

Third-Party Participation in International Arbitration

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available to the main party, it remains bound by the main party's will.⁶² § 67 ZPO provides that if the main party objects to declarations or conduct of the intervener, the intervener cannot proceed. Accordingly, the intervener generally cannot seek legal protection in its own interest, its role is limited to assisting the main party.⁶³ In exchange, the intervener is generally not bound in subsequent proceedings by findings that were the result of the procedural restrictions in the original proceedings.⁶⁴

As a general rule, and though the intervener acts in its own name and on the basis of its own (procedural) right, the appeal is always deemed to be an appeal for the main party.⁶⁵ The intervener thereby assumes the procedural role of an appellant, while the main party remains the principal party to the appellate proceedings.⁶⁶ Where both the intervener and the main party lodge an appeal, this constitutes one single remedy.⁶⁷ This so-called unity principle has several consequences, like extensions of deadlines granted to the intervener also extend to main party, and *vice versa*.⁶⁸ The intervener may only lodge an appeal in its own name where the decision directly affects its personal rights, for instance, where the intervener is ordered to bear costs, its intervention is rejected or its participation rights under § 71(3) ZPO (in particular the right to be heard) are violated.⁶⁹ Beyond such exceptional circumstances, the intervener's procedural autonomy remains tightly constrained.

Where the third-party notice recipient has *not* joined the proceedings as an intervener, the same binding effect applies nevertheless (§ 74(2) and (3) ZPO). As long as the third party is not formally involved in the original proceedings, it has no right to appeal,⁷⁰ and may only challenge the admissibility or effectiveness of the notice in the subsequent proceedings.⁷¹ However, the third-party notice recipient may intervene for the first time in the second instance (§ 66(2) ZPO), e.g. together with filing an appeal.⁷²

2. Right of third-party notice recipient to request setting aside in arbitration

Where the place of arbitration is in Germany, § 1059 ZPO allows those burdened by the award to seek the setting aside of the award.⁷³ This provision mirrors Article V of

⁶² BGH 18.1.2022 – VI ZB 36/21, BeckRS 2022, 1307 mn. 7; Wieczorek/Schütze/Mansel ZPO § 67 mn. 47; MüKo ZPO/Schultes ZPO § 67 mn. 6; Musielak/Voit/Weth, § 67 mn. 7; Vorwerk/Wolf (eds), BeckOK ZPO/von Selle ZPO § 67 mn. 11.

⁶³ BGH 16.1.1997 – I ZR 208/94, NJW 1997, 2385 (2386); BGH 18.1.2022 – VI ZB 36/21, BeckRS 2022, 1307 mn. 7: 'Daraus folgt, dass der einfache Streithelfer keinen Rechtsschutz im eigenen Interesse verlangen kann; er unterstützt lediglich die Hauptpartei, der er beigetreten ist. Das Rechtsmittel eines einfachen Streithelfers ist daher, auch wenn er dabei in eigenem Namen und kraft eigenen (prozessualen) Rechts neben der Hauptpartei handelt, stets ein Rechtsmittel für die Hauptpartei'; Kern/Diehm/Chasklowicz ZPO § 67 mn. 11.

⁶⁴ BGH 19.11.2020 – I ZR 110/19, NJW 2021, 1242 mn. 55; Zöller/Althammer ZPO § 68 mn. 11.

⁶⁵ BGH 18.1.2022 – VI ZB 36/21, BeckRS 2022, 1307 mn. 7; Musielak/Voit/Weth ZPO § 67 mn. 4.

⁶⁶ Musielak/Voit/Weth ZPO § 67 mn. 4.

⁶⁷ Kern/Diehm/Chasklowicz ZPO § 67 mn. 11.

⁶⁸ Wieczorek/Schütze/Mansel ZPO § 67 mn. 53.

⁶⁹ OLG Oldenburg 8.7.1994 – 8 W 51/94, NJW-RR 1995, 829 et seq.; OLG Hamm 16.7.2018 – I-8 U 119/17, BeckRS 2018, 18367 mn. 25; Wieczorek/Schütze/Mansel ZPO § 67 mn. 52; Zöller/Althammer ZPO § 67 mn. 10.

⁷⁰ MüKo ZPO/Schultes ZPO § 74 mn. 5; Musielak/Voit/Weth ZPO § 74 mn. 3; BeckOK ZPO/von Selle ZPO § 74 mn. 6.

⁷¹ Musielak/Voit/Weth ZPO § 74 mn. 3; BeckOK ZPO/von Selle ZPO § 74 mn. 9.

⁷² cf. BGH 10.3.1994 – IX ZR 152/93, NJW 1994, 1537.

⁷³ BGH 26.10.2023 – I ZB 14/23, SchiedsVZ 2024, 254 mn. 13 et seq.: 'Zulässigkeit eines Aufhebungsantrags nach § 1059 Abs. 3 ZPO [setzt] eine Beschwerde des Antragstellers voraus [...]. Beim Erfordernis der Beschwerde handelt es sich um eine besondere Ausprägung des Rechtsschutzbedürfnisses für das

the New York Convention. It has yet to be determined by German courts under what circumstances a notified third party under the DIS-TPNR may request the setting aside of the award rendered in the initial arbitration. Two scenarios are to be distinguished, namely where the third-party notice recipient joins (→ mn. 44) and does not join (→ mn. 49) the arbitration proceedings:

- 44 **a) The joining third-party notice recipient.** Whether or not the intervener has any rights in proceedings to set aside the award is to be determined based upon §§ 1059 et seq. ZPO. Guidance on the interpretation of these provisions may be drawn from case law of the Higher Regional Courts of Stuttgart and Frankfurt a. M.⁷⁴ The Higher Regional Court of Frankfurt a. M. emphasised that an intervener which participated in the arbitration with the consent of the parties and of the tribunal 'is also entitled to independently seek annulment of the award, even if the main party signals that it does not wish to do so itself.'⁷⁵ The Higher Regional Court of Stuttgart held that an intervener in the arbitration may seek annulment under § 1059 ZPO insofar as the binding legal effect of the award impacts its legal position.⁷⁶ At the same time, both decisions illustrate the limits of review under § 1059 (2) ZPO, which limits requests to set aside to specific procedural defects and precludes a substantive re-examination of the merits (prohibition of the *révision au fond*).⁷⁷
- 45 While this case law was rendered before the adoption of the DIS-TPNR, it may be read as to indicate a willingness of German courts to grant the intervener in DIS-TPNR proceedings standing to request to set aside the award rendered in the initial proceedings under certain conditions.⁷⁸ Recent jurisprudence of the Bavarian Higher Court even goes one step further, holding that an intervener in the arbitration who does not participate in the annulment proceedings is to be involved as per § 62(2) ZPO by analogy.⁷⁹ At least on the basis of this pre and post DIS-TPNR jurisprudence, the

Rechtsbehelfsverfahren'; BeckOK ZPO/Wilske/Markert ZPO § 1059 mn. 17; MüKo ZPO/Münch ZPO § 1059 mn. 66.

⁷⁴ OLG Stuttgart 16.6.2002 – 1 Sch 8/02, SchiedsVZ 2003, 84; OLG Frankfurt a.M. 17.7.2002 – 23 W 53/02, NJW-RR 2003, 498.

⁷⁵ OLG Frankfurt a.M. 17.7.2002 – 23 W 53/02, NJW-RR 2003, 498 (500): 'Die Parteien und das Schiedsgericht, die das Schiedsgerichtsverfahren weitgehend selbst bestimmen können (§ 1042 ZPO), haben die Ast. einvernehmlich als Nebenintervenientin der Ag. zu 2 zugelassen. In dieser Eigenschaft steht ihr aber auch die Befugnis zu, selbstständig gegen den Schiedsspruch Rechtsmittel einzulegen, auch wenn die Hauptpartei signalisiert, dass sie selbst dies nicht tun will'. In the case at hand, the main party had not waived its right to set aside the award and, as a result, the intervenor's request was not considered to be in opposition of the main party's conduct, see OLG Stuttgart 16.6.2002 – 1 Sch 8/02, SchiedsVZ 2003, 84; OLG Frankfurt a.M. 17.7.2002 – 23 W 53/02, NJW-RR 2003, 498.

⁷⁶ OLG Stuttgart 16.6.2002 – 1 Sch 8/02, SchiedsVZ 2003, 84 (86): 'Die Nebenintervention des Ast. im Schiedsgerichtsverfahren war zulässig, weil Schiedsgericht und Schiedsverfahrensparteien dem, wie dem Protokoll über die Schiedsverhandlung zu entnehmen ist, jedenfalls stillschweigend zugestimmt haben [...]. Der Ast. hat auch i.S.v. § 66 Abs. 1 ZPO ein rechtliches Interesse daran, dass in dem zwischen der Ag. und dem Schiedsbeklagten anhängigen Schiedsverfahren eine Partei, nämlich der Schiedsbeklagte, obsiegt. Ein rechtliches Interesse am Obsiegen einer Partei hat jemand dann, wenn die Entscheidung des Rechtsstreits mittelbar oder unmittelbar auf seine privatrechtlichen Verhältnisse rechtlich günstig oder ungünstig einwirkt [...]. Ein solches Interesse kann aus der zu Gunsten des Ast. resultierenden Reflexwirkung gemäß § 3 Ziff. 4c der Spielordnung des Ligaverbandes abgeleitet werden, dass – wenn der Ag. eine Lizenz für die 2. Bundesliga für die kommende Saison nichterteilt würde – der Ast. voraussichtlich an der 2. Liga teilnahme. Der Ast. ist deshalb auch durch die Wirkungen des Schiedsspruchs beschwert und kann für den Schiedsbeklagten Aufhebungsantrag stellen.'

⁷⁷ OLG Frankfurt a.M. 17.7.2002 – 23 W 53/02, NJW-RR 2003, 498 (500): 'Gem. § 1059 II ZPO kommt aber eine Aufhebung des Schiedsspruchs nur unter den dort genannten eingeschränkten Voraussetzungen in Betracht'; cf. also OLG Stuttgart 16.6.2002 – 1 Sch 8/02, SchiedsVZ 2003, 84 (88) for instances of § 1059(2) ZPO by analogy.

⁷⁸ cf. Pörnbacher/Reschke, BB 2024, 1667 (1671); Scherpf/Politis/Hermes, J. Int. Arb. 2025, 285 (301 et seq.).

⁷⁹ BayObLG 7.5.2025 – 101 Sch 139/24e.

joining third-party notice recipient in DIS-TPNR proceedings may request the setting aside of the award under § 1059 ZPO within the scope of the grounds for setting aside mentioned in § 1059(2) ZPO.

As in state court litigation, and although the intervener acts in its own name and based on its own (procedural) right, the request for setting aside is deemed to be a request for the main party. As a general rule, it is thus the main party which needs to be burdened by the award (namely by its ruling, not by a possible ground for annulment)⁸⁰ to allow the intervener to request the setting-aside, not the intervener itself.⁸¹ This will be the usual case in most setting-aside proceedings initiated at the request of the third party, because if the main party prevails and is therefore not burdened by the award, the intervener usually has no reason to expect a recourse and therefore seek annulment. However, and again as in state court litigation, the intervener may as well lodge a request for setting aside in its own interest where the award directly affects its rights, for instance, where the intervener is ordered to bear costs. In such cases, it is the intervener which needs to be burdened by the award.

Yet to be seen is whether the German courts will allow the intervener to request a (possibly: partial) setting-aside of the award on the basis that the tribunal wrongfully considered the third-party notice valid.⁸² Let us take as an example the scenario where (i) the third-party notice is invalid as the third-party notice recipient did not validly consent to the DIS-TPNR in its relationship with the main party (such consent is a requirement for the validity of the third-party notice as per Art. 2 DIS-TPNR),⁸³ (ii) the third-party notice recipient objects against the notice on this ground (Art. 10.1 2nd sent. DIS-TPNR), and (iii) the arbitral tribunal nevertheless considers the notice valid. Will the third party under these circumstances be able to successfully request a (possibly: partial) setting aside of the award e.g. on the basis of § 1059(2) No. 1(d) ZPO, as the arbitral proceedings violate an agreement of the parties and as this violation burdens the third-party notice recipient?

At least an initial analysis suggests that there is no easy answer. On the one hand, the arbitral tribunal's decision about the validity of the third-party notice has the form of an order (Art. 10.1 3rd sent. DIS-TPNR), not of an award, and is not binding in the subsequent proceedings (Art. 10.3 2nd sent. DIS-TPNR), which calls into question the recipient's ability to request the setting aside. On the other hand, the third-party notice recipient would then run the risk that the tribunal or court in the follow-on proceedings decides in line with the tribunal in the initial proceedings, and that the recipient therefore depends upon the remedies against the award respectively judgment in the

⁸⁰ MüKo ZPO/Münch ZPO § 1059 mn. 66.

⁸¹ cf. for state court litigation BGH 15.4.2014 – VI ZR 382/12, NJW-RR 2014, 1053 mn. 8: 'Die Revision ist auch nicht deshalb unzulässig, weil die Bekl. zu 2 durch die Abweisung der gegen die Bekl. zu 1 gerichteten Klage nicht selbst beschwert ist. Das Rechtsmittel eines Streithelfers ist nämlich stets ein Rechtsmittel für die Hauptpartei; für die Beurteilung, ob die zu erreichende Rechtsmittelsumme und die erforderliche Beschwer gegeben sind, kommt es allein auf sie an'.

⁸² cf. Hennecke/Menz/Kaehlbrandt/Klich DIS-ERS Art. 10 mn. 4: 'Ungelklärt ist bislang die Frage, inwieweit eine Streitverkündung nach den DIS-ERS Gegenstand einer gerichtlichen Überprüfung im Aufhebungsverfahren gegen den Endschiedsspruch – etwa nach § 1059 ZPO – wäre. Es ist in der deutschen Rechtsprechung anerkannt, dass jedenfalls ein Nebenintervenient einen Aufhebungsantrag nach § 1059 ZPO stellen können soll. Fest steht allerdings, dass die dortige Überprüfung sehr begrenzt ist, und zwar auf die Aufhebungsgründe des § 1059 Abs. 2 ZPO. Eine umfassende Überprüfung der Wirksamkeit einer erfolgten Streitverkündung dürfte von diesem Prüfungsmaßstab nicht umfasst sein.'

⁸³ Art. 2 DIS-TPNR: 'A party believing that, in case of an outcome of the dispute not in its favour, 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, may issue a third-party notice to that third party in accordance with the DIS-TPNR, provided that the third party has agreed to a third-party notice in accordance with the DIS-TPNR.'

subsequent proceedings. Such a state of the law, however, would afford the third-party notice recipient still more comfort than the law governing the litigation world. There, the third-party notice recipient loses its right to challenge the validity of the third-party notice in the subsequent proceedings once it intervenes in the initial proceedings,⁸⁴ which effectively forces the third-party notice recipient to decide between either intervening and accepting to be bound by the decision, or not intervening and being able to object against the validity of the third-party notice.⁸⁵ In the arbitration world, the third-party notice recipient may intervene in the initial proceedings and still object in the subsequent proceedings against the validity of the third-party notice (Art. 10.3 2nd sent. DIS-TPNR) within the boundaries of Art. 10.3 3rd sent. DIS-TPNR. Hereafter, the third-party notice recipient may raise objections against the validity of the third-party notice in the subsequent dispute (i) which it has already raised in the arbitration in which the third-party notice was issued to it or (ii) which are based on circumstances which it neither knew nor had to know at the time it could have intervened. The purpose of this provision is to discuss and clarify the binding force of the third-party notice as much as possible already in the arbitration (and not only in the subsequent proceedings), deviating from the legal regime in litigation.⁸⁶ The DIS-TPNR therefore explicitly acknowledge in Art. 10.1 2nd sent. DIS-TPNR that the third-party notice recipient may intervene in the arbitration for the sole purpose of raising objections to the validity of the third-party notice. Granting instead the intervener via the DIS-TPNR a right to challenge the arbitral award's binding effect already in the setting-aside proceedings was no option, as parties may only establish competency of arbitral tribunals, but not of state courts (save cases where the law explicitly allows party agreements, which is not the case regarding § 1059 ZPO) – this is a task left to the legislator.⁸⁷ *Inter alia* as the future jurisprudence on whether the intervener is entitled under § 1059 ZPO to request the setting aside could not be safely forecasted when drafting the DIS-TPNR, they provide that the arbitral tribunal respectively the court in the subsequent proceedings conducts a full re-examination of the third-party notice's validity.⁸⁸ In these subsequent proceedings, the intervener is a full party and may

⁸⁴ BGH 6.12.2007 – IX ZR 143/06, BGHZ 175, 1, para. 13: 'Tritt der Dritte, dem der Streit verkündet worden ist, dem Streitverkünder bei, so bestimmt sich sein Verhältnis zu den Prozessparteien nach den Grundsätzen über die Nebenintervention (§ 74 Abs. 1 ZPO). Damit gilt auch § 71 Abs. 3 ZPO. Solange nicht die Unzulässigkeit der Intervention rechtskräftig ausgesprochen ist, wird der Interventient im Hauptverfahren zugezogen. Nach Maßgabe des § 74 Abs. 3 ZPO treten die prozessualen Wirkungen des § 68 ZPO ein. Insoweit wird die Zulässigkeit der Streitverkündung im Folgeprozess nicht mehr geprüft [...]. Wird der Beitritt nicht rechtskräftig zurückgewiesen, löst folglich auch eine unzulässige Streitverkündung die Interventionswirkung des § 68 ZPO aus'.

⁸⁵ BGH 22.9.1975 – II ZR 85/74, WM 1976, 56 mn. 9: 'Ferner stünde es der Interventionswirkung nicht entgegen, wenn der Beitritt unter dem Eindruck einer – wie die Revision meint – unwirksamen Streitverkündung erfolgt ist. Allerdings besteht bei jeder Streitverkündung ein gewisser Zugzwang für den Verkündungsgegner, denn er muß sich entscheiden; Entweder tritt er bei, um den Prozeß in seinem Sinn günstig zu beeinflussen – dann muß er im Folgeprozeß die Interventionswirkung hinnehmen, soweit er nicht schlechte Prozeßführung durch die Hauptpartei des Vorprozesses geltend machen kann. Oder er tritt nicht bei und beschränkt sich darauf, im Folgeprozeß die Interventionswirkung anzugreifen, wobei er auch die Zulässigkeit der Streitverkündung beanstanden kann.'

⁸⁶ cf. Hennecke/Menz/Kaehlbrandt/Klich DIS-ERS Art. 10 mn. 3.

⁸⁷ To this end Scherpf/Politis/Hermes, J. Int. Arb. 2025, 285 (301 in fn. 61): 'A somewhat more straightforward approach would probably be to grant the intervening parties a (limited) right to challenge the arbitral award or its binding effect in the sense of setting-aside proceedings before state courts.'

⁸⁸ cf. DIS, 'Supplementary Rules for Third-Party Notices (DIS-TPNR) – Practice Note' (15.3.2024) <<https://www.disarb.org>>, mn. 61: '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.'

challenge the decision on the basis of the usual remedies like appeal (for subsequent litigations) or setting-aside (for subsequent arbitrations).

b) The non-joining third-party notice recipient. Just as the third-party notice 49 recipient may intervene in state court proceedings for the first time at the appeals stage (→ mn. 42), it may intervene for the first time at the stage of the setting-aside proceedings after the initial arbitration proceedings. Thus, also the non-joining third-party notice may request the setting aside of the award under § 1059 ZPO within the scope of the grounds for setting aside mentioned in § 1059(2) ZPO.

In these setting-aside proceedings, however, restrictions may follow from the general 50 principles for interveners in § 67 ZPO. Hereafter, the third party has to accept the legal dispute in whatever situation the dispute is in at the time the third party is acceding to it. Further restrictions may follow from the generally applicable rules under § 1059 ZPO, whereafter the failure to object in the arbitration against a violation of procedural rules may lead to losing that objection in the setting-aside proceedings.⁸⁹ As a result of these restrictions, the third-party notice recipient may run a significant risk if it joins only at the setting-aside stage.

E. Closing

This closes the brief overview and initial thoughts on selected issues of the DIS- 51 TPNR. Their reception suggests that they will be as successful as the DIS-CDR. More than just being a technical innovation, they demonstrate Borris' approach and embody the very spirit of the DIS – pragmatic, precise and rooted in the dialogue between theory and practice. They represent not only an institutional milestone but are a testament to the continued evolution of arbitration in Germany. Congratulations, Christian Borris, to both your idea to use the DIS-CDR as a springboard for the DIS-TPNR, and to your 70th birthday – *ad multos annos!*

⁸⁹ See e.g. MüKo ZPO/Münch ZPO § 1059 mn. 35.

§ 11

ARBITRATING CORPORATE DISPUTES – CONTRACTUAL AND/OR UNILATERAL ARBITRATION CLAUSES

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ichtlicher Verfahren', SchiedsVZ 2009, 143; Vogt/Schmidt, 'Schiedsklauseln in Vereinsstatuten. Bemerkungen zum Bundesgerichtsurteil 5A_1027/2018 vom 22. Juli 2019 und zur Revision des 12. Kapitels des IPRG und des Aktienrechts – Teil I', ASA Bull. 2020, 75; Vorwerk/Wolf (eds), BeckOK ZPO, 58th edn 1.9.2022; Weber, 'Die praxisgerechte inhaltliche Ausgestaltung von Schiedsklauseln in Gesellschaftsverträgen' in Böckstiegel (ed.), Schiedsgerichtsbarkeit in gesellschaftsrechtlichen und erbrechtlichen Angelegenheiten, Cologne 1996, p. 49; Westermann, 'Bestellung und Funktion "weiterer" Stellvertreter des Aufsichtsratsvorsitzenden in mitbestimmten Gesellschaften' in Lutter/Stimpel/Wiedemann (eds), Festschrift für Robert Fischer, Berlin 1979, p. 853; Wolff, 'Beschlussmängelstreitigkeiten im Schiedsverfahren', NJW 2009, 2021; Zöller, Zivilprozessordnung ZPO, 35th edn, Cologne 2024.

A. Introduction

Corporate disputes, i.e. disputes between a company and its shareholders or between the shareholders, arising from the internal structure of the company according to the succinct definition provided by the Jubilee in one of his many contributions, are regularly submitted to arbitration.¹ In practice, many articles of association, shareholder or partnership agreements or other relevant corporate documents contain arbitration clauses.² At the same time, corporate disputes are regularly mentioned as an example for disputes which may – at least in part – either not be arbitrable at all or which raise additional questions whenever they are arbitrated.³ There are two main reasons for that. First, corporate disputes often involve parties that may not have signed an arbitration clause in the traditional sense. Second, awards rendered must often have binding effect for all persons involved in the corporate entity, whether they participated in the arbitration or not. The paradigm example for such problems are disputes about the validity of shareholder resolutions.

At least in Germany, the particular problems associated with shareholder resolution disputes have, to a large extent, been solved at least under German law thanks to Christian Borris.⁴ His brainchild, the DIS Supplementary Rules for Corporate Disputes (DIS Supplementary Rules), now contained in Annex 5 of the DIS Arbitration Rules 2018, have helped to overcome most of the central problems associated with such disputes. They take care of the requirements imposed by the German Federal Court of Justice (BGH) in its *Schiedsfähigkeit II*-decision for the validity of the arbitration agreement under German law, in particular the *erga omnes* effects of the award and the associated question of participation and exclusion of competing proceedings.⁵ Like many brilliant ideas, the DIS Supplementary Rules are based on a very simple principle: replication of the required effects, in particular the *erga omnes* effect of decisions, on a contractual basis. That basis is then not provided by a lengthy arbitration agreement, but a set of rules

¹ Borris, SchiedsVZ 2018, 242 (243); see also for a catalogue of possible disputes: Zöller/Geimer ZPO§ 1066 mn. 4 et seqq.

² While corporations (*Kapitalgesellschaften*) have statutes, i.e. articles of association (*Satzungen*), as well as shareholder agreements (*Gesellschaftsverträge*), partnerships have partner(ship) agreements (*Gesellschaftsverträge/Gesellschafterverträge*).

³ See Gélinas/Bahmany, Arbitrability, pp. 89 et seq.

⁴ The German solution has been copied in many other jurisdictions where the local institutions adopted rules that are at least strongly influenced by the DIS Supplementary Rules; see e.g. Brazil: CAM-CCBC, Corporate Arbitration Rules, Supplementary Rules 02/2023; Russia: The International Commercial Arbitration Court (ICAC), The Rules of Arbitration of Corporate Disputes (Chapter 8 of the Arbitration Rules); Switzerland: Supplemental Swiss Rules for Corporate Law Disputes of the Swiss Arbitration Center of 2023; Austria: Supplemental Rules of Corporate Law Disputes of the Vienna International Arbitration Center (VIAC) of 2025 (Appendix 7 to the VIAC Rules).

⁵ BGH 6.4.2009 – II ZR 255/08, NJW 2009, 1962.

incorporated into the arbitration agreement with a mere reference. Consequently, everything that is required today to submit shareholder resolution disputes to arbitration in Germany is an arbitration agreement binding all shareholders and partners with a reference to the DIS Supplementary Rules.⁶

- 3 While the DIS Supplementary Rules solve most of the specific problems associated with shareholder resolution disputes, at least one of the other central problems of corporate disputes persists: the requirement that all persons forming the corporate entity must have consented to arbitrate their corporate disputes in one way or another. At the time of the creation of the DIS Supplementary Rules, the underlying idea was that the reference to them had to be included in an arbitration agreement fulfilling the requirements of §§ 1029 et seqq. of the German Code of Civil Procedure (ZPO).
- 4 In addition to such a clearly consent-based agreement, the German arbitration law also recognises in § 1066 ZPO ‘arbitral tribunals established lawfully by [...] other dispositions not based on an agreement’. The exact meaning of § 1066 ZPO, in particular what is meant by ‘established lawfully’ and to what extent it covers statutory arbitration clauses contained in articles of association or comparable corporate documents has been hotly debated in German literature. In particular, when the arbitration clause is contained in the articles of association or other documents of a more corporate nature, to which not everyone involved has consented explicitly – or in a contract binding only some of the parties –, a number of additional questions in relation to the actual consent of the parties arise. It is, *inter alia*, highly contentious whether arbitration clauses can be introduced in such corporate documents by majority vote or whether they can bind shareholders, partners or corporate bodies that have not explicitly agreed to them.
- 5 Recent legislative developments in Switzerland may provide a new impetus for the German discussion. By adding a new article Art. 697n to the Swiss Code of Obligations (CO), the Swiss legislator has solved many of the problems underlying the German discussion. We hope that the following contribution will find the interest of Christian Borris. Its close connection with the topic of shareholder resolution disputes is evidenced by the complementary adoption of additional rules for such disputes by the Swiss Arbitration Center.⁷

B. Statutory arbitration clauses under the new Swiss legislation

- 6 Following nearly a decade of discussions, the Swiss legislator has, with effect from 1. January 2023 explicitly addressed the problem of statutory arbitration clauses contained in articles of association. Swiss law now explicitly stipulates in Art. 697n CO that the articles of association of companies limited by shares (*Aktiengesellschaften*) may contain a statutory arbitration clause. According to Art. 764(2) and Art. 797a CO, the same applies *mutatis mutandis* to partnerships limited by shares (*Kommanditaktiengesellschaften*) and limited liability companies (*Gesellschaften mit beschränkter Haftung*). The provision does not apply to partnerships, where arbitration clauses still are to be

⁶ See even the application of the DIS Supplementary Rules without an express reference, but mere submission to the DIS Rules: BayObLG 10.10.2022 – 101 SchH 46/22, SchiedsVZ 2023, 100 (105 mn. 56).

⁷ Supplemental Swiss Rules for Corporate Law Disputes (Supplemental Swiss Rules) in force as of 1 January 2023, for an introduction see the official Explanatory Note of the Swiss Arbitration Centre at <https://www.swissarbitration.org/wp-content/uploads/2022/11/Explanatory_Note_EN.pdf> (last accessed: 15.11.2025).