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Making Third Party-Notices Work in Arbitration: The DIS' New Supplementary Rules for Third-Party Notices

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Since March 15, 2024, the [German Arbitration Institute](#) (DIS) offers a one-of-its kind solution to make third-party notices work also in arbitration: The Supplementary Rules for Third-Party Notices (DIS-TPNR). The DIS-TPNR are the work product of a DIS working group which was established in 2021. The authors of this post have had a leading role in this project. They describe why third-party notices are relevant, the solution offered by the DIS-TPNR, and how this solution works.

Third-Party Notices Avoid the So-Called “Recourse Trap”

Often a party to a legal dispute with another party may have a claim for recourse against a third party that depends upon the outcome of the legal dispute. In such scenario, the same factual or legal issues may be relevant for both the legal dispute between the initial parties and for the potential subsequent legal dispute with a third party.

By way of example: General contractor B delivers to buyer A goods which B bought from C. The court or arbitral tribunal in the initial dispute between A and B determined that these goods were defective and holds B liable. B thereupon brings a claim for recourse against C. As the decision in the initial dispute between A and B has no *res iudicata* effect on the subsequent legal dispute between B and C, the same issue (were the goods defective?) will have to be re-decided. B therefore runs the risk to lose both the initial legal dispute with A (if the goods are considered defective) and the subsequent legal dispute with C (if the goods are not considered defective). The consequence of this so-called “recourse trap” is widely perceived as unsatisfactory. It is not only procedurally inefficient, but jeopardizes the consistency of judicial decisions.

Litigation and Arbitration – Two Different Worlds in the Past, But No Longer

In state court proceedings, the German Code of Civil Procedure provides for a bespoke solution to solve this problem: the so-called third-party notice (*Streitverkündung*). Other countries have similar concepts.

In arbitration, however, a third-party notice does not easily work. German arbitration law (an adoption of the UNCITRAL Model Law) does not provide for it. That also seems to be the case for most other arbitration laws. At the same time, while most institutional arbitration rules allow joining a third party to the arbitration with all rights and obligations incumbent upon a party, this rarely happens in practice. The consent of all parties required for such joinder is difficult to obtain. Parties are often wary of the complications possibly arising from the involvement of a third party in the arbitration in such capacity and role. That is all the more true for parties that cannot expect to benefit from the joinder.

Since March 15, 2024, the DIS-TPNR offer a one-of-its kind solution for this problem. They consist of a set of 15 provisions, which has to be agreed upon in both the contract between the parties to the initial arbitration (the so-called main party and its counterparty) as well as in the contract between the parties to the subsequent dispute (the main party and the third party). The DIS-TPNR do not automatically apply by concluding a DIS arbitration agreement, but have to be agreed separately.

By agreeing upon the DIS-TPNR, the main party and its counterparty grant each other the right to join a third party. The third party is allowed to participate in the initial arbitration, which includes in particular the right to participate in the constitution of the arbitral tribunal. In turn, the third party agrees to be bound by the award rendered in the initial arbitration. These binding effects of the third-party notice extend to the determination and legal assessment of the facts, including any prejudicial legal relationships. They are therefore to be distinguished from and go beyond *res iudicata* effects.

The subsequent dispute does not have to be a DIS arbitration but may also be another arbitration or a state court proceeding. This significantly expands the scope of application of third-party notices in DIS arbitration proceedings based upon the DIS-TPNR.

Minimally Invasive Approach

The DIS-TPNR are characterized by a minimally invasive approach. The role of the third-party notice recipient in the initial arbitration is limited to that of a so-called intervener (*Nebenintervenient*). It does not become a party and is therefore not allowed to bring claims against the other parties to the arbitration, just as the other parties may not bring claims against the third-party notice recipient. This is the decisive difference between the DIS-TPNR and other institutional arbitration rules allowing the joinder of third parties.

This minimally invasive approach significantly reduces the impact of the joinder upon the initial arbitration and increases the acceptability of the DIS-TPNR, as it makes it more acceptable for the other party to consent to the participation of the third party. The DIS-TPNR never allow the third party to intervene in its own right. The participation of the third party always requires a third-party notice.

Point in Time When DIS-TPNR Are Agreed Upon

The DIS-TPNR are designed to be agreed upon already when the main contracts are concluded. At

this point in time, the parties are usually more lenient to making concessions in a give-and-take negotiation process.

The main party typically has the greatest interest in agreeing upon the DIS-TPNR. However, its counterparty will also easily agree to the DIS-TPNR if—as is often the case—the counterparty itself has an interest in being able to join a third party. Even if only one of the two has an interest in joining a third party, it may be able to offer its contracting partner more favorable contractual conditions elsewhere in return for its consent. Since the burden which the DIS-TPNR impose on the counter-party is limited, the DIS-TPNR will hardly be a reason for refusing to enter into a contract which includes them.

The third party in turn may agree to the DIS-TPNR because it may have an interest in joining the initial arbitration in support of the main party, thereby preventing a recourse claim in the first place. It may also agree in order to be itself in a position to join the main party in proceedings in which the third party is involved as a party. Finally, the main party may offer the third party more favorable contractual terms elsewhere in return for its consent to the DIS-TPNR.

The DIS-TPNR in a Nutshell

To the extent possible under mandatory arbitration law, the DIS-TPNR are modelled after the provisions for third-party notices in [Sections 72 et seq. of the German Code of Civil Procedure](#). The DIS-TPNR come into operation only where the parties to a contract have agreed upon their applicability (Art. 1.1 DIS-TPNR). The third-party notice is admissible where the main party believes that, in case of an outcome of the dispute not in its favor, it will be able to assert a claim for warranty or indemnification against a third party, or is concerned that such a claim may be brought against it by a third party (Art. 2 DIS-TPNR). The third-party notice can be issued by a written statement to the DIS (Art. 3 DIS-TPNR) within the time limits set out by Art. 4 DIS-TPNR. To allow the third party the opportunity to participate in the constitution of the arbitral tribunal (Art. 7 and 8 DIS-TPNR), third-party notices can be issued only before the arbitral tribunal is constituted. Later third-party notices require the third party to accept the composition of the arbitral tribunal (Art. 4.4 DIS-TPNR).

A third-party notice recipient may join the arbitration as an intervener. Only for the purposes of appointing the arbitral tribunal, the DIS or its Arbitration Council determines the validity of the intervention with binding effect (Art. 6.2 DIS-TPNR). The intervener can support (but not contradict) the main party (Art. 6.4 DIS-TPNR). Objections to the validity of the third-party notice must generally be raised in the initial arbitration. A finding of the tribunal that the notice is invalid is final and terminates the intervention (Art. 10.2 DIS-TPNR). If the tribunal determines the notice to be valid, the validity can again be reviewed in the subsequent dispute, but only based on newly arisen objections (Art. 10.3 DIS-TPNR).

Regardless of whether the third-party notice recipient intervenes, it is bound by the award rendered, and the limitation period of eventual recourse claims against the third party is suspended (Art. 11 DIS-TPNR). Since the third-party notice mainly serves its interests, the main party has to bear the administrative fees of the DIS caused by the third-party notice regardless of the outcome of the arbitration (Art. 13.1 DIS-TPNR).

In order to facilitate the use of the DIS-TPNR, the DIS has published [model clauses](#) and a [Practice](#)

Note, which are available in both German and English.

The above is an abbreviated version of an article published in the SchiedsVZ | German Arbitration Journal, Vol. 22, No. 2 (2024), which is also included on Kluwer Arbitration. See [here](#) for more information on and other contributions to the Journal.

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