

# **GERMAN ARBITRATION LAW**

## **1998**

(Act on the Reform of the Law relating to Arbitral Proceedings)



## GERMAN ARBITRATION LAW 1998\*

Act on the Reform of the Law relating to Arbitral Proceedings

of 22 December 1997  
Bundesgesetzblatt (Federal Law Gazette) 1997 Part I page 3224

The following provisions have entered into force on  
**1 January 1998**

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\* Unofficial translation by the German Institution of Arbitration (DIS) and the German Federal Ministry of Justice.

## **Book Ten of the Code of Civil Procedure<sup>1</sup>**

### **Arbitration Procedure**

#### **Sections 1025 – 1066**

#### **Chapter I General provisions**

##### **Section 1025 Scope of application**

(1) The provisions of this Book apply if the place of arbitration as referred to in section 1043 subs. 1 is situated in Germany.

(2) The provisions of sections 1032, 1033 and 1050 also apply if the place of arbitration is situated outside Germany or has not yet been determined.

(3) If the place of arbitration has not yet been determined, the German courts are competent to perform the court functions specified in sections 1034, 1035, 1037 and 1038 if the respondent or the claimant has his place of business or habitual residence in Germany.

(4) Sections 1061 to 1065 apply to the recognition and enforcement of foreign arbitral awards.

##### **Section 1026 Extent of court intervention**

In matters governed by sections 1025 to 1061, no court shall intervene except where so provided in this Book.

##### **Section 1027 Loss of right to object**

A party who knows that any provision of this Book from which the parties may derogate or any agreed requirement under the arbitral procedure has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, may not raise that objection later.

<sup>1</sup> Completely revised by Article 1, No. 7 of the Act on the Reform of the Law relating to Arbitral Proceedings of 22 December 1997, Bundesgesetzblatt (Federal Law Gazette) 1997 Part I page 3224. The Act entered into force on 1 January 1998.

### **Section 1028 Receipt of written communications in case of unknown whereabouts**

(1) Unless otherwise agreed by the parties, if the whereabouts of a party or of a person entitled to receive communications on his behalf are not known, any written communication shall be deemed to have been received on the day on which it could have been received at the addressee's last-known mailing address, place of business or habitual residence after proper transmission by registered mail/return receipt requested or any other means which provides a record of the attempt to deliver it there.

(2) Subsection 1 does not apply to communications in court proceedings.

#### **Chapter II Arbitration agreement**

##### **Section 1029 Definition**

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of a separate agreement ("separate arbitration agreement") or in the form of a clause in a contract ("arbitration clause").

##### **Section 1030 Arbitrability**

(1) Any claim involving an economic interest ("vermögensrechtlicher Anspruch") can be the subject of an arbitration agreement. An arbitration agreement concerning claims not involving an economic interest shall have legal effect to the extent that the parties are entitled to conclude a settlement on the issue in dispute.

(2) An arbitration agreement relating to disputes on the existence of a lease of residential accommodation within Germany shall be null and void. This does not apply to residential accommodation as specified in section 549 subs. 1 to 3<sup>2</sup> of the Civil Code.

(3) Statutory provisions outside this Book by virtue of which certain disputes may not be submitted to arbitration, or may be submitted to arbitration only under certain conditions, remain unaffected.

<sup>2</sup> Section 1030 subs. 2, sentence 2 was amended by Article 3 of the Act on the Reform of the Rent Law of 19 June 2001, Bundesgesetzblatt (Federal Law Gazette) 2001 Part I, p. 1149, in force as of 1 September 2001.

### **Section 1031**

#### **Form of arbitration agreement**

(1) The arbitration agreement shall be contained either in a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication which provide a record of the agreement.

(2) The form requirement of subsection 1 shall be deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties and - if no objection was raised in good time - the contents of such document are considered to be part of the contract in accordance with common usage.

(3) The reference in a contract complying with the form requirements of subsection 1 or 2 to a document containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

(4) An arbitration agreement is also concluded by the issuance of a bill of lading, if the latter contains an express reference to an arbitration clause in a charter party.

(5) Arbitration agreements to which a consumer<sup>3</sup> is a party must be contained in a document which has been personally signed by the parties. The written form pursuant to subsection 1 may be substituted by electronic form pursuant to section 126 a of the Civil Code ("Bürgerliches Gesetzbuch – BGB")<sup>4</sup>. No agreements other than those referring to the arbitral proceedings may be contained in such a document or electronic document; this shall not apply in the case of a notarial certification.<sup>5</sup>

(6) Any non-compliance with the form requirements is cured by entering into argument on the substance of the dispute in the arbitral proceedings.

<sup>3</sup> A consumer is any natural person who concludes a transaction for a purpose which can be regarded as being outside his trade or self-employed profession ("gewerbliche oder selbständige berufliche Tätigkeit") - section 13 Civil Law Code. Section 13 Civil Law Code was newly introduced by Art. 2 subs. 1 of the Act of 27 June 2000. By the same Act, section 1031 subs. 5, 3<sup>rd</sup> sentence was deleted.

<sup>4</sup> Section 126 a Civil Code ("BGB") [Electronic form]: (1) If the statutory written form is to be substituted by electronic form, the author of the statement must add his name to the statement and append a qualified electronic signature pursuant to the Signature Act. (2) In the case of a contract, the parties must each electronically sign a document identical in wording in the manner prescribed in subsection 1. Section 126 a Civil Code was newly introduced by Art. 1 of the Act of 13 July 2001 (Bundesgesetzblatt Part I, p. 1542). Section 2 Signature Act ("Signaturgesetz – SigG") [Qualified electronic form]: For the purpose of this Act,

1. "electronic signature" means data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication;

2. "advanced electronic signature" means an electronic signature pursuant to No. 1 which a) is uniquely linked to the signatory, b) is capable of identifying the signatory, c) is created using means that the signatory can maintain under his sole control, and d) is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable;

3. "qualified electronic signature" means an electronic signature pursuant to No. 2 which a) is based on a qualified certificate valid at the time of the signature's creation, and b) is created with a secure signature-creation device; ... – Act of 16 May 2001 (Signature Act), Bundesgesetzblatt Part I, p. 876.

<sup>5</sup> Sentence 2 and 3 of section 1031 subs. 5 were amended by Art. 2 of the Act of 14 December 2001 (Electronic Commerce Act), Bundesgesetzblatt Part I, p. 3721.

### **Section 1032**

#### **Arbitration agreement and substantive claim before court**

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if the respondent raises an objection prior to the beginning of the oral hearing on the substance of the dispute, reject the action as inadmissible unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

(2) Prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible.

(3) Where an action or application referred to in subsection 1 or 2 has been brought, arbitral proceedings may nevertheless be commenced or continued, and an arbitral award may be made, while the issue is pending before the court.

### **Section 1033**

#### **Arbitration agreement and interim measures by court**

It is not incompatible with an arbitration agreement for a court to grant, before or during arbitral proceedings, an interim measure of protection relating to the subject-matter of the arbitration upon request of a party.

## **Chapter III**

### **Constitution of arbitral tribunal**

### **Section 1034**

#### **Composition of arbitral tribunal**

(1) The parties are free to determine the number of arbitrators. Failing such determination, the number of arbitrators shall be three.

(2) If the arbitration agreement grants preponderant rights to one party with regard to the composition of the arbitral tribunal which place the other party at a disadvantage, that other party may request the court to appoint the arbitrator or arbitrators in deviation from the nomination made, or from the agreed nomination procedure. The request must be submitted at the latest within two weeks of the party becoming aware of the constitution of the arbitral tribunal. Section 1032 subs. 3 applies mutatis mutandis.

### **Section 1035**

#### **Appointment of arbitrators**

(1) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators.

(2) Unless otherwise agreed by the parties, a party shall be bound by his appointment of an arbitrator as soon as the other party has received notice of the appointment.

(3) Failing an agreement between the parties on the appointment of the arbitrators, a sole arbitrator shall, if the parties are unable to agree on his appointment, be appointed, upon request of a party, by the court. In an arbitration with three arbitrators, each party shall

appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator who shall act as chairman of the arbitral tribunal. If a party fails to appoint the arbitrator within one month of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within one month of their appointment, the appointment shall be made, upon request of a party, by the court.

(4) Where, under an appointment procedure agreed upon by the parties, a party fails to act as required under such procedure, or if the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or a third party fails to perform any function entrusted to it under such procedure, any party may request the court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) The court, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. In the case of a sole or third arbitrator, the court shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

#### **Section 1036** **Challenge of an arbitrator**

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

#### **Section 1037** **Challenge procedure**

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of subsection 3 of this section.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within two weeks after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in section 1036 subs. 2, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of subsection 2 of this section is not successful, the challenging party may request, within one month after having received notice of the decision rejecting the challenge, the court to decide on the challenge; the parties may agree on a different time-limit. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

#### **Section 1038** **Failure or impossibility to act**

(1) If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. If the arbitrator does not withdraw from his office or if the parties cannot agree on the termination, any party may request the court to decide on the termination of the mandate.

(2) If, under subsection 1 of this section or section 1037 subs. 2, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground for withdrawal referred to in subsection 1 of this section or section 1036 subs. 2.

#### **Section 1039** **Appointment of substitute arbitrator**

(1) Where the mandate of an arbitrator terminates under section 1037 or 1038 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(2) The parties are free to agree on another procedure.

### **Chapter IV** **Jurisdiction of arbitral tribunal**

#### **Section 1040** **Competence of arbitral tribunal** **to rule on its jurisdiction**

(1) The arbitral tribunal may rule on its own jurisdiction and in this connection on the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers that the party has justified the delay.

(3) If the arbitral tribunal considers that it has jurisdiction, it rules on a plea referred to in subsection 2 of this section in general by means of a preliminary ruling. In this case, any party may request, within one month after having received written notice of that ruling, the court to decide the matter. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

### **Section 1041** **Interim measures of protection**

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

(2) The court may, at the request of a party, permit enforcement of a measure referred to in subsection 1, unless application for a corresponding interim measure has already been made to a court. It may recast such an order if necessary for the purpose of enforcing the measure.

(3) The court may, upon request, repeal or amend the decision referred to in subsection 2.

(4) If a measure ordered under subsection 1 proves to have been unjustified from the outset, the party who obtained its enforcement is obliged to compensate the other party for damage resulting from the enforcement of such measure or from his providing security in order to avoid enforcement. This claim may be put forward in the pending arbitral proceedings.

## **Chapter V** **Conduct of arbitral proceedings**

### **Section 1042** **General rules of procedure**

(1) The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

(2) Counsel may not be excluded from acting as authorised representatives.

(3) Otherwise, subject to the mandatory provisions of this Book, the parties are free to determine the procedure themselves or by reference to a set of arbitration rules.

(4) Failing an agreement by the parties, and in the absence of provisions in this Book, the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate. The arbitral tribunal is empowered to determine the admissibility of taking evidence, take evidence and assess freely such evidence.

### **Section 1043** **Place of arbitration**

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of subsection 1 of this section, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for an oral hearing, for hearing witnesses, experts or the parties, for consultation among its members or for inspection of property or documents.

### **Section 1044** **Commencement of arbitral proceedings**

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. The request shall state the names of the parties, the subject-matter of the dispute and contain a reference to the arbitration agreement.

### **Section 1045** **Language of proceedings**

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

### **Section 1046** **Statements of claim and defence**

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state his claim and the facts supporting the claim, and the respondent shall state his defence in respect of these particulars. The parties may submit with their statements all documents they consider to be relevant or may add a reference to other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it without sufficient justification.

(3) Subsections 1 and 2 apply mutatis mutandis to counter-claims.

### **Section 1047** **Oral hearings and written proceedings**

(1) Subject to agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of documents and other materials. Unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of taking evidence.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to both parties.

### **Section 1048** **Default of a party**

(1) If the claimant fails to communicate his statement of claim in accordance with section 1046 subs. 1, the arbitral tribunal shall terminate the proceedings.

(2) If the respondent fails to communicate his statement of defence in accordance with section 1046 subs. 1, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations.

(3) If any party fails to appear at an oral hearing or to produce documentary evidence within a set time-limit, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

(4) Any default which has been justified to the tribunal's satisfaction will be disregarded. Apart from that, the parties may agree otherwise on the consequences of default.

### **Section 1049** **Expert appointed by arbitral tribunal**

(1) Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal. It may also require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents or property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Sections 1036 and 1037 subs. 1 and 2 apply mutatis mutandis to an expert appointed by the arbitral tribunal.

### **Section 1050** **Court assistance in taking evidence and other judicial acts**

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a court assistance in taking evidence or performance of other judicial acts which the arbitral tribunal is not empowered to carry out. Unless it regards the application as inadmissible, the court shall execute the request according to its rules on taking evidence or other judicial acts. The arbitrators are entitled to participate in any judicial taking of evidence and to ask questions.

## **Chapter VI** **Making of award and termination of proceedings**

### **Section 1051** **Rules applicable to substance of dispute**

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law of the State with which the subject-matter of the proceedings is most closely connected.

(3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so. The parties may so authorize the arbitral tribunal up to the time of its decision.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

### **Section 1052** **Decision making by panel of arbitrators**

(1) In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members.

(2) If an arbitrator refuses to take part in the vote on a decision, the other arbitrators may take the decision without him, unless otherwise agreed by the parties. The parties shall be given advance notice of the intention to make an award without the arbitrator refusing to participate in the vote. In the case of other decisions, the parties shall subsequent to the decision be informed of the refusal to participate in the vote.

(3) Individual questions of procedure may be decided by a presiding arbitrator alone if so authorized by the parties or all members of the arbitral tribunal.

### **Section 1053 Settlement**

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings. If requested by the parties, it shall record the settlement in the form of an arbitral award on agreed terms, unless the contents are in violation of public policy (ordre public).

(2) An award on agreed terms shall be made in accordance with section 1054 and shall state that it is an award. Such an award has the same effect as any other award on the merits of the case.

(3) If notarial certification is required for a declaration to be effective, it will be substituted, in the case of an arbitral award on agreed terms, by recording the declaration of the parties in the award.

(4) An award on agreed terms may, upon agreement between the parties, also be declared enforceable by a notary whose notarial office is in the district of the court competent for the declaration of enforceability according to section 1062 subs. 1, no. 2. The notary shall refuse the declaration of enforceability, if the requirements of subsection 1, sentence 2 are not complied with.

### **Section 1054 Form and contents of award**

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 1053.

(3) The award shall state its date and the place of arbitration as determined in accordance with section 1043 subs. 1. The award shall be deemed to have been made on that date and at that place.

(4) A copy of the award signed by the arbitrators shall be transmitted to each party.

### **Section 1055 Effect of arbitral award**

The arbitral award has the same effect between the parties as a final and binding court judgment.

### **Section 1056 Termination of proceedings**

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with subsection 2 of this section.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when

1. the claimant:
  - a) fails to state his claim according to section 1046 subs. 1 and section 1048 subs. 4 does not apply, or
  - b) withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute, or

2. the parties agree on the termination of the proceedings, or

3. the parties fail to pursue the arbitral proceedings in spite of being so requested by the arbitral tribunal or when the continuation of the proceedings has for any other reason become impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of sections 1057 subs. 2, 1058 and 1059 subs. 4.

### **Section 1057 Decision on costs**

(1) Unless the parties agree otherwise, the arbitral tribunal shall allocate, by means of an arbitral award, the costs of the arbitration as between the parties, including those incurred by the parties necessary for the proper pursuit of their claim or defence. It shall do so at its discretion and take into consideration the circumstances of the case, in particular the outcome of the proceedings.

(2) To the extent that the costs of the arbitral proceedings have been fixed, the arbitral tribunal shall also decide on the amount to be borne by each party. If the costs have not been fixed or if they can only be fixed once the arbitral proceedings have been terminated, the decision shall be taken by means of a separate award.



### **Section 1058**

#### **Correction and interpretation of award; additional award**

- (1) Any party may request the arbitral tribunal
  1. to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature,
  2. to give an interpretation of specific parts of the award,
  3. to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.
- (2) Unless otherwise agreed by the parties, the request shall be made within one month of receipt of the award.
- (3) The arbitral tribunal shall make the correction or give the interpretation within one month and make an additional award within two months.
- (4) The arbitral tribunal may make a correction of the award on its own initiative.
- (5) Section 1054 shall apply to a correction or interpretation of the award or to an additional award.

### **Chapter VII**

#### **Recourse against award**

### **Section 1059**

#### **Application for setting aside**

- (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections 2 and 3 of this section.
- (2) An arbitral award may be set aside only if:
  1. the applicant shows sufficient cause that:
    - a) a party to the arbitration agreement referred to in sections 1029 and 1031 was under some incapacity pursuant to the law applicable to him; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under German law; or
    - b) he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
    - c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

- d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with a provision of this Book or with an admissible agreement of the parties and this presumably affected the award; or
2. the court finds that
  - a) the subject-matter of the dispute is not capable of settlement by arbitration under German law; or
  - b) recognition or enforcement of the award leads to a result which is in conflict with public policy (ordre public).
- (3) Unless the parties have agreed otherwise, an application for setting aside to the court may not be made after three months have elapsed. The period of time shall commence on the date on which the party making the application had received the award. If a request had been made under section 1058, the time-limit shall be extended by not more than one month from receipt of the decision on the request. No application for setting aside the award may be made once the award has been declared enforceable by a German court.
- (4) The court, when asked to set aside an award, may, where appropriate, set aside the award and remit the case to the arbitral tribunal.
- (5) Setting aside the arbitral award shall, in the absence of any indication to the contrary, result in the arbitration agreement becoming operative again in respect of the subject-matter of the dispute.

### **Chapter VIII**

#### **Recognition and enforcement of awards**

### **Section 1060**

#### **Domestic awards**

- (1) Enforcement of the award takes place if it has been declared enforceable.
- (2) An application for a declaration of enforceability shall be refused and the award set aside if one of the grounds for setting aside under section 1059 subs. 2 exists. Grounds for setting aside shall not be taken into account, if at the time when the application for a declaration of enforceability is served, an application for setting aside based on such grounds has been finally rejected. Grounds for setting aside under section 1059 subs. 2, no. 1 shall also not be taken into account if the time-limits set by section 1059 subs. 3 have expired without the party opposing the application having made an application for setting aside the award.

### **Section 1061 Foreign awards**

(1) Recognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (Bundesgesetzblatt [BGBl.] 1961 Part II p. 121). The provisions of other treaties on the recognition and enforcement of arbitral awards shall remain unaffected.

(2) If the declaration of enforceability is to be refused, the court shall rule that the arbitral award is not to be recognized in Germany.

(3) If the award is set aside abroad after having been declared enforceable, application for setting aside the declaration of enforceability may be made.

## **Chapter IX Court proceedings**

### **Section 1062 Competence**

(1) The Higher Regional Court ("Oberlandesgericht") designated in the arbitration agreement or, failing such designation, the Higher Regional Court in whose district the place of arbitration is situated, is competent for decisions on applications relating to

1. the appointment of an arbitrator (sections 1034 and 1035), the challenge of an arbitrator (section 1037) or the termination of an arbitrator's mandate (section 1038);
2. the determination of the admissibility or inadmissibility of arbitration (section 1032) or the decision of an arbitral tribunal confirming its competence in a preliminary ruling (section 1040);
3. the enforcement, setting aside or amendment of an order for interim measures of protection by the arbitral tribunal (section 1041);
4. the setting aside (section 1059) or the declaration of enforceability of the award (section 1060 et seqq.) or the setting aside of the declaration of enforceability (section 1061).

(2) If the place of arbitration in the cases referred to in subsection 1, no. 2, first alternative, nos. 3 and 4 is not in Germany, competence lies with the Higher Regional Court ("Oberlandesgericht") where the party opposing the application has his place of business or place of habitual residence, or where assets of that party or the property in dispute or affected by the measure is located, failing which the Berlin Higher Regional Court ("Kammergericht") shall be competent.

(3) In the cases referred to in section 1025 subs. 3, the Higher Regional Court ("Oberlandesgericht") in whose district the claimant or the respondent has his place of business or place of habitual residence is competent.

(4) For assistance in the taking of evidence and other judicial acts (section 1050), the Local Court ("Amtsgericht"), in whose district the judicial act is to be carried out, is competent.

(5) Where there are several Higher Regional Courts ("Oberlandesgerichte") in one Land, the Government of that Land may transfer by ordinance competence to one Higher Regional Court, or, where existent, to the highest Regional Court ("oberstes Landesgericht"); the Land Government may transfer such authority to the Department of Justice of the Land concerned by ordinance. Several Länder may agree on cross-border competence of a single Higher Regional Court.

### **Section 1063 General provisions**

(1) The court shall decide by means of an order.<sup>6</sup> The party opposing the application shall be given an opportunity to comment before a decision is taken.

(2) The court shall order an oral hearing to be held, if the setting aside of the award has been requested or if, in an application for recognition or declaration of enforceability of the award, grounds for setting aside in terms of section 1059 subs. 2 are to be considered.

(3) The presiding judge of the civil court senate ("Zivilsenat") may issue, without prior hearing of the party opposing the application, an order to the effect that, until a decision on the request has been reached, the applicant may pursue enforcement of the award or enforce the interim measure of protection of the arbitration court pursuant to section 1041. In the case of an award, enforcement of the award may not go beyond measures of protection. The party opposing the application may prevent enforcement by providing as security an amount corresponding to the amount that may be enforced by the applicant.

(4) As long as no oral hearing is ordered, applications and declarations may be put on record at the court registry.

### **Section 1064 Particularities regarding the enforcement of awards**

(1) At the time of the application for a declaration of enforceability of an arbitral award the award or a certified copy of the award shall be supplied. The certification may also be made by counsel authorised to represent the party in the judicial proceedings.

(2) The order declaring the award enforceable shall be declared provisionally enforceable.

(3) Unless otherwise provided in treaties, subsections 1 and 2 shall apply to foreign awards.

### **Section 1065 Legal remedies<sup>7</sup>**

(1) A complaint on a point of law is available against the decisions mentioned under section 1062 subs. 1, nos. 2 and 4. No recourse against other decisions in the proceedings specified in section 1062 subs. 1 may be made.

<sup>6</sup> Amended by Art. 2 subs. 1 no. 104 of the Act of 27 July 2001 (Civil Procedure Reform Act), Bundesgesetzblatt Part I, p. 1887. Cf. section 128 CCP [Principle of Oral Presentation]: (4) Unless provided otherwise, decisions of the court which do not constitute judgments can be rendered without oral hearing.

<sup>7</sup> Amended by Art. 2 subs. 1 no. 105 of the Act of 27 July 2001 (Civil Procedure Reform Act), Bundesgesetzblatt Part I, p. 1887.

(2) The complaint on a point of law can also be based on the ground that the decision is based on a violation of a treaty. Sections 707 and 717 apply mutatis mutandis.

**Chapter X**  
**Arbitral tribunals not established by agreement**

**Section 1066**  
**Mutatis mutandis application of the provisions**  
**of the Tenth Book**

The provisions of this Book apply mutatis mutandis to arbitral tribunals established lawfully by disposition on death or other dispositions not based on an agreement.

[END OF TEXT]

**Article 2 Section 19 of the Arbitral Proceedings Reform Act:**

**Amendment to the**  
**Act on Restraints of Competition**

Section 91 of the Act on Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen) as promulgated on 20 February 1990 (Bundesgesetzblatt Part I p.235), last amended by section 2 subs. 20 of the Act of 17 December 1997 (Bundesgesetzblatt Part I p. 3108), is repealed.

[END OF TEXT]

Note:

The repeal of section 91 of the Act on Restraints of Competition is of great relevance for economic arbitration, since the restrictions on the arbitrability of cartel disputes are thereby abolished. The arbitrability of cartel disputes is now determined solely according to the general provisions on arbitrability contained in section 1030 of the Code of Civil Procedure.

Section 91 of the Act on Restraints of Competition had provided that arbitration agreements on future legal disputes arising out of effective cartel agreements or decisions, which do not grant each party the right to choose between proceedings before an arbitral tribunal or a state court, are null and void.

**Article 4 of the Arbitral Proceedings Reform Act**

**Transitional provisions**

**Section 1. Arbitral proceedings**

(1) The effectiveness of arbitration agreements that have been concluded prior to the entry into force of this Act, shall be determined according to the law previously in force.

(2) Arbitral proceedings that are pending but not terminated upon the entry into force of this Act are governed by the law previously in force provided that the arbitral settlement ("schiedsrichterlicher Vergleich") is substituted by the award on agreed terms. The parties may agree to apply the new law.

(3) Court proceedings pending upon the entry into force of this Act remain subject of the law previously in force.

(4) Arbitral settlements that have been concluded and declared enforceable prior to the entry into force of this Act are subject to enforcement provided that the decision on their enforceability has become final and binding or has been declared provisionally enforceable.

**Section 2**

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[END OF TEXT]



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