

# Arbitration rules of the court of arbitration for private construction law in Germany

## Section 1: Introductory provisions

### Arbitration agreement

#### § 1 – Scope of application

(1) These arbitration rules apply to disputes which should be decided according to the parties' agreement, whereby any recourse to courts of law is excluded by the court of arbitration for private construction law in Germany in accordance with the provisions of the following arbitration rules.

(2) When the value in dispute exceeds EUR 50,000, regular arbitration proceedings shall be implemented.

(3) The court of arbitration shall implement simplified arbitration proceedings when the value in dispute amounts to up to EUR 50,000. The simplified proceedings differ from the regular proceedings in terms of the number of arbitrators and the fees (§ 2 Para 3 et seq., § 5 Para 1 + 2, § 16 Para 2, § 20 Para 3).

### Validity of the Code of Civil Procedure

(4) German law and the provisions of the Code (*Zivilprozessordnung ZPO*) of Civil Procedure (*ZPO*) apply to the arbitration proceedings unless divergent provisions are made in the following.

(5) Arbitration proceedings held before the court of arbitration for private construction law in Germany are held in German.

### Written notification

#### § 2 – Institution of arbitration proceedings

(1) The party that wants to institute the arbitration proceedings (plaintiff) has to notify the other party (defendant) and the court of arbitration for private construction law in Germany in writing in accordance with § 3.

### Beginning of the arbitration proceedings

(2) The arbitration proceedings begin on the day on which the notification of the institution of arbitration proceedings is obtained by the plaintiff and the court.

### Content of the notification

(3) The notification of the institution of arbitration proceedings must contain the following details:

a) the request to solve the dispute by means of arbitration proceedings;

b) the names and addresses of the parties;

c) a reference to the arbitration agreement asserted;

d) a reference to the contract or the legal relationship from which the dispute results or to which it refers;

e) the general subject matter of the proceedings and the claim, details of the amount of the value in dispute and the statement of claim (§ 253 Code of Civil Procedure)

f) an advance payment amounting to a daily rate in simplified arbitration proceedings or the payment of court fees in due arbitration proceedings.

(4) The court of arbitration for private construction law in Germany must immediately make a declaration upon receipt of its mandate once it has been informed of its appointment. The declaration must be submitted in writing to both parties.

### Written declarations

#### § 3 – Correspondence

(1) All the declarations made by the parties or their authorised agents who are instituting the arbitration proceedings should be communicated against furnishing of a proof of service. The effectiveness of written declarations which are communicated in a different way remains unaffected.

(2) Para 1 does not apply to simplified arbitration proceedings.

### Attorneys of record

#### § 4 – Representation

(1) The representation of the parties by attorneys of record is admissible.

(2) Party representatives not acting as legal representatives of their party must identify themselves with a document of written authority upon request.

### Tripartite court of arbitration

## Paragraph II: Composition of the court of arbitration

#### § 5 – Number of arbitrators

(1) In the simplified arbitration proceedings the dispute is resolved by one arbitrator. Depending on each case the dispute will be dealt with and resolved by a building expert or a lawyer.

(2) In case of due arbitration proceedings the court of arbitration consists of at least three referees: one or two building experts and one or two referees qualified for holding judicial office or an equivalent foreign professional training. HOAI (German schedule of fees for architects and engineers), disputes can, upon application of the parties (regardless of the amount of the value in dispute), be dealt with by one or two arbitrators.

### Impartiality

(3) The court of arbitration does not act as a representative of the parties, but instead observes the office conferred upon it according to the best of its knowledge and belief in an impartial way.

### Co-operation with the Dutch court of arbitration for construction

(4) In disputes within the due arbitration proceedings during which one party is represented which has its place of business or permanent domicile in the Netherlands, one party can, upon application, nominate an arbitrator from Raad van Arbitrage voor de Bouwbedrijven in Nederland.

### Disputes based on HOAI

(5) Disputes which are purely concerned with the schedule of fees for architects can, upon application of the parties (regardless of the amount of the value in dispute), be dealt with by one or two arbitrators.

### Declaration of acceptance

#### § 6 – Appointment of arbitrators

(1) The court of arbitration for private construction law in Germany appoints the arbitrators. These arbitrators are deemed commissioned by both parties.

(2) The presiding arbitrator, the arbitrators and the employees are obliged to observe secrecy.

(3) The court of arbitration for private construction law in Germany must immediately declare its acceptance of the mandate once it has been informed of its appointment. The declaration must be submitted in writing to both parties.

### Paragraph III: Rejection and replacement of arbitrators

*Suspicion of partiality*

#### § 7 – Declaration of the rejection of the office of arbitrator

Each arbitrator is obliged to decline his/her appointment if he/she has a relationship with a party as described in § 41 Code of Civil Procedure or if the preconditions of § 42 Code of Civil Procedure (Suspicion of partiality) are fulfilled; the same applies if an arbitrator is unable to carry out his/her office with immediate effect.

*Preconditions for rejection*

#### § 8 – Rejection of the arbitrator by one party

(1) An arbitrator can be rejected if reasons exist which give rise to justified doubts concerning his/her impartiality and independence.

*Time at which rejection takes place*

(2) The rejection of an arbitrator must take place with immediate effect once the reason is known. If this does not take place despite the fact that the reason for rejection is known, then this is regarded as a waiver of the right of refusal.

(3) The rejection must be informed to the other party and the court of arbitration. The announcement must be made in writing (§ 3) setting forth the reasons.

*Recourse to the court*

#### § 9 – Refusal proceedings

(1) If one party rejects the arbitrator, then he/she must, if the opposing party does not agree to the refusal, bring about the decision with respect to the declaration of refusal by recourse to the competent higher regional court (§ 1037 Para 1 and 3, 1062 Para 1 No. 1 Code of Civil Procedure). The decision must be requested with immediate effect and 14 days following the statement of the other party regarding the refusal at the latest.

*Right of refusal*

(2) If the application is not made within this period of time, then this is regarded as a waiver of the right of refusal. For the refusal of the German court of arbitration § 1032 Code of Civil Procedure applies in combination with § 41, 42, 43 and 44 Para 4 Code of Civil Procedure.

#### § 10 – Replacement of an arbitrator

(1) If an arbitrator is prevented from exercising his/her function due to death or illness, another arbitrator can be appointed by the court of arbitration.

(2) This does not have any further influence on the course of the proceedings.

### Paragraph IV: Arbitration proceedings

#### § 11 – Fundamental procedural principles

(1) The arbitration proceedings are in private.

*Filing of the statement of claim*

(2) As soon as recourse has been made to the court of arbitration for private construction law in Germany, it appoints the arbitrators with immediate effect.

*Expedition principle*

(3) The court of arbitration must ensure that the arbitration proceedings are carried out swiftly. The parties have to submit their means of prosecuting a case and their means of defence completely and as early as is necessary according to the respective stage of proceedings corresponding to a careful conduct of a case aiming at the furtherance of proceedings.

*Passing on of the statement of claim*

(4) The court of arbitration for private construction law in Germany passes the statement of claim on to the defendant with the request that he/she makes a statement within a period of time set by the court whilst citing the judicial evidence and files a due application.

*Date of court hearing*

(5) If the statement of defence is present or the time set for its submission has expired, then the court determines the date of the court hearing. The parties must be summoned to this hearing by means of a registered letter. A period of 14 days must separate the arrival of the summons and the first hearing. In urgent cases the court may curtail the period and summon the parties by telegraph, telex or facsimile.

*Preparation of the court hearing*

(6) The court of arbitration for private construction law in Germany should already prior to the court hearing see to all arrangements which appear necessary to ensure that the lawsuit can be resolved in one hearing if possible.

*No binding arrangement as regards the motions for the admission of evidence*

(7) The court of arbitration is not bound by motions for the admission of evidence the parties' can allow evidence to be taken by one of the three arbitrators as the commissioned arbitrator or refuse the parties' motions to take admission of evidence when and insofar as it deems them irrelevant, unnecessary or an attempt to delay the proceedings.

*Discretion of the court of arbitration*

(8) Otherwise the court of arbitration regulates the proceedings at its discretion. It can make the beginning and continuation of its activities contingent upon the advance payment of the appropriate court fee.

#### § 12 – Place of the hearing

*Place of hearing*

The place of the hearing is the domicile of the court of arbitration for private construction law in Germany; the court of arbitration may decide upon a different location. If a local inspection needs to be made, then it must, if possible, be combined with the date of the hearing.

#### § 13 – Oral proceedings

*Oral proceedings*

(1) As a rule, oral proceedings take place. Written proceedings can be ordered in appropriate cases if the parties declare their consent.

*Preparation in writing and hearing of the parties*

(2) The hearing should be prepared in advance by means of written pleadings. The parties and their representatives must be heard during the hearing.

*Assessment of the parties' behaviour*

(3) If one of the parties informed of the facts of the case does not make any declaration regarding the actual allegations of the opposite party or does not appear despite a due summons to appear without an adequate excuse, then the court of arbitration continues with the proceedings and makes an award based on the findings established up to that point in time.

#### § 14 – Court record

*Court record of oral hearing*

(1) A record of the hearing before the court of arbitration for private construction law in Germany must be kept (either in writing or with sound-recording tape). The parties' applications and their pleadings are to be recorded within this record insofar as they are deemed essential by the court of arbitration and are not already contained in the parties' written pleadings. Minutes must also be recorded concerning the questioning of witnesses and experts and the implementation of local inspections.

*Record kept by commissioned arbitrators*

(2) If individual arbitrators are entrusted with the task of taking evidence, then they have to produce the necessary record.

<i>Obligation of secrecy</i>	<p><b>§ 15 – Obligation of secrecy</b> The arbitrators as well as the experts and other persons called in by the court of arbitration are obliged to observe secrecy regarding the facts which have been revealed as a result of their involvement in the arbitration proceedings.</p>
<i>Deliberation and order</i>	<p><b>§ 16 – Passing of an order as regards the arbitration award</b> (1) Only the arbitrators may be present during the deliberation on the passing of an order regarding the arbitration award. (2) During simplified arbitration proceedings the arbitrator who has been commissioned arbitrates. (3) During due arbitration proceedings the court of arbitration arbitrates upon a majority-vote basis.</p>
<i>Majority vote</i>	
<i>Written form</i>	<p><b>§ 17 – Form and effect of the arbitration award</b> (1) The arbitration award must be formulated in writing. (2) The court of arbitration must publish the reasons for the arbitration award unless the parties have expressly waived this requirement. (3) The arbitration award must be signed by the arbitrators in accordance with § 1054 Para 1 Code of Civil Procedure and must contain the details of the date and the location upon which it was passed and the location of the arbitral proceedings in terms of § 1043 Para 1 Code of Civil Procedure. (4) A copy of the arbitration award verdict must be delivered in due form to each party (§ 1054 Code of Civil Procedure). (5) The arbitration award has the effect of a final and conclusive court judgement (§ 1055 Code of Civil Procedure). (6) The court records compiled will, unless returned to the parties as their property upon application, be preserved by the court of arbitration for five years upon conclusion of the proceedings. (7) It is deemed to be agreed that the local court or regional court is responsible for the delivery of the enforceable official copy of the arbitration award that is competent for the defendant's place of business or, in the event that this is outside of Germany, for the defendant's legal residence. If this is outside of Germany, then the local or regional court competent for the court of arbitration is deemed elected by the parties.</p>
<i>Obligation to file supporting argument</i>	
<i>Signing of the award</i>	<p><b>§ 18 – Agreement or other reasons for the termination of the proceedings</b> (1) If the parties reach an agreement concerning the settlement of the dispute prior to the pronouncement of the award, then the court of arbitration either has to issue an order regarding the termination of arbitration proceedings or, if applied for by both parties and agreed to by the court of arbitration, a record should be taken of the agreement in the form of an arbitration award with a form of wording which has been agreed upon by the parties. In this case the arbitration award is not subject to any substantiation. (2) If it becomes unnecessary or impossible to continue the arbitration proceedings for reasons different than those mentioned in Section (1) before that arbitration award has been issued, then the court of arbitration must inform the parties of its intention to order the termination of proceedings. The court of arbitration is entitled to issue such an order unless one of the parties raises justified objections against this means of proceeding. (3) The court of arbitration communicates copies of the court order signed by the arbitrators concerning the discontinuation of the arbitration proceedings or the arbitration award using an agreed form of wording.</p>
<i>Distribution of the verdict</i>	
<i>Effect of the verdict</i>	<p><b>Paragraph VI: Costs of the arbitration proceedings</b> <b>§ 19 – Determination of costs</b> (1) The court of arbitration determines the costs of the arbitration proceedings.</p>
<i>Preservation of court records</i>	
<i>Delivery of an enforceable official copy</i>	<p><b>§ 20 – Value in dispute and fees</b> (1) A fee of the court of arbitration for a due process of law amounts to 30/10 of the fees in accordance with the German Federal Attorneys' Fees Act (Bundesrechtsanwaltsgebührenordnung BRAGO). In the event of disputes regarding architects' fees, the costs of the fees amount to 13/10 or 20/10 depending on the agreed number of arbitrators if a reduced number of arbitrators was agreed upon in accordance with § 1 (4). (2) Expenses, cost of debt etc. are calculated separately in accordance with the principles of BRAGO or in accordance with the costs actually accrued. (3) In the event of simplified arbitration proceedings it will be settled upon the basis of the time actually spent in accordance with the daily rates that currently apply. The latter can be asked for with the court of arbitration for private construction law in Germany. (4) If in exceptional cases the court of arbitration for private construction law in Germany deems a divergent fee ruling absolutely necessary, then this must be justified in writing by the court of arbitration prior to the first court hearing. (5) If regular proceedings have been instituted, then the following fees are charged by the court: a) 0.5 x fee until presentation of the statement of claim in accordance with § 19 of this contract. b) 1.0 x fee following the filing of the statement of claim in accordance with § 19 of this contract. c) 1.5 x fee following the filing of the statement of defence in accordance with § 19 of this contract. d) 2 x fee following the oral hearing. e) A further fee for the pronouncement of an order to take evidence. f) A further fee for the issuance of an arbitration award which does not accrue if it is an arbitration award that is not justified due to an agreement between the parties in accordance with § 18 Para 1 of this contract. (6) The parties must bear all the necessary costs for the arbitrators as well as the costs which are incurred due to the questioning of witnesses and experts, for requests for opinions and other information. (7) The parties are jointly and severally liable vis-à-vis the court of arbitration for private construction law in Germany. (8) The court of arbitration for private construction law in Germany may request advance payments to cover costs which may be incurred at every stage of the proceedings. (9) Each party is to pay half of the advance payments. If one party does not pay this share, then the court may request the other party to pay the amount in question. If the other party also does not pay this amount, the court terminates the proceedings. If the advance payments for judicial evidence to be obtained are not effected, the provisions of the Code of Civil Procedure shall apply.</p>
<i>Premature agreement between the parties</i>	
<i>Termination of the arbitration</i>	
<i>Communication of the order to discontinue the proceedings</i>	
<i>Divergent fee ruling</i>	
<i>Exceptional cases</i>	
<i>Consent of the parties</i>	
<i>Fees incurred in the event of premature termination</i>	
<i>Necessary expenses</i>	
<i>Liability of the parties</i>	
<i>Advance payments</i>	