

Arbitration Board Operating Guidelines

1. Chair appointment

- a. Within 5 business days after the appointment of the second board member by a competent authority, the board members shall contact each other to discuss appointment of a third board member, who will serve as chair.
- b. Within 60 calendar days after the appointment of the second board member by a competent authority, the two board members shall appoint a third member, who will serve as a chair. (See paragraph 22(e) of the Protocol.)
- c. The competent authorities will provide to their appointed board members a list of persons who the competent authorities have agreed may potentially serve as chair of the board. The competent authorities encourage the board members to select a person from the list, particularly because of issues regarding governmental contracting.
- d. The two board members selected by the competent authorities may select as a chair a person not on the list, however, the board members should inform the competent authorities, in writing, prior to making the appointment. If they select a person not on the list, the person need not have arbitration experience; however, he or she should have significant familiarity with international tax issues.

2. Non-disclosure

Pursuant to paragraph 22 (n) of the Protocol, upon confirmation of appointment of the arbitration board, each board member must agree in a statement to abide by and be subject to the confidentiality and nondisclosure provisions of Article 26 of the Convention and the applicable domestic laws of the Contracting States, as well as to the Memorandum of Understanding and these guidelines.

3. Installation of Board

- a. When the chair accepts his or her appointment, the chair shall write to both competent authorities to inform them of his or her acceptance, providing the non-disclosure agreements, and indicating the date of appointment and provide the chair's contact information.

4. Operating Procedures

- a. To the extent needed, the board may adopt any additional procedures necessary for the conduct of its business, provided that the procedures are not inconsistent with any provision of Article 25 of the Convention, the Protocol, or any other related agreement between Germany and the U.S.
- b. If the board adopts any additional procedures, the chair shall provide a written copy of them to the competent authorities.

5. Communication with the CAs

- a. Before the chair is appointed, the competent authorities will send any correspondence concurrently to both board members.

- b. After the chair is appointed, the competent authorities will send any correspondence to the chair. Similarly, the chair will send any correspondence concurrently to the competent authorities.
- c. No board member will have any ex parte communications, except for administrative or logistical matters, with one competent authority.
- d. All communication, except for logistical matters, between the board and the competent authorities must be in writing. Written communication by fax or email is allowed, however, no information that may identify the taxpayer(s) may be included in an email. Express mail or air mail shall be used for all correspondence other than that sent via facsimile or email.
- e. The board members may communicate by telephone, videoconference, fax or face-to-face meetings. Board members may communicate by email; however, they must not include any taxpayer information in the email.
- f. All three board members must be present during substantive discussions.
- g. No board member shall have communications regarding the issues or matters before the board with the taxpayers involved in the case or their representatives during or subsequent to the arbitration process.

6. Position papers and supporting papers

- a. Within 90 days of the appointment of the chair, each competent authority shall submit four copies of the following documents to the board:
 - i. A proposed resolution paper not to exceed 5 pages, and
 - ii. A supporting position paper not to exceed 30 pages, plus annexes.
- b. The chair will send a copy of each competent authority's proposed resolution and supporting position papers to the other competent authority within 5 days of receipt of the later submission by the board.
- c. In the event that only one competent authority submits a Proposed Resolution and supporting Position Paper within the allotted time, then that Proposed Resolution shall be deemed to be the determination of the board in that case and the Proceeding shall be terminated.

7. Reply Submissions

- a. Within 180 days of the appointment of the chair, each competent authority may submit four copies of a reply submission not to exceed 10 pages, to address any points raised by the proposed resolution or position paper submitted by the other competent authority.
- b. The chair will send a copy of each competent authority's reply submission paper to the other competent authority within 5 days of receipt of the later reply by the board.

8. Requesting additional information

- a. The competent authorities may not submit to the board any additional information, unless the board so requests. (See paragraph 22(g) of the Protocol.).

- b. The board may request additional information only from either competent authority. Such a request shall be in writing and include a response deadline. On the date the board issues the request, the board shall send a copy of the request to the other competent authority.
- c. The board shall send a copy of a competent authority's response to the other competent authority.

9. Board meetings

- a. The competent authorities encourage the members to use tele- and videoconferencing. If a face-to-face meeting is necessary, the chair will contact the competent authority of the country that initiated the mutual agreement proceeding and ask it to arrange facilities for the meeting.
 - i. For requests for competent authority assistance concerning an adjustment raised in either Germany or the United States, the competent authority of the country that proposed the adjustment (or in the case where there is no adjustment, denied the credit or claim) is considered the competent authority initiating the Mutual Agreement Procedure.
 - ii. For requests originally submitted as an APA, the competent authority of the country in which the parent company is located is considered the competent authority initiating the Mutual Agreement Procedure. If the parent company is a resident of a 3rd state, the competent authorities will determine the competent authority serving as the one initiating the MAP.
- b. The competent authority will arrange meeting facilities in a location that minimizes the board's travel time and expenses. Each competent authority may arrange a meeting in the other's meeting facilities, as needed.

10. A board member's use of staff

- a. The competent authorities anticipate that board members will be able to perform their duties without the use of additional staff.
- b. If a board member uses staff, that staff person must sign a non-disclosure agreement before performing any work on the matter.
- c. The board member must send the non-disclosure agreement to the competent authorities.
- d. The staff person must be subject to the same conflict of interest rules as the board member.
- e. The competent authorities will not compensate the staff member.

11. Payment of board members

- a. The expenses of members of the board shall be set in accordance with the International Centre for Settlement of Investment Disputes (ICSID) Schedule of Fees for arbitrators, as in effect on the date on which the arbitration proceedings begin. (See paragraph 22(o) of the Protocol.). This applies in particular for hotel,

meals and incidental costs. With regard to travel expenses, board members will be reimbursed for economy class travel.

- b. With respect to fees, each board member will be compensated for no more than three days of preparation, for two meeting days and for travel days.
- c. If the board members feel they require additional time to properly consider the case, the Chair will contact the competent authorities to request additional time.

12. Inability of a board member to fulfill duties

- a. If the chair is unable to fulfill his or her duties, the remaining two board members will jointly inform both competent authorities and select a new chair within 14 days.
- b. If one of the other board members is unable to fulfill his or her duties, the chair will notify the competent authorities. The competent authority that selected the board member who is unable to fulfill his or her duties will select a substitute board member within 14 days.
- c. If any board member is unable to fulfill his or her duties the competent authorities will consult with the remaining board members to determine a new timetable, if necessary.
- d. Should it come to light that a board member has a conflict of interest which would have prevented that member's original appointment, the board member must recuse himself or herself from consideration of the case and inform the competent authorities.

13. Process for board's determination

- a. The board must make a determination by adopting one of the proposed resolutions submitted by the competent authorities.
- b. For each issue, each board member must choose one of the proposed resolutions.
- c. A majority vote shall determine the decisions of the board in a case.

14. Multiple issue cases

- a. If a case contains more than one issue (for example, the case involves the transfer of tangible goods, the transfer of intangible goods and the performance of services) the board will make a determination on each issue individually.

15. Permanent establishment cases

- a. If the competent authorities have not reached an agreement on the existence of a permanent establishment, the board members must first determine whether a permanent establishment exists.
- b. Once it is determined that a permanent establishment exists, the board members must then determine the amount of profits attributable to that permanent establishment. Accordingly, the competent authorities may submit a position paper and supporting paper that take alternative positions. For example, a competent authority may take the position that a permanent establishment does not exist. That competent authority may also take the position that if the board

determines that a permanent establishment exists, a certain amount of income should be allocated to that permanent establishment.

16. Board's Determination

- a. Within 9 months of the appointment of the chair, the chair shall provide the written determination concurrently to each competent authority. (See paragraph 22(h) of the Protocol.)
- b. The written determination shall include only one of the two proposed resolutions for the issue(s) presented to the Board except for in circumstances described in paragraph 11 of the Memorandum of Understanding.
- c. The board will not determine the treatment of any associated interest or penalties; rather that treatment will be determined by applicable domestic law of Germany and the United States, as the case may be. (See paragraph 22(m) of the Protocol.)
- d. The written determination shall not include any rationale or analysis. (See paragraph 22(j) of the Protocol.)
- e. The determination of the board will have no precedential value. (See paragraph 22(j) of the Protocol.)
- f. No information relating to the Proceeding (including the board's determination) may be disclosed by the members of the arbitration board or their staffs or by either competent authority, except as permitted by the Convention and the domestic laws of Germany or the United States. (See paragraph 22(n) of the Protocol.)

17. Terminating a Proceeding

- a. A Proceeding may be terminated by the board's determination in the matter, by the competent authorities reaching a mutual agreement, or by a taxpayer's withdrawal of its competent authority request.
- b. If a taxpayer withdraws its competent authority request, the competent authorities will notify the board that the taxpayer has withdrawn its request and the arbitration process is terminated.
- c. If the competent authorities wish to terminate a proceeding (for example, because they have reached an agreement on the treatment of the case), the competent authorities will notify the board that they have reached a mutual agreement and the arbitration process is terminated.
- d. At the termination of any proceeding each board member must immediately destroy all documents or other information received from either competent authority, or otherwise reflecting the considerations or discussions of the arbitration board, and delete all information that may be stored on any computer, personal data assistant or other electronic device or media.