

SUPPLEMENTARY RULES FOR THIRD-PARTY NOTICES (DIS-TPNR)

PRACTICE NOTE¹

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Purpose

- 1 The Supplementary Rules for Third-Party Notices (“DIS-TPNR”) contractually bind a third party to an award rendered in an arbitration conducted pursuant to the DIS-TPNR (“Initial Arbitration”) and take effect (the “Effects of the Third-Party Notice” being defined in Art. 11 DIS-TPNR) in a subsequent dispute between a party to the Initial Arbitration and a third party (“Subsequent Dispute”).
- 2 The DIS-TPNR closely follow the third-party notice model provided for in Sect. 72 et seqq. of the German Code of Civil Procedure (“ZPO”). This model primarily serves two purposes: first, procedural economy by preventing the re-litigation of the same issue in different proceedings, and second, legal consistency by precluding contradictory decisions by different courts on the same issue. In civil court proceedings, the concept of third-party notice, therefore, has great practical importance. Other legal systems have similar concepts, even though they differ to a certain extent in their requirements and in their legal effects.
- 3 In an arbitration, the concept of third-party notice is not readily available. German arbitration law in Sect. 1025 et seqq. ZPO, as most arbitration laws, does not contain any provisions on

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third-party notice. A fundamental problem is that the participation of third parties in an arbitration requires the consent of all parties. Generally, declarations of consent are lacking prior to the dispute arising and, in practice, are difficult to obtain after the dispute has arisen.

- 4 In practice, however, it has been shown that, at least in certain scenarios, the parties to an arbitration may have an interest to include a third party in the arbitration and to ensure that this third party cannot challenge the outcome of the Initial Arbitration in a Subsequent Dispute. This applies particularly to scenarios in which the potential inclusion of the third party is already foreseeable from the outset, e.g., in a supply chain or in subcontractor agreements. Such aim is achieved by the third-party notice according to the model of the ZPO. The lack of a set of rules for third-party notices in arbitration law is – at least for certain cases – considered a significant disadvantage of arbitration.
- 5 The fact that arbitration law does not provide for a third-party notice does not mean that it is inadmissible. Arbitration law grants vast autonomy to the parties in structuring their arbitration. By making full use of this leeway, the DIS-TPNR are designed with the aim to create the preconditions for a third-party notice on a contractual basis, i.e. fully based on consent, in a manner largely analogous to the relevant provisions of the ZPO and, as far as possible, within mandatory requirements under arbitration law.
- 6 The underlying consideration was to mirror the pertinent provisions of the ZPO, as far as possible, which is also reflected in the adoption of the corresponding legal terminology and wording. The provisions of the ZPO have proven useful in long term practice in state court proceedings; it was thus appropriate to closely follow them. In addition, this practice also allows to seek guidance from the extensive case law of state courts on third-party notices when interpreting the DIS-TPNR. However, the similarity to the provisions of the German ZPO does not require the place of arbitration to be in Germany.
- 7 The third-party notice is a sub-category of third party participation in an arbitration. The arbitration rules of most arbitral institutions provide for such option, usually referred to as “joinder” in English legal terminology, and also in Art. 19 of the Arbitration Rules of the DIS (“Rules”). In practice, however, these joinder rules are used sparingly. This is likely due to two main reasons:
 - (i) Firstly, joinder rules require the consent of all parties to include the third party in the arbitration, even though some rules do not explicitly stipulate this. Universal consent, e.g. by an agreement prior to the commencement of the arbitration, is mostly lacking in practice. When the decision on admissibility is left to the discretion of the arbitral tribunal, they will generally be reluctant to include third parties in the arbitration against the will of one or more third parties to the arbitration.
 - (ii) Secondly, joinder rules regularly provide that the third party will be included in the arbitration as a party, i.e., with all the rights and obligations a party to the arbitration is entitled to. This includes the right to assert claims against any other party to the arbitration, as set out in Art. 19.4 of the Rules.
- 8 Such far-reaching inclusion of another party in the arbitration, however, often presents difficulties in assessing the risk of procedural and substantive complications in the relationship between the different parties. This is usually not in the interest of the parties to the arbitration. Therefore, including a third party in mutual consent of all parties via the joinder rules is rarely successful in practice, particularly after the dispute has arisen.
- 9 In contrast, the DIS-TPNR are characterised by their minimally invasive approach. They limit the role of the third party to supporting the party issuing the third-party notice in the Initial Arbitration as an “intervening” party (“Intervener”). The third party does not become a party to the Initial Arbitration and consequently can neither raise its own claims nor can any claims be

raised against it in these proceedings. Thus, the potential complications of including a third party in the Initial Arbitration are reduced to a minimum. The ensuing limited role of the Intervener in the Initial Arbitration should make it easier for all parties to agree to the third-party notice. With the Effects of the Third-Party Notice established by the DIS-TPNR in relation to the third-party notice recipient, the dual objective of a third-party notice is achieved (no re-litigation in the Subsequent Dispute of the determinations made in the Initial Arbitration, no risk of contradictory decisions).

- 10 The DIS-TPNR, however, do not provide for an autonomous intervention of any third party, which has a legal interest in one party prevailing in a dispute pending between other parties following the model set out in Sect. 66 ZPO. This was based on the consideration that the parties to an arbitration, generally, will not allow the participation of third parties in the arbitration without at least one of them having a legal interest in doing so. The criterion of a legal interest of the third party also entails an unpredictable risk of intervention by a third party in the arbitration.

Effects

- 11 The main effects of the DIS-TPNR and a third-party notice issued in accordance with the DIS-TPNR on the parties involved are as follows:

For the party issuing the third-party notice

- 12 In the event of an unfavourable outcome of the Initial Arbitration, the party issuing the third-party notice ("Main Party") establishes the Effects of the Third-Party Notice in the Subsequent Dispute (Art. 11.1). Therefore, the third-party notice recipient may no longer challenge the outcome of the Initial Arbitration in a Subsequent Dispute. In return, the third-party notice recipient may support the Main Party in the Initial Arbitration, which is often already an advantage for the Main Party as the third-party notice recipient may be more familiar with the issues in dispute than the Main Party, e.g., in a case of defects of a delivered item.

For the opposing party of the Main Party in the Initial Arbitration

- 13 By agreeing to the DIS-TPNR, the opposing party of the Main Party in the Initial Arbitration consents to the inclusion of a third-party notice recipient in the Initial Arbitration in accordance with the DIS-TPNR. This ensures in particular that the principle of confidentiality also applies to the relationship between the opponent of the Main Party and the third-party notice recipient, as stipulated in Art. 15.

For the third-party notice recipient

- 14 The third-party notice recipient obtains the right to participate in the Initial Arbitration, including the constitution of the arbitral tribunal. In return, it is bound by the key findings of the arbitral tribunal in the Initial Arbitration within the scope of the Effects of the Third-Party Notice and may, therefore, in principle, no longer challenge these findings in a Subsequent Dispute with the Main Party. In addition, the limitation period with respect to claims of the Main Party against the third-party notice recipient is suspended.

Core Elements

- 15 The Effects of the Third-Party Notice to the disadvantage of the third-party notice recipient are legitimised by the four core elements of the DIS-TPNR:
- (i) The third-party notice recipient accepts the Effects of the Third-Party Notice in accordance with the DIS-TPNR by entering into a respective agreement with the Main Party.

- (ii) The third-party notice recipient has the right to participate in the Initial Arbitration as an Intervener.
- (iii) In particular, a third-party notice recipient that has intervened in the arbitration has the right to participate in the constitution of the arbitral tribunal in the Initial Arbitration.
- (iv) The opponent of the Main Party agrees to the inclusion of a third-party notice recipient in the Initial Arbitration in accordance with the DIS-TPNR.

Model Clauses

- 16 The DIS-TPNR create the Effects of the Third-Party Notice by linking corresponding agreements between the parties to the (potential) Initial Arbitration, on the one hand, and the parties to the (potential) Subsequent Dispute, on the other hand. Therefore, always (at least) two corresponding agreements are required for including the DIS-TPNR.
- 17 The parties of the potential *Initial Arbitration* can agree on the application of the DIS-TPNR simply by using the DIS-TPNR standard model clause. In addition to the options for further stipulations generally existing and recommended for arbitration agreements (in particular: place of arbitration, language of the arbitration, number of arbitrators), the parties may, in addition to the agreement on the application of the DIS-TPNR, agree on narrowing down the potential third-party notice recipients, e.g. if the respective (potential) opposing party wants to protect itself from the potential inclusion of an unpredictable group of third parties.
- 18 The parties to the potential *Subsequent Dispute* have two options with regard to the agreement to be concluded between them:
- (i) The parties to the potential Subsequent Dispute may also agree on the DIS-TPNR standard model clause. Linking the DIS-TPNR standard model clause in both legal relationships offers the maximum flexibility with regard to third-party notice options to all parties involved.
 - (ii) However, in order to establish the Effects of the Third-Party Notice in an arbitration under the DIS-TPNR, a corresponding arbitration agreement regarding the Subsequent dispute is not required. The Effects of the Third-Party Notice can also be extended to a Subsequent Dispute that is conducted as an arbitration under rules other than those of the DIS or before a state court. For such scenarios, the parties to the potential Subsequent Dispute may agree on the so-called DIS-TPNR alternative model clause. Thereby, the third-party notice recipient undertakes to recognise the Effects of the Third-Party Notice established in an arbitration conducted between the party issuing the third-party notice and another party in accordance with the DIS-TPNR in a Subsequent Dispute. This is contingent upon the third-party notice recipient having had an opportunity to participate in the arbitration in accordance with the DIS-TPNR. The DIS-TPNR alternative model clause thus does not contain an arbitration agreement.
- The alternative model clause is generally reciprocal, i.e., it provides each party with the right to issue a third-party notice to the other contracting party, on the condition that the party issuing the third-party notice conducts an arbitration with another party in accordance with the DIS-TPNR. With the optional wording offered, the parties may also provide that only one contracting party shall be entitled to issue a third-party notice to the other contracting party (but not *vice versa*).

Article-by-Article Commentary

- 19 The 15 articles of the DIS-TPNR essentially have the following objects and purposes:

Article 1 Scope of Application

- 20 Art. 1 stipulates when and in which version the DIS-TPNR apply. The provision also determines their relationship to the Rules.
- 21 According to Art. 1.1 sentence 1, the DIS-TPNR only apply if the parties have specifically agreed upon them. The reason for this is that every third-party notice adds a third party to the proceedings, which requires the consent of all parties in an arbitration, due to the confidentiality of the proceedings (Art. 44 of the Rules). Therefore, the DIS-TPNR do not automatically apply upon conclusion of an arbitration agreement under the DIS Rules.
- 22 Art. 1.1 sentence 2 stipulates that the special provisions of the DIS-TPNR take precedence over the general provisions of the Rules. Between contracting parties who have agreed upon the DIS-TPNR (e.g., by the alternative model clause, para. 18), without also having concluded a DIS arbitration agreement, Art. 1.1 sentence 2 incorporates the Rules. In consequence, the third-party notice recipient is bound by the provisions of the Rules (in conjunction with the DIS-TPNR) in the Initial Arbitration and by the award of the Initial Arbitration in the Subsequent Dispute in accordance with the DIS-TPNR. At the same time, the dispute resolution mechanism agreed upon by the parties to the Subsequent Dispute remains unaffected.
- 23 Art. 1.2 corresponds to Art. 1.2 of the Rules and provides for a dynamic agreement on the DIS-TPNR as a default. A static agreement on a specific version of the DIS-TPNR is possible, but not advisable in view of possible future adaptations of the DIS-TPNR.

Article 2 Admissibility of the Third-Party Notice

- 24 Art. 2 determines the requirements under which a third-party notice is admissible. Since the third-party notice serves the purpose of procedural economy and legal consistency, it is only admissible in certain scenarios where the outcome of the Initial Arbitration can affect the claims in the relationship between the Main Party and the third-party notice recipient. Beyond that, in particular, if the third party is to be given the status of a party, an inclusion of third parties can only be considered in accordance with the general joinder rules (Art. 19 of the Rules).
- 25 The provision is largely based on Sect. 72 para. 1 ZPO, the interpretation of which can also be employed. Art. 2 deviates from Sect. 72 para. 1 ZPO in three aspects:
- (i) In contrast to Sect. 72 para. 1 ZPO, Art. 4 stipulates that, in order to allow for the participation of all parties in the composition of the arbitral tribunal, a third-party notice cannot be issued until the final decision of the dispute has been rendered. This does not apply only if the third-party notice recipient does not raise objections to the composition of the arbitral tribunal and accepts the arbitration as it stands at the time of its intervention (Art. 4.4, para. 34).
 - (ii) The third-party notice can only be issued in accordance with the DIS-TPNR, in particular with its Arts. 4-6 (paras. 30 et seq.).
 - (iii) Unlike in proceedings before the state courts, the third party must have agreed to receiving a third-party notice by agreeing to the DIS-TPNR. Only the third party's consent allows the effects of an arbitral award not to be limited to the parties (e.g. Sect. 1055 ZPO), but to also extend its effects to the third-party notice recipient (Art. 11, paras. 63 et seq.).

Article 3 Form of the Third-Party Notice

- 26 Art. 3 specifies the form in which the Main Party has to issue the third-party notice. The provision is based on the requirements of the Rules for the filing of the Request and includes the elements required for a Statement of Third-Party Notice under Sect. 73 sentence 1 ZPO, as well as the obligation to attach the Submissions made in the arbitration so far.
- 27 Pursuant to Art. 3.1, the third-party notice shall be made by way of a Statement of Third-Party Notice. Like the Request under Art. 5.1 of the Rules, the statement must be submitted to the DIS (Art. 3.1 sentence 1). As stipulated in Art. 3.1 sentence 2, the Statement of Third-Party Notice shall contain the name and address of the third-party notice recipient (just as the Request pursuant to Art. 5.2 (i) of the Rules), the reasons for the third-party notice and information on the status of the dispute (in accordance with Sect. 73 sentence 1 ZPO, for interpretation see para. 6) as well as the agreement on the DIS-TPNR between the parties to the arbitration (Art. 1.1 sentence 1, para. 21) and with the third-party notice recipient (Art. 2, paras. 24 et seq.). The DIS checks whether the Statement of Third-Party Notice sufficiently complies with the requirements of Art. 3.1 sentence 1 and whether such information is, on a prima facie basis, not obviously incorrect. Unlike proceedings before the state courts, the Submissions already made in the arbitration, including any attachments thereto (Art. 3.2 of the Rules), must be made available to the third-party notice recipient (Art. 3.1 sentence 3), which ensures that the third-party notice recipient is fully informed. The DIS may set a time limit pursuant to Art. 3.3 if the Submissions are incomplete, but it is not obliged to verify the completeness of the documents.
- 28 Art. 3.2 stipulates the form of transmission and the number of copies of the Statement of Third-Party Notice to be transmitted. Accordingly, the Statement of Third-Party Notice shall be sent to the DIS in paper form as well as in electronic form, whereas Art. 4.1 of the Rules determines how a transmission in electronic form shall be made. Art. 3.2 sentences 2 and 3, which stipulate the number of copies in which the Statement of Third-Party Notice is to be filed and grant the DIS the right to request further copies, are modelled on Art. 4.2 of the Rules.
- 29 If relevant information in the copies of the Statement of Third-Party Notice or such copies themselves are missing, the DIS may set a time limit for the Main Party to supplement the submission in accordance with Art. 3.3 as is the case with the Request (Art. 5.4 of the Rules). If the submission is not supplemented within such time limit, the third-party notice is deemed not to have been issued, with the consequence that none of the effects of Art. 11 will occur. In contrast to Art. 5.4 sentence 2 of the Rules, in order to accelerate the proceedings, the DIS does not have any discretion in this regard.

Article 4 Time Limits for a Third-Party Notice

- 30 Art. 4 DIS-TPNR determines when a third-party notice may be issued. In principle, the possibility to issue a third-party notice is limited in time in order to enable the third-party notice recipient to participate in the constitution of the arbitral tribunal while at the same time limiting any delay of the constitution of the arbitral tribunal as much as possible. In this respect, the DIS-TPNR deviate from the ZPO, which in Sect. 72 para. 1 allows for an unlimited possibility of issuing a third-party notice until the final decision of the dispute has been rendered.
- 31 Art. 4.1 provides the Claimant with the option to issue a third-party notice already in the Request. In this case, the Request is deemed to also constitute a Statement of Third-Party Notice within the meaning of Art. 3 (para. 26). A third-party notice in the Request is the default rule regarding a third-party notice by the Claimant.
- 32 Pursuant to Art. 4.2, the Respondent may issue a third-party notice within 21 days following the date of the transmission of the Request. This time limit is identical with that of Art. 7.1 of

the Rules. After the expiry of the time limit set out in Art. 4.2, a third-party notice issued by the Respondent needs to comply with the requirements of Art. 4.4, even if the arbitral tribunal has not yet been constituted at the time of the third-party notice. The same applies when a counterclaim is filed. In this scenario, the Respondent may also only issue a third-party notice within the time limit set out in Art. 4.2 and, in all other cases, under the additional requirements of Art. 4.4.

33 In addition to the default rule of issuing a third-party notice together with the Request pursuant to Art. 4.1, Art. 4.3 provides the Claimant with the option to issue a third-party notice within 14 days following the date of the transmission of the Answer. This provision is intended to meet the practical need of the Claimant to be able to decide whether a third-party notice is appropriate only after reviewing the submissions in the Answer. In order to avoid any delay of the constitution of the arbitral tribunal, a third-party notice can only be issued pursuant to Art. 4.3 if no arbitrator has been appointed at that time. This time limit coincides with that of Art. 19.1 of the Rules, which also allows for a Request against an additional party only until an arbitrator has been appointed. By notifying the DIS accordingly, the Claimant can ensure that the DIS does not appoint an arbitrator up to the time limit provided for in Art. 4.3, *i.e.*, before the time limit of 14 days following the date of the transmission of the Answer has elapsed. This way, the Claimant can ensure that its right to issue a third-party notice under Art. 4.3 remains unaffected.

34 Beyond the limited options of third-party notices in Art. 4.1 to 4.3, a third-party notice is only admissible under the additional requirements of Art. 4.4, *i.e.*, that the third-party notice recipient agrees thereto and declares that it does not raise objections to the composition of the arbitral tribunal and that it accepts the arbitration as it stands at the time its intervention following the third-party notice was possible. These additional requirements for the third-party notice under Art. 4.4 take into account that the third-party notice will only be issued at a point in time when the arbitral tribunal has already (partially) been constituted and, consequently, a participation of the third-party notice recipient in the constitution of the arbitral tribunal is no longer possible or only possible to a limited extent. The power to decide on the admission of the third-party notice pursuant to Art. 4.4 lies with the arbitral tribunal. Thus, if the arbitral tribunal is not yet fully constituted at the time a third-party notice is issued pursuant to Art. 4.4, the parties involved in the proceedings shall only learn whether the third-party notice will be admitted after the constitution of the arbitral tribunal. In its discretionary decision, the arbitral tribunal shall take into account the interests of all parties and all third-party notice recipients. The arbitral tribunal will not admit a third-party notice if it gives rise to grounds for the challenge of an arbitrator.

Article 5 Follow-on Third-Party Notice by the Third-Party Notice Recipient

35 Art. 5 regulates a third-party notice recipient's follow-on third-party notice. In accordance with Sect. 72 para. 3 ZPO, the third-party notice recipient may issue a third-party notice to an additional, "follow-on" third party and establish the Effects of a Third-Party Notice in a potential Subsequent Dispute between them. The third-party notice recipient issuing the follow-on third-party notice is defined in Art. 5.1 (i) as the "Follow-on Issuer", the follow-on third-party notice recipient as the "Follow-on Third Party".

36 Pursuant to Art. 5.1, follow-on third-party notices are only admissible under specific requirements. First, the requirements of Art. 2 (paras. 24 et seqq.) must be complied with between the Follow-on Issuer and the Follow-on Third Party (Art. 5.1 (i)). In addition, the Follow-on Third Party and the parties to the arbitration must agree to the follow-on third-party notice (Art. 5.1 (ii)). This is mainly to protect the parties from having the arbitration overloaded

with Follow-on Third Parties without the parties' involvement. In addition, the requirements of Art. 4.4 (para. 34) must be complied with (Art. 5.1 (iii)), *i.e.*, admission of the follow-on third-party notice by the arbitral tribunal. This is to take the fact into account that the Follow-on Third Party, as clarified in Art. 5.1 sentence 2, is not involved in the constitution of the arbitral tribunal to avoid a delay of the constitution process.

- 37 Art. 5.2 stipulates the specific features of a follow-on third-party notice in comparison to a third-party notice issued by the parties to the arbitration. The effects of the follow-on third-party notice are limited to the relationship between the Follow-on Issuer and the Follow-on Third Party. If the follow-on third-party notice is deemed to be withdrawn pursuant to Art. 7.4, or Art. 8.4 in conjunction with Art. 7.4, these effects cease with the transmission of the notice of withdrawal to the DIS (paras. 49 et seq. and 55). To avoid complex issues regarding the recovery of the costs of the follow-on third-party notice, the DIS-TPNR provide that the Follow-on Third Party has to bear its own costs. As a consequence of a Follow-on Third Party having to bear its own costs, unlike in the scenario of a third-party notice issued by the parties to the arbitration in accordance with Art. 13.5 (paras. 72 et seqq.), the arbitral tribunal has no discretion in the decision on costs in this respect. The parties are, however, free to agree on deviating arrangements in individual cases.
- 38 Pursuant to Art 5.3 sentence 1, apart from the special provisions of Art. 5.2, the rules of the DIS-TPNR for third-party notices by the parties to the arbitration, including Art. 15 (confidentiality, para. 78), apply, *mutatis mutandis*, to the follow-on third-party notice. This ensures that the regular third-party notice and the follow-on third-party notice are as synchronised as possible.

Article 6 Transmission of the Statement of Third-Party Notice, Intervention of a Third-Party Notice Recipient

- 39 Art. 6 stipulates the means of transmission of the Statement of Third-Party Notice and the right of the third-party notice recipient to intervene in the arbitration.
- 40 Art. 6.1 deviates from Sect. 73 sentence 2 ZPO to the extent that the DIS is responsible for the transmission of the Statement of Third-Party Notice. In accordance with the Rules (Art. 5.5 of the Rules), the DIS may withhold the transmission if the Statement of Third-Party Notice does not comply with the requirements of Arts. 3.1 and 3.2 or if the Main Party does not pay the Administrative Fees for the third-party notice in due time in accordance with Art. 13.1. This provides the DIS with a means of ensuring that the DIS-TPNR are complied with.
- 41 Deviating from the provisions of the ZPO, in addition to the third-party notice (paras. 30 et seqq.), the intervention itself is limited as well to enable the third-party notice recipient to participate in the constitution of the arbitral tribunal, on the one hand, and not to cause too much of a delay of the constitution of the arbitral tribunal on the other hand. Pursuant to Art. 6.2 sentence 1, the third-party notice recipient is given 21 days following the date of the transmission of the Statement of Third-Party Notice to join the arbitration as an intervener (defined in the DIS-TRNP as the "Intervention Period"). With regard to the form of the declaration of intervention, Art. 6.2 sentence 2 refers to Art. 3.2 sentence 2 (i) and (ii) (para. 28). Pursuant to Art. 6.2 sentence 3, if the declaration of intervention does not comply with the requirements of Art. 6.2 sentence 2, the DIS may set a time limit for the third-party notice recipient to remedy any deficiencies.
- 42 For the purposes of appointing the arbitral tribunal in accordance with Arts. 7 (paras. 45 et seqq.) and 8 (paras. 51 et seqq.), the DIS shall determine, in accordance with Art. 6.2 sentence 4, with binding effect *vis-à-vis* the parties and the third-party notice recipients whether or not the intervention has been validly made, and shall notify the parties and the third-

party notice recipients thereof. This includes the confirmation of the validity of the third-party notice. This is to ensure the enforceability of the award in cases where the arbitral tribunal is constituted with the participation of the third-party notice recipient and where the arbitral tribunal later declares the third-party notice to be invalid pursuant to Art. 10.2 (para. 59) or where a state court deciding on the setting aside of the award determines the validity of the third-party notice differently. If a party or a third-party notice recipient that has intervened in the arbitration (defined in the DIS-TPNR as the “Intervener”) disputes the validity of the intervention prior to the determination pursuant to sentence 4 within the time limit stipulated in Art. 10.1 sentence 1 (para. 57), the Arbitration Council shall determine whether or not the intervention has been validly made (Art. 6.2 sentence 5). Apart from this case, the arbitral tribunal, and not the DIS, is responsible for deciding on the validity of the third-party notice pursuant to Art. 10 (paras. 57 et seqq.).

- 43 Art. 6.3 stipulates the consequences of a third-party notice recipient not intervening at all or not in due time. In accordance with Sect. 74 para. 2 ZPO, the main consequence in either case is that the arbitration initially continues without the third-party notice recipient. Pursuant to Art. 6.3 sentence 2, the third-party notice recipient may still intervene in the arbitration after the Intervention Period has expired. The Intervener will then, however, not be involved in the constitution of the arbitral tribunal. Therefore, in addition to the requirements of Art. 6.2 sentences 2 and 3 (paras. 41 et seq.), the Intervener must also declare that it does not raise objections to the composition of the arbitral tribunal.
- 44 Similar to Sect. 74 para. 1, Sect. 67 sentence 1 ZPO, Art. 6.4 sentences 1 and 2 stipulate the consequences of the intervention. To ensure an autonomous right of the Intervener to participate in the constitution of the arbitral tribunal, the Intervener's obligation not to contradict declarations and actions of the Main Party as stipulated in sentence 2 shall not apply to the constitution of the arbitral tribunal pursuant to sentence 3.

Article 7 Sole Arbitrator

- 45 Art. 7 determines the procedure for the appointment of a sole arbitrator in the case of a third-party notice under the DIS-TPNR.
- 46 In accordance with Art. 11 of the Rules, the parties and Interveners may jointly nominate a sole arbitrator pursuant to Art. 7.1. To ensure the equal participation of all parties and Interveners, the time limit for the appointment of 21 days does not commence until the transmission of the Request to all Respondents and of the Statements of Third-Party Notice to all third-party notice recipients to whom a third-party notice has been issued in accordance with Arts. 4.1 (para. 31) or 4.2 (para. 32) and the latter have declared their intervention in time. In addition, all binding determinations by the DIS within the meaning of Art. 6.2 sentence 4 (para. 42) must have been made.
- 47 To limit any delay of the constitution of the arbitral tribunal, the constitution process is not paused with regard to a potential third-party notice to be issued pursuant to the requirements of Art. 4.3 (para. 33). A third-party notice pursuant to Art. 4.3 is thus admissible only to the extent that no arbitrator has been appointed. Only if the arbitrator has not yet been appointed, the DIS shall ensure, pursuant to Art. 7.2, that the third-party notice recipient is given equal opportunity to participate in the appointment of the sole arbitrator.
- 48 In accordance with Art. 11 of the Rules, the Appointing Committee shall select and appoint the sole arbitrator pursuant to Art. 7.3 if the parties and the Interveners do not agree upon a sole arbitrator within the time limits in Arts. 7.1 and 7.2. To ensure equal treatment of the Interveners and the parties in this respect, Art. 11 sentence 3 of the Rules shall apply, *mutatis mutandis*, to the Intervener.

- 49 A Main Party may wish to prevent the selection of the sole arbitrator by the Appointing Committee as a consequence of a failed agreement with an Intervener that has intervened in the arbitration upon the Main Party's third-party notice. Accordingly, Art. 7.4 provides the Main Party the right to withdraw from the third-party notice by way of a notice of withdrawal to the DIS. As a consequence of such a notice of withdrawal, the respective Intervener is released from the arbitration and any follow-on third-party notice issued by the Intervener is also deemed to be withdrawn. At the same time, the Main Party's autonomous right of nominating an arbitrator remains unaffected as the time limits for the nomination stipulated in in Arts. 7.1 and 7.2 recommence.
- 50 Pursuant to Art. 7.4 sentence 3, the effects of Art. 11 (paras. 63 et seqq.) shall cease with respect to the Intervener so released as of the date of transmission of the notice of withdrawal to the DIS. For the suspension of the limitation period pursuant to Art. 11.4, this means that, in accordance with Art. 11.4 sentence 3 (which is based on Sect. 204 para. 2 sentence 1 of the German Civil Code, "BGB"), the suspension ends six months following the date of the notice of withdrawal (para. 69).

Article 8 Three-Member Arbitral Tribunal

- 51 Art. 8 determines the procedure for the constitution of the arbitral tribunal if the arbitral tribunal is comprised of three arbitrators. It is based on the mechanism set out in Art. 20.3 of the Rules. The provision largely corresponds with the procedure for the appointment of a sole arbitrator set out in Art. 7 (paras. 45 et seqq.).
- 52 Following Art. 8.1 of the DIS-CDR, Art. 8.1 provides that a nomination of an arbitrator in the Request is deemed to be a mere proposal by the Claimant. This is because pursuant to Art. 8.2, after a third-party notice recipient has intervened in the arbitration on the Claimant's side, both the Claimant and the Intervener shall agree on the nomination of the arbitrator for the Claimant's side. In this case, the Claimant can thus no longer unilaterally nominate an arbitrator. Therefore, the Claimant is not obliged to nominate an arbitrator already in its Request, as is provided for in Art. 5.2 (vii) of the Rules. If the Claimant nevertheless nominates an arbitrator, this nomination is deemed to be a mere proposal to the third-party notice recipient and/or the Appointing Committee.
- 53 According to Art. 8.2, the parties and the Interveners on the Claimant's side as well as the parties and the Interveners on the Respondent's side shall each jointly agree on and nominate a co-arbitrator to the DIS. In order to ensure equal participation of the Interveners in the nomination process, the time limit for the nomination shall, again, not commence until the transmission of all binding determinations pursuant to Art. 6.2 sentence 4 (para. 42) with respect to those third-party notice recipients to whom a third-party notice has been issued pursuant to Arts. 4.1 or 4.2 (paras. 31 et seqq.). The reference to Art. 7.2 in Art. 8.2 sentence 2 ensures that third-party notices issued pursuant to Art. 4.3 are dealt with in the same way as in the case of a sole arbitrator (para. 33).
- 54 The alternative selection and appointment of arbitrators by the Appointing Committee is provided for in Art. 8.3. In order to ensure equal treatment of the Interveners and the parties in this regard as well, Arts. 12.2 and 12.3 of the Rules shall apply accordingly to the nomination and appointment of the president of the arbitral tribunal, with the provision that Interveners shall be treated as parties.
- 55 The provision of Art. 8.4, which refers to Art. 7.4, ensures that the Main Party may withdraw from a third-party notice also in the case of an arbitral tribunal of three arbitrators in order to avoid a substitute appointment by the Appointing Committee (paras. 49 et seq.).

Article 9 Impartiality and Independence of Arbitrators and Experts Appointed by the Arbitral Tribunal

56 The Intervener is not a party. Art. 9 provides that, for the purpose of applying Arts. 9 (Impartiality and Independence, Duties of Disclosure), 13.3 (Objection to the Appointment of an Arbitrator), 15 (Challenge of an Arbitrator) and 28.3 of the Rules (consultation with the parties before the appointment of an Expert by the arbitral tribunal), Interveners “shall be treated” as parties. This signifies that Interveners have an *independent* position in the arbitration regarding the appointment of arbitrators and experts appointed by the arbitral tribunal, and that the restrictions otherwise applicable to Interveners under Art. 6.4 sentence 2 (para. 44) do not apply. This provision supplements the provision for the constitution of the arbitral tribunal in Art. 6.4 sentence 3 (para. 44).

Article 10 Objections to the Validity of the Third-Party Notice

57 Parties as well as third-party notice recipients may raise objections against the validity of the third-party notice within 21 days following the date of the transmission of the declaration of intervention (Art. 10.1 sentence 1). Third-party notice recipients must intervene in the arbitration if they wish to raise objections. Art. 10.1 sentence 2 clarifies that such intervention may also be made for the sole purpose of raising objections to the validity of the third-party notice.

58 Objections to the validity of the third-party notice may be raised on the grounds that the requirements for a third-party notice of Art. 2 (admissibility, paras. 24 et seq.) are not met or that form requirements (Art. 3, paras. 26 et seqq.) or time limits (Art. 4, paras. 30 et seqq.) for the third-party notice were not complied with. Pursuant to Art. 10.1 sentence 3, the arbitral tribunal shall decide on the validity of the third-party notice by way of an order (for this form of decision, cf. Art. 42.2 of the Rules).

59 If the arbitral tribunal determines the invalidity of the third-party notice, the Effects of the Third-Party Notice shall cease with respect to the third-party notice recipient (Art. 10.2 sentence 1). If the third-party notice recipient has intervened in the arbitration, it is released from the arbitration (Art. 10.2 sentence 2). The arbitral tribunal shall then decide by way of an arbitral award between the third-party notice recipient and the Main Party on the third-party notice recipient's claim for reimbursement of costs against the Main Party (Art. 10.2 sentence 3, Art. 13.5). For this purpose, an “Intervention Arbitration Agreement” is concluded between the Main Party and the third-party notice recipient upon the third-party notice recipient's intervention (see Art. 11.3, para. 67).

60 In contrast to Sect. 72 ZPO, the DIS-TPNR are designed to resolve any possible dispute about the validity of a third-party notice as soon as possible, *i.e.* ideally at an early stage of the Initial Arbitration, for the purpose of clarity for the third-party notice recipient as to whether it would be appropriate to support the Main Party in the Initial Arbitration. In this respect, Art. 10 distinguishes between two scenarios:

- (i) Scenario 1 (Art. 10.2): The arbitral tribunal determines the invalidity of the third-party notice. In that case, the Effects of the Third-Party Notice shall cease to exist with respect to the third-party notice recipient. A third-party notice recipient that intervened in the arbitration shall be released from the arbitration. This decision is binding in the Subsequent Dispute and may not be reviewed (Art. 10.2 sentence 4).
- (ii) Scenario 2 (Art. 10.3): The arbitral tribunal confirms the validity of the third-party notice. In this case, the arbitration shall continue with a third-party notice recipient that intervened in the arbitration. The confirmation of the validity of the third-party notice is not binding in the Subsequent Dispute and may be reviewed at that stage.

- 61 The distinction between these scenarios aims at ensuring effective legal protection of the third-party notice recipient in case of objections against the validity of the third-party notice, including the possibility to challenge the arbitral tribunal's decision confirming the validity of the third-party notice by way of an setting aside procedure. Since it is yet unclear whether the third-party notice recipient can challenge the arbitral tribunal's decision confirming the validity of the third-party notice by way of an application for setting aside the award, the arbitral tribunal or the state court of the Subsequent Dispute, respectively, functions as a reviewing instance.
- 62 To prevent a third-party notice recipient from raising objections against the validity of the third-party notice not already in the Initial Arbitration, but only in the Subsequent Dispute for purely tactical reasons, Art. 10.3 sentence 3 stipulates that the third-party notice recipient may only raise objections in the Subsequent Dispute which it had already (unsuccessfully) raised in the Initial Arbitration. An exception to this principle only applies to objections that are based on circumstances which the third-party notice recipient neither knew nor should have known at the end of the time limit provided for in Art. 10.1. In light of the provisions in Art. 10, in order to preserve its rights, the third-party notice recipient is thus forced to intervene in the Initial Arbitration for the purpose of raising its objections and to seek clarification regarding the validity of the third-party notice already in the Initial Arbitration by raising all objections. Generally, it seems unlikely that the arbitral tribunal or the state court of the Subsequent Dispute, respectively, would come to another conclusion regarding the confirmation of jurisdiction than the arbitral tribunal in the Initial Arbitration.

Article 11 Effects of the Third-Party Notice

- 63 Art. 11 determines the Effects of the Third-Party Notice.
- 64 Art. 11.1 sentence 1 stipulates the binding Effect of the Third-Party Notice in a Subsequent Dispute in line with Sect. 68 ZPO. In this regard, the third-party notice recipient will not be heard in the Subsequent Dispute in its relationship to the Main Party with the allegation that the final decision in the dispute was incorrect. The Effects of the Third-Party Notice extend not only to the legal consequences following the dispositive section of the arbitral award, but to whether the arbitral tribunal's decision was correct and thus to the determination and legal assessment of the facts, including any prejudicial legal relationships (together referred to as the "key findings of the arbitral tribunal"). This Effect of the Third-Party Notice (between the Main Party and the third-party notice recipient) thus, in line with Sect. 68 ZPO, exceeds the *res judicata* effect of the award (between the Main Party and the opposing party) to the extent that it is not limited to the dispositive section of the award.
- 65 These Effects of the Third-Party Notice do not occur insofar as the Main Party has conducted the Initial Arbitration inadequately. However, as also stipulated in Sect. 68 ZPO, the third-party notice recipient may only argue that the Main Party conducted the dispute inadequately to the extent that the third-party notice recipient was prevented from raising any challenges or defences in the Initial Arbitration or the Main Party intentionally or with gross negligence failed to raise challenges or defences which it was unaware of in the Initial Arbitration. According to Art. 11.1 sentence 2, in case of an award by consent, the third-party notice only has binding effects if and to the extent that the third-party notice recipient has joined the settlement reached by the parties which forms the basis of the award by consent.
- 66 The Effects of the Third-Party Notice as described in Art. 11.1 arise between the third-party notice recipient and the Main Party by virtue of the agreement on the DIS-TPNR between them. Art. 11.2 additionally establishes the obligation of the third-party notice recipient to recognise the effects of a third-party notice as set out in Art. 11.1 in a Subsequent Dispute.

- 67 Pursuant to Art. 11.3 sentence 1, the Main Party and the third-party notice recipient agree that, upon the intervention of the third-party notice recipient, the jurisdiction of the arbitral tribunal to render decisions pursuant to Art. 10.2 sentence 3 and Art. 13.5 is also established in relation to the third-party notice recipient. This ensures that the arbitral tribunal appointed on the basis of an arbitration agreement between the parties can also award a claim for reimbursement of costs in the relationship between the Main Party and the third-party notice recipient. For this purpose, an arbitration agreement between the latter two is required, which establishes the jurisdiction of the arbitral tribunal for this decision on costs. Art. 11.3 contains this so-called „Intervention Arbitration Agreement“.
- 68 In Art. 11.4, the DIS-TPNR contain a provision on the suspension of the limitation period. An express provision is necessary as the provision under German law regarding the suspension of the limitation period as a consequence of legal action in Sect. 204 BGB mentions a third-party notice in para. 1 no. 6, however, the arbitration law does not expressly regulate the third-party notice. Thus, Sect. 204 para. 1 no. 11 BGB only mentions the commencement of an arbitration as a cause for suspension of the limitation period. Sect. 204 para. 1 no. 6 and no. 11 BGB may be used by analogy to suspend the limitation period through the third-party notice in the arbitration. However, in order to establish the greatest possible legal certainty, the parties and the third-party notice recipient agree that the receipt of the Statement of Third-Party Notice by the DIS that complies with the requirements of Art. 3.1 in at least one of the two forms for transmission pursuant to Art. 3.2 suspends the limitation period with respect to the third-party notice recipient (Art. 11.4 sentence 1).
- 69 The time when the suspension commences, *i.e.*, the receipt by the DIS, corresponds to that of the Request under German law (Sect. 204 para. 1 no. 11 BGB, Sect. 1044 ZPO in conjunction with Art. 6.1 of the Rules). To ensure that the suspension is maintained even if the arbitral tribunal determines the invalidity of the third-party notice (Art. 10.2, cf. para. 59), a third-party notice transmitted to the third-party notice recipient in accordance with Art. 6.1 shall be deemed valid pursuant to Art. 11.4 sentence 2 until proof of the opposite. Pursuant to Art. 11.4 sentence 3 (*ii*), this decision is followed by an additional six-month suspension period as provided for in Sect. 204 para. 2 BGB, so the Main Party has sufficient time to otherwise suspend the limitation period. According to Art. 11.4 sentence 3 (*i*) and (*iii*), this additional six-month suspension period also applies to the withdrawal of the third-party notice (Arts. 7.4, 8.4, cf. paras. 49, 54) and upon termination of the arbitration, in case the suspension of the limitation period has not already occurred. The additional suspension period shall commence at the respective time specified in Art. 11.4 sentence 3 (notice of withdrawal to the DIS, determination of invalidity of the third-party notice by the arbitral tribunal, termination of the arbitration), *i.e.*, not only upon transmission of these declarations.
- 70 If the Main Party does not comply with the formal requirements and the requirements for the advance on costs causing the third-party notice to be deemed not to have been issued pursuant to Art. 3.3, Art. 13.1 sentence 3 or Art. 13.2 sentence 3, the suspension is deemed not to have occurred *ab initio* (Art. 11.4 sentence 4), with the result that there is no additional suspension period. This protects the third-party notice recipient from the Main Party misusing the third-party notice as means of suspension.

Article 12 Transmission of the Award

- 71 Art. 12 sentence 1 provides for the transmission of the award to the third-party notice recipients and thereby ensures that each third-party notice recipient receives an original of the signed award. This also triggers any time limits for the third-party notice recipient to file remedies against the award. The three-month time limit for the application for setting aside awards rendered in Germany under Sect. 1059 ZPO, which according to the prevailing opinion may

also be filed by the Intervener (*i.e.*, the third-party notice recipient who intervenes in the arbitration), begins with the receipt of the award (Sect. 1059 para. 3 ZPO). Pursuant to Art. 12 sentence 2, the DIS shall transmit the originals of the signed award to the third-party notice recipients only after all Deposits and Administrative Fees of the DIS have been paid in full, *i.e.*, all cost and fee obligations of all parties involved in the proceedings, including those arising from the third-party notice.

Article 13 Costs

- 72 Art. 13 governs the allocation of costs in arbitration where a third-party notice is issued. The provision ensures that the third-party notice recipient is not burdened with the costs of the opposing party and that the opposing party is not burdened with the costs of the third-party notice recipient.
- 73 The Administrative Fees of the DIS caused by the third-party notice shall be paid and borne solely by the Main Party (Art. 13.1 sentence 1). The Main Party will insofar not be reimbursed by the opposing party or by the third-party notice recipient. This is appropriate since the third-party notice as such essentially serves the interests of the Main Party. The Administrative Fees of the DIS generated by the third-party notice shall accrue even if the third-party notice is deemed not to have been issued pursuant to Art. 3.3 sentence 2 (para. 29), Art. 13.1 sentence 3 or Art. 13.2 sentence 3 (para. 73). This is because administrative efforts have also occurred in this case. For the purpose of calculating the Administrative Fees of the DIS, a third-party notice recipient is to be treated as a party under Sect. 3.4 of the Schedule of Costs (Art. 13.1 sentence 2). This takes into account that each third-party notice causes an effort for the DIS Secretariat. If the Administrative Fees caused by the third-party notice are not paid within a time limit set by the DIS, the third-party notice shall be deemed not to have been issued (Art. 13.1 sentence 3). Consequently, the suspension of the limitation period is deemed not to have occurred from the beginning with respect to the third-party notice recipient (Art. 11.4 sentence 4, para. 70).
- 74 The share of the initial deposit and the Deposit for fees and expenses of the arbitrators resulting from the third-party notice shall initially be paid by the Main Party (Art. 13.2 sentence 1). A third-party notice recipient is only considered as an additional party within the meaning of Sect. 2.4 of the Schedule of Costs if it has intervened in the arbitration (Art. 13.2 sentence 2), as it only causes additional effort for the arbitral tribunal from such moment onwards. The arbitral tribunal shall decide upon and distribute the share of the initial deposit and Deposit for the arbitrators' fees and expenses resulting from the third-party notice between the Main Party and the Intervener in accordance with Arts. 32 and 33 of the Rules and Art. 10.2 (Art. 13.5 sentence 1), so any opposing party is not burdened with these costs. This seems appropriate since the intervention does not serve the opposing party and any resulting cost risks could otherwise be a reason not to agree to the DIS-TPNR (a consideration that is, due to the lack of, not relevant for the third-party notice in state court proceedings). The arbitral tribunal may either include the allocation of costs in the final award, in which case the Intervener must be included in the final award, or in a separate award between the Main Party and the Intervener. If initial deposit and Deposit under sentence 1 are not paid within a time limit set by the DIS, the third-party notice is deemed not to have been issued (Art. 13.2 sentence 3).
- 75 A third-party notice recipient that does not intervene in the arbitration or who withdraws from the arbitration pursuant to Art. 7.4 or Art. 8.4 in conjunction with Art. 7.4 shall bear its own costs and expenses within the meaning of Art. 32 (*iii*) of the Rules (Art. 13.3). If the third-party notice recipient intervenes in the arbitration, the arbitral tribunal shall also decide on the costs and expenses of the Intervener by way of an award between the Main Party and the Intervener in

accordance with Arts. 32 and 33 of the Rules (Art. 13.5 sentence 1), so the opposing party is not burdened with these costs. Beyond this, the Intervener is not obliged to reimburse any costs of the arbitration within the meaning of Art. 32 of the Rules (Art. 13.5 sentence 2). This ensures that the Intervener does not have to bear any costs and expenses of the opposing party.

- 76 The costs and expenses of the opposing party, as well as those of the Main Party, incurred by the parties as a result of the Intervention are costs of the arbitration (Art. 13.4). The arbitral tribunal shall decide on the allocation of these costs between the Main Party and the opposing party in accordance with Arts. 32 and 33 of the Rules. This also applies to fees and expenses of any experts appointed by the arbitral tribunal on the Intervener's Submission (Art. 13.4).

Article 14 Transmission of Documents, Time Limits

- 77 Art. 14 stipulates that the provisions on the transmission of documents and time limits in Art. 4 of the Rules apply, *mutatis mutandis*, to third-party notice recipients (Art. 14.1) and that the DIS may extend the time limits provided for in the DIS-TPNR at its discretion (Art. 14.2).

Article 15 Confidentiality

- 78 Art. 15 extends the parties' obligation to keep the arbitration confidential to the third-party notice recipient. Confidentiality, therefore, applies in relation between all parties and all third-party notice recipients, including any Follow-on Third Parties (Art. 5, paras. 35 et seqq.), to the extent described in Art. 44 of the Rules. This obligation thus does not only apply to the third-party notice recipient upon intervening in the arbitration, but already upon receipt of the Statement of Third-Party Notice.