

Kluwer Arbitration Blog

DIS Spring Conference 2023: Disruption, Change and Reordering in Global Supply Chains – Pandemic, War and Inflation in Arbitration

Sophie Thiel, Moritz Voit (Hogan Lovells) · Saturday, June 17th, 2023

The DIS Spring Conference, one of the DIS's two main annual conferences, attracted over 300 participants and took place in Munich on 3 May 2023 after the traditional Gala Dinner on the eve of the conference.

The conference set off with a welcome note by [Dr. Rouven F. Bodenheimer](#) (DIS), introducing the theme of the conference – *Pandemic, war and inflation in arbitration* – and thanking [Karl Pörnbacher](#) (Hogan Lovells) and [Jan K. Schäfer](#) (King & Spalding) for their contributions to the organization of the conference.

Mr. Pörnbacher then briefly presented an overview of the recent crises and Mr. Schäfer introduced the three topics of the conference, namely the disruption of the supply chain from the business's perspective followed by substantive and procedural law aspects of such disruptions. These discussions are summarized below.

Suddenly Disruption Everywhere – What is Noticeable? How do Businesses Deal With it?

The first panel was moderated by [Dr. Annett Kuhli-Spatschek](#) (Kantenwein) and addressed the business's perspective on supply chain disruptions. The panelists were [Max Asmuß](#) (RWE Offshore Wind), [Jörg Strümpe](#) (Sandoz) and [Djalma Goncalves](#) (Robert Bosch). The speakers agreed that the crises of the recent years created many disruptions and challenges for their supply chains.

Mr. Asmuß painted a lively picture of the challenges which the offshore industry faces in addition to the general challenges of the market dynamics. The offshore wind industry's positive outlook and technological progress require high investments and long-term planning – e.g. the significantly bigger and heavier rotor blades require new production facilities and newly built, larger ships – both naturally come at a price and require long lead times. General market dynamics of rising prices, decreasing availability and stronger regulation additionally affect the offshore wind industry. Potential mitigation strategies are more global supply chains, strategic partnerships with key suppliers, industrialization of service and maintenance and a higher diversity of suppliers.

Mr. Strümpe explained that supply chains of pharmaceutical companies have also faced many challenges during the recent crises. To name but a few, he mentioned different lockdown regulations in different countries, increasing competition for the available active pharmaceutical ingredients and logistics, and increased transparency requirements for suppliers. He emphasized that earlier crises like Covid were handled more amicably and in close cooperation with suppliers who have become more litigious recently with increasing inflation.

Mr. Goncalves added the perspective of the automotive industry which was particularly affected by the chip crisis. In view of crises being the “new normal”, he agreed that a more resilient supply chain is necessary and that new structures are being implemented.

The following discussion centered around tools to make supply chains more robust, the importance of communication, negotiation strategies and supplier management. All three panelists agreed that a more flexible sourcing strategy leading to more independence from suppliers is the aim but is very difficult to achieve – it requires long timeframes and high investments.

Disruption and Substantive Law – Legal Principles, Contractual Practice and (Uniform) Application in the Current Environment

The second panel was moderated by [Franz T. Schwarz](#) (Wilmer Hale) and covered effects of crises and disruptions on contracts under different substantive laws.

[Susanne Schwalb](#) (CMS Hasche Sigle), [Dr. Dorothee Schramm](#) (independent arbitrator) and [James H. Boykin](#) (Hughes Hubbard & Reed) reported that in Germany, Switzerland and the US, contracts (in particular long-term supply agreements) frequently provide for clauses for force majeure and/or hardship. [Prof. Dr. Klaus Peter Berger](#) (University of Cologne) added a transnational law perspective and also mentioned the [ICC model clauses on hardship and force majeure](#), fittingly published in March 2020.

The panelists agreed that while the wording of these clauses is often similar, their application depends on the circumstances of the individual case. Neither the pandemic nor Russia’s invasion of Ukraine as such therefore constitute force majeure and/or hardships. Rather, the effects of these factual developments on the specific contract must be assessed.

More significant differences between the jurisdictions became apparent when the panelists addressed the consequences of crises and disruptions to contracts not providing for such clauses. Ms. Schwalb and Ms. Schramm demonstrated that German law (expressly) and Swiss law (impliedly) allows contracting parties to seek contract adaptation before courts or arbitral tribunals under certain prerequisites. By contrast, Mr. Boykin reported that US law does not provide for a comparable contract adaptation mechanism but at most exempts the affected party from its contractual obligations under the doctrines of frustration and impracticability. Both Ms. Schwalb and Mr. Boykin reported cases concerning the obligation of business tenants to pay full rent for a business which they could not use for parts of the pandemic due to lockdown-measures. While the German Federal Court [found](#) that these measures can generally give rise to contract adaptation claims by business tenants, a New York court explicitly [rejected](#) the applicability of the doctrines of frustration and impracticability because lockdown-measures were temporary and the business premises themselves remained intact.

At the end of the panel, Dr. Bodenheimer honored [Elizabeth Hincapié](#) (Toshiba Railway Europe), [Moritz Schmitt](#) (rothorn legal) and [Dr. Johanna Büstgens](#) (Hanefeld) for their contributions during their three-year term as DIS40 national coordinators.

Disruption and Procedural Law – Coordination of Proceedings, Multi-party Proceedings and Speed as a Challenge for Arbitration

The third panel, moderated by [Anna Masser](#) (Allen & Overy) began with a presentation of the draft DIS Supplementary Rules for Third-party Notices (*Ergänzende Regeln für Streitverkündungen*, “**Draft DIS-ERS**”) by the co-chairs of the DIS working group, [Prof. Dr. Christian Borris](#) (Borris Hennecke Kneisel) and [Dr. David Quinke](#) (Gleiss Lutz).

Prof. Borris explained that often identical questions are relevant in various links of a supply chain. They are, however, determined within their legal relationship without an extension of *res judicata*. This not only hampers procedural efficacy but also poses the peril of inconsistent arbitral awards. The possibility of third-party notices, as foreseen by German procedural law ([Sections 72–74 ZPO](#)) is missing in German arbitration law. Existing rules on multi-party arbitrations (e.g. [Art. 19 DIS Rules](#), [Art. 7 ICC Arbitration Rules](#), [Art. 4.2 Swiss Rules](#)) often fail to effectively include a third party.

Under the Draft DIS-ERS, all parties concerned consent to the possibility and effect of a third-party notice by agreeing on the applicability of the DIS-ERS in the contract(s), i.e. *before* a dispute arises, similar to the concept of the [DIS Supplementary Rules for Corporate Law Disputes \(DIS-ERGeS\)](#). Dr. Quinke went on to explain that such agreement would then allow a decision in an initial arbitration conducted in accordance with the DIS-ERS to have a binding effect on subsequent disputes between a party and the noticed third party.

The Draft DIS-ERS sparked considerable interest among the audience. The discussion revolved around cost implications of a notice and the question whether the validity of the notice must already be challenged in the initial arbitral proceedings or whether this issue should be shifted to the subsequent dispute. The panel favored a requirement for an early objection to the notice in order to avoid unnecessary proceedings while at the same time entrusting the DIS not to serve notices which are clearly invalid for an apparent lack of consent of the noticed party.

The panel proceeded with a presentation by [Dr. Ralf Hafner](#) (Advant Beiten) on arbitration agreements in global supply chains. He emphasized that supply chain arbitrations are complex and often come with multiple procedural issues, e.g. the application of an arbitration clause in a framework agreement to orders made under this agreement by different affiliates or subcontractors of the contracting parties in different jurisdictions. Dr. Hafner concluded that it is all the more important to take these constellations into account in the arbitration and choice of law agreements, and to avoid conflicting dispute resolution mechanisms within the different links of the supply chain.

The panel concluded with [Sibylle Schumacher](#) (Pinsent Masons) reflecting on interim relief in arbitration. While emergency arbitration (as e.g. provided for in the ICC Rules but not in the DIS Rules) has gained some traction, it is still not as prevalent as one might expect in light of the recent disruptions to supply chains. According to Ms. Schumacher, this might be due to the prolonged duration of emergency arbitrator proceedings and the more complex enforcement. She suggested

that an adjudicator or an adjudication board involved throughout the duration of a supply contract could render faster and cheaper interim decisions accepted by both parties.

Conclusion

Prof. Dr. Stefan Vogenauer (Max Planck Institute for Legal History and Legal Theory) provided a fitting summary of this year's DIS Spring Conference by highlighting the prevalent theme of disruption. He aptly observed that disruption has always occurred and will continue to occur in our unpredictable world. What remained equally consistent, however, is the remarkable ability of the law – as evidenced by the insightful panel discussions – to respond effectively to these disruptions.

Dr. Ramona Schardt (DIS) closed the event and invited the audience to the DIS Autumn Conference 2023 in Berlin on 13/14 September 2023.


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