print media (e.g. newspapers, magazines, posters and flyers) and electronic media (e.g. broadcasting and online services).”

Based on this definition, it is to be expected that relevant disputes will include, for example, copyright and licensing issues. Also, pursuant to Article 18(2) of the DMS Rules, the minimum amount in dispute must be EUR 100,000.00.

The DMS may come to the conclusion that it does not have jurisdiction with regard to certain disputes. As clarified by Article 3(3)(b) of the DMS Rules, such a decision may be issued in the event that the matter is not sufficiently significant for the development of media law. The notion of “insufficient significance” gives the DMS a wide discretionary power to reject cases. However, this threshold is vague and may cause legal uncertainty for the parties. How the DMS will interpret this term remains to be seen.

### **Place of the Arbitration and Applicable Laws**

According to the model arbitration clause, the place of the arbitration proceedings is Leipzig, where the DMS has its headquarters (Article 2 of the DMS Rules).

The Rules provided for an application of the provisions of the German Code of Civil Procedure (*Zivilprozessordnung* - “CCP”) relating to arbitration proceeding when the DMS Rules are silent on the matter (Article 19(2) of the DMS Rules). Also, unless otherwise agreed by the parties, German law is the applicable substantive law (Article 4(1) of the DMS Rules). If the parties agree on the application of foreign law, they must bear the additional costs for obtaining any necessary legal opinion (Article 4(2), read with Article 18, of the DMS Rules).

This shows that the DMS arbitration proceedings are largely based on and dictated by German law. To some extent, this may restrict the parties’ flexibility to shape their arbitration proceedings. Against this backdrop, it remains to be seen how attractive arbitration proceedings under the DMS Rules will be not only for German, but also for international media companies.

### **DMS Arbitrators**

The DMS provides a list of arbitrators (currently 21), each with special expertise and a reputation in media law (Article 6 of the DMS Rules). The parties must choose their arbitrators from this list (Article 12(1) DMS Rules).

Furthermore, the parties must decide whether the arbitral tribunal shall consist of either three, five or seven members. Ideally, the parties should agree on the number of arbitrators in advance (i.e. in their arbitration agreement). The model arbitration clause provides specific wording in this respect. However, in the absence of a clear stipulation of the number of arbitrators in the arbitration clause, and failing an agreement between the parties at a later stage when the dispute has already arisen, the arbitral tribunal cannot be constituted (Article 12(2) of the DMS Rules). As such, one party may effectively block arbitration proceedings by simply not engaging in discussions with the other party about the number of the arbitrators.

### **Arbitral Award**

An arbitral award has the effect of a final judgement (Article 31 of the DMS Rules), and as such it may be subject to annulment pursuant to Article 1059 of the CCP. However, before the initiation of arbitration proceedings, the parties may agree in their arbitration agreement “*to the contrary that the*

*legal action is to remain pending before a state court without any restriction*". Thus, recourse to domestic courts remains open to the parties if they so agreed. The model arbitration clause provides specific wording should the parties take the advantage of this possibility, which reads as follows:

"All media law disputes that arise in conjunction with [describe matter in dispute in detail] shall be ultimately decided upon in accordance with the rules of arbitration of the German Media Arbitral Tribunal by way of the continued unrestricted permissibility of a legal action before a state court."

However, this possibility seems inconsistent with the DMS' intention of providing a faster and more economical alternative to litigation proceedings before domestic courts. This intention serves the broader objective of arbitration, that is, to resolve disputes outside of the courts' jurisdiction.

## **Outlook**

The 2016 Queen Mary Dispute Resolution Survey "Pre-empting and Resolving Technology, Media and Telecoms Disputes" (which was discussed on this blog by Gustavo Moser) identified the future potential and increased use of arbitration as a viable mechanism for the resolution of technology, media and telecoms ("TMT") disputes. According to the aforementioned survey, litigation is still the most frequently used dispute resolution mechanism in this area of law. However, this will hopefully change in the future. The survey also reported that, to date, the most popular arbitral institutions for TMT disputes are the ICC, the LCIA, the SIAC, and the WIPO Arbitration and Mediation Center. The DMS was thus established at a time in which arbitration is becoming more and more relevant for the resolution of media law disputes, and as such the DMS is an important step for the further promotion of arbitration in the field of media law.