I-52, NOT19, 459822

GUIDELINES
for building arbitration VBA-2007

Introduction

These guidelines are intended primarily for lawyers who are about to embark on their first building arbitration cases. However, hopefully they will also be useful to all lawyers conducting arbitration cases that relate to construction and civil works.

The guidelines do not deal with the substantive aspects of construction law, but focus on the procedural rules applying to building arbitration cases as they appear in "Rules of arbitration procedure for disputes relating to building and construction" (VBA - arbitration rules) as adopted by the Arbitration Board for Building and Construction and approved by the Danish Enterprise and Construction Authority on 25 July 2006, in "Bye-laws of the Arbitration Board for Building and Construction" as adopted by the Arbitration Board for Building and Construction on 21 September 2006 and approved by the Danish Enterprise and Construction Authority on 9 October 2006, in "Rules of simplified arbitration of the Danish Arbitration Board for Building and Construction" (VBA – simplified arbitration) as adopted by the Arbitration Board for Building and Construction and approved by the Danish Enterprise and Construction Authority on 11 June 2007, and in the practice evolved over the years in connection with the conduct of building arbitration cases. The above rules are referred to collectively as the procedural rules, however with an indication of whether they appear in the two sets of written rules, hereinafter to as 'the Rules of Procedure' and 'the Bye-laws', or may be derived from precedents. The Rules of Procedure and the Bye-laws are available on the website of the Arbitration Board for Building and Construction at www.voldgift.dk.

In the present guidelines, the term 'building arbitration' is used to refer to building and construction projects as well as civil works.

Besides stating the text of and references to the rules to be followed, the Guidelines also include advice, recommendations and comments.

The Guidelines are structured as a running commentary on the Rules of Procedure and the Bye-laws and include references to similarities and dissimilarities between the rules of procedure applied in the ordinary courts of law and those of the building arbitration tribunals

The Guidelines were prepared by a working party consisting of representatives of the Arbitration Board for Building and Construction, the Presidency of the arbitral tribunals and the Danish Bar and Law Society. The members of the working party were:

Peter Fogh, attorney-at-law
Mogens Hansen, deputy CEO, attorney-at-law
Per Helwigh, head of secretariat
Klaus Kastrup-Larsen, attorney-at-law
Claus Kaare Pedersen, attorney-at-law
Hugo Wendler Pedersen (chairman), Supreme Court judge
Pernille Sølling, attorney-at-law
Irene Wittrup, attorney-at-law.

1. Building arbitration tribunals: composition and competence

Article 4 of the Bye-laws: the panel of professional judges
The Arbitration Board has a Presidency consisting of a chairman, a vice-chairman and one further member.
The President of the Supreme Court appoints the chairman and vice chairman of the Presidency from among the Supreme Court judges, while the additional member is appointed from among the judges of the two High Courts.
The President of the Supreme Court also appoints 15 alternates to the members of the Presidency, with 2 of the alternates being appointed from among the Supreme Court judges and 13 alternates to be appointed from among the judges of the High Courts.
The members of the Presidency and the alternates sit for a term of 5 years and may be reappointed.
Members of the Presidency and alternates must vacate their seats when resigning from the court of law at which they served when appointed, or by the end of the month in which they reach the age of 70. However, resigning members and alternates may finalise cases already assigned to them.
Under special circumstances the chairman of the Presidency may appoint one or more present or former judges of the Supreme Court or High Courts, or other lawyers meeting the requirements for appointment as arbitrator, to act as arbitrators in individual arbitration cases, at the same time deciding who shall be the presiding arbitrator. Under no circumstances is it possible to be appointed arbitrator after turning 70.

Article 5 of the Bye-laws: composition of the individual arbitral tribunal
The presiding arbitrators of arbitral tribunals appointed by the Arbitration Board and having more than one member are appointed by the Chairman of the Presidency from among the members of the Presidency and the alternates.
The Arbitration Board appoints two professional judges to sit as arbitrators in the individual case, depending upon its nature.
As a general rule, in cases heard by one arbitrator sitting alone, the arbitrator shall be an expert arbitrator.

Article 1 of the Rules of Procedure
The Arbitration Board for Building and Construction decides disputes between parties who have agreed to submit to arbitration such disputes as have arisen or may arise between them in respect of a defined legal relationship within the building and construction industry. Such agreement shall be deemed to exist once the parties have adopted 'General Conditions for the Provision of Works and Supplies within Building and Construction' of 10 December 1992 (AB 92), 'General Conditions for the Provision of Technical Consultancy and Assistance' of October 1989 (ABR 89) or 'General Conditions for Design-and-Build Contracts' of December 2003 (ABT 93).
Par. 2. In cases involving consumer-related disputes an arbitration agreement concluded before the dispute arose shall not be binding upon the consumer.

- According to article 4 of the Bye-laws, the Presidency of the arbitral tribunals consists of 1 chairman and 1 vice chairman, both of whom are Supreme Court judges and appointed by the President of the Danish Supreme Court. The Presidency further consists of 1 High Court judge, who is also appointed by the President of the Supreme Court, cf. art. 4(2) of the Bye-laws.

The Presidency has 15 alternates - 2 Supreme Court judges and 13 High Court judges, all of whom are also appointed by the President of the Supreme Court, cf. art. 4(2) of the Bye-laws.
The chairman of the Presidency may appoint one or more present or former judges of the Supreme Court or High Courts, or other lawyers meeting the requirements for appointment as arbitrator, to act as

arbitrators in individual arbitration cases. Under no circumstances is it possible to be appointed arbitrator after having turned 70, cf. art. 4(3) of the Bye-laws.

- Disputes may be resolved by building arbitration only if the parties have agreed to submit the dispute between them to building arbitration. The agreement may be made verbally or in writing.

Such an agreement may be made before a dispute has arisen, for instance in connection with the signing of a construction or consultancy contract, or in connection with a specific dispute. To be valid, the arbitration agreement must be limited to a defined legal relationship. Accordingly, the parties cannot sign an agreement under which future disputes relating to agreements not yet entered into are to be resolved by arbitration. In practice, an agreement to refer any disputes to building arbitration is generally made when the parties sign a construction contract while at the same time adopting 'General Conditions for the Provision of Works and Supplies within Building and Construction' of 10 December 1992 (AB 92), 'General Conditions for Design-and-Build Contracts' of December 2003 (ABT 93) or 'General Conditions for the Provision of Technical Consultancy and Assistance' of October 1989 (ABR 89), all of which contain provisions for the resolution of disputes between the parties by means of building arbitration.

It happens fairly frequently that the parties disagree as to whether or not resolution by building arbitration has been agreed upon. This question, which does not fall within the scope of the present Guidelines, will have to be resolved in the same way as any other question concerning the interpretation of contracts.

A special problem of relevance to construction law arises in connection with the provisions of article 5(10) of AB 92, see also pars. 4 and 5 of article 10, which state that under certain circumstances the client may raise a claim directly against the subcontractors or suppliers of the contractor.

Another provision of relevance in this context is art. 47(8) of AB 92, which states that in cases where AB 92 apply to the relationship between a client and several parties (contractors, suppliers), the provisions of pars.1-7 shall also apply to the mutual relationship between such parties.

- In cases involving consumer-related disputes, an arbitration agreement signed prior to the occurrence of the dispute is not binding upon the consumer.

See also s. 3 of the Danish Consumer Agreements Act for a definition of the term 'consumer'.

It follows, conversely, that consumers are entitled to invoke a prior arbitration agreement if they so wish. When the dispute has arisen, the parties are free to enter into arbitration agreements also in cases relating to consumer agreements. However, even if an arbitration agreement exists, the consumer may file a complaint with the National Consumer Agency or an approved private complaints or appellate body, and in the event that arbitration proceedings have commenced, they must be stayed at the request of the consumer, cf. s. 2 of the Act on Consumer Complaints Boards.

2. Arbitration or another type of dispute resolution

Building arbitration may not always be required to resolve a dispute in a building case which has not found a solution by negotiation between the parties or their lawyers. There are several alternative methods of dispute resolution which are generally less resource-consuming than building arbitration cases. The Arbitration Board has prepared "Rules of conciliation by the Danish Arbitration Board for Building and Construction", "Rules of Mediation by the Danish Arbitration Board for Building and

Construction" and "Rules of Expert Decisions concerning the Provision of Security, etc., by the Danish Arbitration Board for Building and Construction".

The above rules are available on the Arbitration Board's website at www.voldgift.dk

- Conciliation

Conciliation is applicable in cases where the parties have agreed on conciliation pursuant to the rules of the Arbitration Board, or if the parties make a joint request for conciliation.

The Arbitration Board appoints a suitably qualified conciliator in the case and notifies the parties accordingly. The Board determines an appropriate amount in deposit in cover of the estimated fee of the conciliator and other costs. Unless otherwise agreed, the parties pay half of the deposit each. Conciliation commences once the deposit has been paid up in full.

The conciliator has no authority to make a decision in the dispute between the parties but may produce a draft settlement, if possible.

The conciliator may advise the parties of his opinion of the case, including his opinion of the likely outcome of a possible award or decision in the case.

As a general rule, conciliation must be finalised within 15 calendar days of the appointment of the conciliator.

If the conciliation process is successful, the parties and the conciliator together prepare an agreement to be signed by the parties.

If the conciliation process fails, the parties will not be bound by the proceedings and their legal position will not have been prejudiced.

The conciliator and the parties undertake a mutual commitment to treat any and all information produced in the course of the conciliation proceedings with confidentiality.

The conciliator's fee is determined by the Arbitration Board on a time basis. The hourly rate payable to the conciliator is stated by the Arbitration Board at the time it appoints the conciliator.

- Mediation

Mediation is applicable in cases where the parties have agreed on mediation pursuant to the rules of the VBA, or if the parties make a joint request for mediation.

The Arbitration Board appoints a suitably qualified mediator in the case and notifies the parties accordingly. The Board determines an appropriate amount in deposit in cover of the estimated fee of the mediator and other costs. Unless otherwise agreed, the parties pay half of the deposit each. Mediation commences once the deposit has been paid up in full.

The mediator has no authority to make a decision in the dispute between the parties and will not produce any draft settlement. The role of the mediator is solely that of a neutral and impartial negotiator, who will conduct the mediation proceedings and help the parties resolve the dispute themselves in a satisfactory manner.

This means that the mediator does not give any legal or technical advice/assessment, and it is not the role of the mediator to make sure that the parties sign agreements that comply with existing legislation or that an agreement is consistent with the outcome of a possible award or decision in the case.

Accordingly, mediation builds exclusively upon the interest of the parties in the case.

As a general rule, mediation must be finalised within 15 calendar days of the appointment of the mediator.

If the mediation process is successful, the parties and the mediator together prepare an agreement to be signed by the parties.

If the mediation process fails, the parties will not be bound by the proceedings and their legal position will not have been prejudiced.

The mediator and the parties undertake a mutual commitment to treat any and all information produced in the course of proceedings with confidentiality.

The mediator's fee is determined by the Arbitration Board on a time basis. The hourly rate payable to the mediator is stated by the Arbitration Board at the time it appoints the mediator.

- Anticipatory dispute resolution

The parties to a construction contract may agree to file a request with the Arbitration Board for the appointment of an adjudicator to render an opinion on technical, financial, administrative or legal issues arising between the parties. The request may be filed before or after handover of the works involved.

The parties may file the request jointly or separately. The request must contain a brief outline of the issues for which adjudication is requested.

A suitably qualified adjudicator will be appointed – in special cases more than one – if the parties so agree.

The adjudicator will examine the issued raised in the manner and to the extent decided upon by him and the parties in unison, whereupon he will verbally render an opinion of his view of the issues raised. It is then up to the parties to decide whether or not they are capable of resolving the issues raised on their own.

The fee payable to the adjudicator is determined on a time basis, the fee being paid together with the other costs in the case out of the security lodged by the parties in equal parts. The parties are jointly and severally liable for the costs.
The adjudication is not legally binding upon the parties and will not affect their general legal position.

- Expert Decision

According to art. 6 and 7 of AB 92, clients and contractors are required to provide security to one another for payment of the contract sum and the execution of the contract. Pursuant to art. 46 of AB 92, either party may file a request with the Arbitration Board for Building and Construction for the appointment of an expert to decide on the release of the security provided. The expert may also decide on the justification for withholding payments or effect setoffs.

An expert decision may be obtained fairly quickly, see the provisions of par. 3, 4 and 6 of art. 46 of AB 92. The expert may decide that the release of security to private clients or contractors be made conditional upon the lodging of security (counter security), see art. 46(5) of AB 92.

It is important to note that an expert decision made in pursuance of art. 46 of AB 92 is not enforceable. However, where a guarantee refers to a construction contract that falls under AB 92, the guarantor has a contractual obligation to release the security lodged if so ordered by an expert decision.

- Resolution by a complaints board

Subject to certain limitations, a consumer may bring a dispute with a tradesman before a complaints board such as the Building Industry Complaints Board, which is approved by the Ministry of Family and Consumer Affairs. Reference is made to www.byggerietsankenaevn.dk.

As part of the proceedings, an expert opinion will be prepared. The questions to be answered in the expert opinion will be decided in a collaborative effort between the parties and the expert. The decisions made by the Building Industry Complaints Board are not binding upon the parties. However, enterprises that are members of Dansk Byggeri (the Danish Construction Association) are committed by decisions made by the Building Industry Complaints Board.

The Building Industry Complaints Board decides cases on the basis of written submissions only. Cases requiring the taking of verbal evidence from the parties or witnesses or which, for other reasons, are not suitable for resolution by a complaints board will be dismissed. As a general rule, major cases involve elements that make them unfit for resolution by the Building Industry Complaints Board. The vast majority of cases before the Building Industry Complaints Board involve amounts below DKK 100,000.

In cases involving consumers, the insurance companies require the case to have been brought before an approved complaints board before they decide whether or not cover is provided for legal expenses.

The insurance companies will not cover the lawyer's fees payable by consumers in relation to cases before complaints boards, as the processing of cases by an approved complaints board builds upon the parties being able to conduct their case without legal assistance. The maximum costs incurred by a consumer in bringing a case before the Building Industry Complaints Board currently amount to DKK 3,000, and no fee is charged if a case is dismissed.

3. Commencement of proceedings. Statement of claim and statement of defence.

Article 10 of the Rules of Procedure.
The arbitral proceedings in a case shall be deemed to have commenced once a statement of claim has been submitted to the Arbitration Board for Building and Construction.
Par. 2. A statement of claim submitted by fax or email shall be deemed to have been received on the date it was stamped by the Arbitration Board as being received. This also applies to other written pleadings in the case.

Article 11 of the Rules of Procedure
The statement of claim shall contain the following information:

1) the identity of the parties involved as well as their addresses and phone numbers,
2) the claim of the claimant and a brief description of the facts upon which it is relied, and
3) a list of the documents and other evidence which the claimant intends to invoke. The documents must be enclosed and must be serially numbered (1, 2, a.s.o.).
Par. 2. The statement of claim and the enclosed documents (exhibits) must be submitted in 5 copies of which the Arbitration Board shall forward one copy to the respondent. In cases considered by a single arbitrator the number of copies shall be reduced to 3, and in cases heard by a 5-member tribunal it shall be increased to 7.

Article 12 of the Rules of Procedure
Within a period of time to be determined by the Arbitration Board the respondent shall produce a statement of defence to be submitted to the Arbitration Board for Building and Construction.
Par. 2. The statement of defence shall contain:
1) the respondent's defence,
2) an indication of any counterclaims,
3) a presentation of the actual and legal circumstances upon which the defence and the counterclaims are relied, and

4) a specification of the documents and other evidence upon which the respondent intends to rely. The documents must be enclosed and must be serially lettered (A, B, a.s.o.).
Par. 3. Art. 11(2) shall apply mutatis mutandis.

- The arbitral proceedings are deemed to have been commenced upon the submission to the address of the Arbitration Board of a statement of claim, see art. 47(2) of AB 92 and art. 10 of the Rules of Procedure. A statement of claim (or other written pleadings) submitted by fax or email shall be deemed to have been received on the date of receipt as stamped by the Arbitration Board.

- According to art. 10(1) of the Rules of Procedure, the statement of claim filed with the Arbitration Board must contain:

1) the identity of the parties involved as well as their addresses and phone numbers,
2) the claim of the claimant and a brief description of the facts upon which it is relied,
3) a list of the documents and other evidence which the claimant intends to invoke. The documents must be enclosed and must be serially numbered (1, 2, a.s.o.).

It is important to thoroughly consider the claim(s) so as to make sure that they appear as clear and intelligible to the opponent and the arbitral tribunal. It must appear whether the amount claimed is inclusive or exclusive of VAT, and from which date interest accrues and at what rate. When figures are indicated in the statement of claim, it must be stated if they are inclusive or exclusive of VAT, and the presentation of claim must be set out systematically, ensuring that the amounts contained in it must all be either inclusive or exclusive of VAT. It is also important to be aware of the question of indexation.

- The statement of claim and the enclosed documents (exhibits) must be submitted in three copies in cases heard by one arbitrator, in five copies in cases heard by three arbitrators, and in

7 copies in cases heard by five arbitrators. In cases with more than one respondent the above numbers of copies increase by one for each additional respondent, see art. 11(2) of the Rules of Procedure.

- The Arbitration Board will immediately inform the respondent(s) about the claim and will forward a copy of the statement of claim and the enclosed documents to the respondent(s). In its forwarding letter, the Arbitration Board requests the respondent to produce a statement of defence and such exhibits as he intends to rely on. The statement of claim and its exhibits must be submitted in the same number of copies as the statement of claim, see art. 12(3) of the Rules of Procedure.

It follows from art. 12(2) of the Rules of Procedure that the statement of defence must contain:
) the respondent's defence,

2) an indication of any counterclaims,

3) a presentation of the actual and legal circumstances upon which the defence and the counterclaims are relied, and

4) a specification of the documents and other evidence upon which the respondent intends to rely. The documents must be enclosed and must be serially lettered (A, B, a.s.o.).

The comments above in relation to the statement of claim with regard to clarity and intelligibility, VAT, interest and indexation also apply to the statement of defence.

- Where parties are represented by lawyers, it is general practice to send statement of claim, statement of defence and other pleadings directly to the lawyer acting for the other party. It is also considered good practice for all notifications from a party to the Arbitration Board to be sent to the other parties in the case or their representatives at the same time.

- Ordinary correspondence can be sent via email, whereas pleadings must also be sent by mail and carry original signatures.

- It regularly happens that a party tries to submit unilaterally obtained declarations in a building arbitration case. Unilaterally obtained declarations are defined as declarations or statements from experts on technical, legal, financial or similar aspects which have been obtained by one of the parties at its own initiative for the purpose of a future or pending arbitration case. The problem with such declarations is that the opponent has not had an opportunity to participate in the process of commissioning the declaration and, accordingly, has not been able to influence the choice of expert and is unaware of which discussions and contacts that have taken place between the party and the author of the declaration. Although the nature of a building arbitration case with its tribunal consisting of expert judges is such that it will often be better equipped than an ordinary court of law to assess the contents of such unilaterally obtained declarations, it is nevertheless a general rule that unilaterally obtained declarations are not admissible in evidence. However, there may be exceptions from this general rule. For instance, a unilaterally obtained declaration or parts thereof may be admitted if it contains evidentiary facts that are no longer obtainable in any other way, or if other quite extraordinary circumstances apply.

As a general rule, declarations not obtained for the purpose of a future or pending arbitration case may be submitted in evidence. For instance, it is general practice to admit technical reports used in connection with 5-year and C-inspections from the Danish Building Defects Fund.

- It is general practice to provide all enclosures and exhibits with numbers or letters in the top right-hand corner before submitting them to the Arbitration Board. Multi-page enclosures must be stapled and provided with page numbers. Different enclosures should not be stapled; nor should enclosures be stapled to a pleading.

The exhibits of the claimant must be numbered with Arabic numerals, while the respondent's exhibits must be provided with capital letters: A-Å; AA-AÅ, a.s.o.
Subexhibits requiring numbers or letters must be provided with Arabic numerals/capital letters followed by a lower-case letter: 1a, 1b, a.s.o./Aa, Ab, a.s.o.

In cases with two or more respondents, the respondent first named in the statement of claim will mark its exhibits with IA, IB a.s.o.; the ensuing respondents with IIA, IIB a.s.o./ IIIA, IIIB a.s.o.

In cases involving a joinder of parties, the first-named third party thus joined will mark its exhibits with Adc. IA, Adc. IB, a.s.o.; the ensuing third parties will use Adc. IIA, Adc.IIB, a.s.o./ Adc.IIIA, Adc. IIIB, a.s.o.

Pleadings and statements of claim and defence do not need numbers or letters.

- It may be conducive to the arbitral tribunal's understanding of the case to supplement the verbal description of the case with photos, summary charts and drawings, descriptions of the property/properties, etc. Such documents will be included in the case as supporting exhibits.

- In the statement of claim and statement of defence it is appropriate to explain the issues in the case in a systematic and thematised manner, for instance by means of subdivisions such as delay, defects, additional claims, counterclaims, etc.

- Each pleading must include a list of all the exhibits submitted.

- In major cases involving many exhibits it may be appropriate to provide the exhibits with page numbers in addition to the above numbers and letters to facilitate references to the relevant places in an exhibit during the preparation of a case and during the oral hearing.

- In major cases it may also be appropriate to provide pleadings with a list of contents.

- After the exchange of statement of claim and statement of defence it is appropriate for the parties to consider the evidence upon which they intend to rely their case, for instance by considering the need to obtain an expert opinion, in order for any necessary evidentiary steps to be taken as soon as possible so as to allow the case to be proceeded with within a reasonable time.

4. Conflict of interests

Article 6 of the Rules of Procedure
When a person is approached in connection with the possible appointment as arbitrator, he shall disclose any and all circumstances that may give rise to justifiable doubt as to his impartiality or independence. An arbitrator, from the time of the appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances unless they have already been disclosed by him.

Par. 2. When the members of the arbitral tribunal have been appointed, the parties shall be informed of the appointment.
Par. 3**.** The appointment of an arbitrator may be challenged only if circumstances exist which give rise to justifiable doubts as to the impartiality or independence or the arbitrator or as to the qualifications of an expert arbitrator.
Par. 4. A party wishing to challenge an arbitrator shall, within 15 calendar days of becoming aware of the appointment of the arbitrator or the circumstances upon which the challenge relies, submit a written statement to the Arbitration Board setting out the reasons for the challenge.
Par. 5. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge
Par. 6. If a challenge to an arbitrator is not successful, the challenging party may request, within 30 calendar days after having received notice of the decision to reject the challenge, that the challenge be decided by the courts of law.

- It follows from art. 6(1) of the Rules of Procedure, which corresponds to the mandatory provision contained in s. 12(1) of the Danish Arbitration Act, that a person approached by the secretariat of the Arbitration Board in connection with a possible appointment to arbitrator must disclose to the secretariat of the Arbitration Board any such circumstances that may cause reasonable doubt about said person's impartiality or independence. In the event that such circumstances occur after the appointment, the arbitrator must immediately notify the other members of the arbitral tribunal and the Arbitration Board accordingly. In practice a person appointed arbitrator is asked to issue a declaration of impartiality to the Arbitration Board. If it appears from this declaration of impartiality that factors exist which may give reason to doubt the impartiality or independence of the appointee, the other members of the arbitral tribunal and the parties will be notified accordingly.

- According to prevailing building arbitration practice, the requirements to arbitrators concerning a conflict of interests are the same as those applying to judges appearing in the ordinary courts of law. Accordingly, the general requirements concerning a conflict of interests provided in ss. 60(1) and 61 of the Danish Administration of Justice Act apply.

- Moreover, a party may challenge the qualifications of an expert arbitrator. According to prevailing building arbitration practice, it is possible for the parties to comment on the expert arbitrators and, in particular, their professional qualifications. Both parties may ask to see the resume of an expert arbitrator in order for them to decide whether or not the arbitrator in question can be considered impartial and competent.

- In order to avoid any unnecessary delay, it is provided by art. 6(4) of the Rules of Procedure that a party wishing to challenge an arbitrator must submit a written statement to the Arbitration Board within 15 calendar days of becoming aware of the appointment of the arbitrator or the circumstances upon which the challenge relies.

- Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal will decide on the challenge. The decision is made by the full

arbitral tribunal, meaning that the arbitrator against whom the challenge is made also participates in the decision.

- If a challenge to an arbitrator is not successful, the challenging party may request, within 30 calendar days after having received notice of the decision to reject the challenge, that the challenge be decided by the courts of law.

While the challenge is pending before a court of law, the arbitral tribunal, including the arbitrator against whom the challenge is made, may continue the proceedings of the arbitration case and make an arbitral award.

- It is not considered acceptable practice for a person acting as expert arbitrator to accept recruitment by a party in another building arbitration case for the purpose of assisting that party during the oral hearing.

5. The procedure for appointing a building arbitration tribunal

Article 4 of the Bye-laws. The panel of professional arbitrators
The Arbitration Board has a Presidency consisting of a chairman, a vice chairman and one additional member.
The President of the Supreme Court appoints the chairman and vice chairman of the Presidency from among the Supreme Court judges, with the additional member being appointed from among the judges of the High Courts.
The President of the Supreme Court appoints another 15 alternates to the members of the Presidency, with 2 of the alternates being appointed from among the Supreme Court judges and 13 alternates to be appointed from among the judges of the High Courts.
The members of the Presidency and the alternates sit for a term of 5 years and may be reappointed.
Members of the Presidency and alternates shall resign upon their resignation from the court of law at which they hold office, or by the end of the month in which they turn 70. However, resigning members of the Presidency may finalise cases already assigned to them.
Under special circumstances, the chairman of the Presidency may appoint one or more present or former judges of the Supreme Court or High Courts, or other lawyers meeting the requirements for appointment as arbitrator, to act as arbitrators in individual arbitration cases and decide who shall be the presiding arbitrator. Under no circumstances is it possible to be appointed arbitrator after having turned 70.

Article 5 of the Bye-laws. Composition of the individual Arbitral Tribunal
When appointing arbitral tribunals with more than one arbitrator, the Arbitration Board shall appoint the presiding arbitrator from among the members of the presidency and its alternates.
The Arbitration Board shall appoint the two expert arbitrators for the individual arbitral tribunal depending upon the nature of the case.
As a general rule, where a case is heard by one arbitrator sitting alone, the arbitrator shall be an expert arbitrator.

Article 2 of the Rules of Procedure
An arbitral tribunal shall consist of a professional arbitrator to be appointed by the chairman of the Presidency of the arbitral tribunals as well as of two expert arbitrators to be appointed by

the Arbitration Board depending on the nature of the case, however see the provisions of art. 3-5 below.

Article 3 of the Rules of Procedure
At the request of either party the arbitral tribunal shall be expanded to include two additional professional arbitrators to be appointed by the chairman of the Presidency of the arbitral tribunals.
Par. 2. The additional cost of such expansion shall be taken into account when the apportionment of costs is decided. If at this stage it is found that the request for an expansion of the arbitral tribunal was not sufficiently justified, the tribunal may decide that the costs attributable to the expansion shall be defrayed by the party filing the request.

Article 4 of the Rules of Procedure
Upon request from the parties the Arbitration Board may decide that the tribunal shall consist of an expert arbitrator sitting alone. Such request may be made in the statement of claim.
Par. 2. The Arbitration Board may of its own account propose to the parties that a case be decided by a tribunal consisting of an expert arbitrator sitting alone, if this is deemed appropriate.

Article 5 of the Rules of Procedure
Upon request from the parties the chairman of the Presidency of the arbitral tribunals may decide that a tribunal shall consist of a professional arbitrator sitting alone.
Par. 2. The Arbitration Board may of its own account propose to the parties that a case be decided by a tribunal consisting of a professional arbitrator sitting alone, if this is deemed appropriate.

- The appointment of a judge as presiding arbitrator of the individual arbitral tribunal is made by the chairman of the Presidency, see art. 5(1) of the Bye-laws and art. 2 of the Rules of Procedure.

In practice this task is assigned to the head of secretariat of the Arbitration Board, but in major cases or cases involving matters of principle the question of appointment will be submitted to the chairman of the Presidency.

Whenever possible, the assignment of cases to the chairman of the Presidency and the alternates is arranged so as to ensure that cases are assigned to both the Presidency and the alternates on an ongoing basis.

- According to art. 3(1) of the Rules of Procedure, either party may request that the tribunal in a building arbitration case be expanded to include two additional professional arbitrators. In such cases it is general practice to appoint the two additional professional arbitrators from among the members of the chairmanship of the Presidency, if possible.

- In accordance with art. 5(2) of the Bye-laws and art. 2 of the Rules of Procedure, the Arbitration Board will appoint 2 expert arbitrators for each individual case. The appointment will be made on

the basis of the nature of the individual case, meaning that the Arbitration Board will endeavour to appoint expert arbitrators who have expertise in the subject areas included in the individual case.

- Subject to agreement between the parties, a building arbitration case may also be heard by an expert arbitrator sitting alone, see art. 4 of the Rules of Procedure. This generally occurs in cases involving minor amounts and in cases of no general interest or not about a matter of principle.

Subject to agreement between the parties, an arbitral tribunal may also consist of one professional arbitrator sitting alone, see art. 5 of the Rules of Procedure. In practice this happens in cases involving the resolution of legal issues only.

40 per cent of the cases brought before the Arbitration Board are heard by an expert arbitrator sitting alone. It is general practice in such cases for the expert arbitrator to be assisted by a lawyer from the Arbitration Board's secretariat.

- Accordingly, pursuant to the Rules of Procedure a building arbitration tribunal may consist of 5 arbitrators (3 professional and 2 expert arbitrators), 3 arbitrators (1 professional and 2 expert arbitrators) or 1 arbitrator (1 professional or expert arbitrator).

- For preparatory meetings, see section 8 below.

6. Provision of security

Article 32 of the Rules of Procedure

The parties shall provide security for all costs estimated to arise out of the case, including a fee to the Arbitration Board in cover of its handling costs for the case.

Par. 2. Security shall be provided as soon as the Arbitration Board has determined the size and nature of the security to be provided, using as a basis therefor the financial scope of the case. Should it later turn out that such scope is wider than originally anticipated, the Arbitration Board may demand the security to be increased.

Par. 3. As a general rule, the two parties shall be required to put up identical security. Failure by a claimant to advance the required security shall cause the case to be dismissed. Failure by a respondent to advance the required security shall result in the claimant having to put up the full security. The same provisions shall apply to counterclaims.

Par. 4**.** Failure to provide the required security may cause the Arbitration Board to terminate the proceedings.

- The amount in security is determined on a preliminary basis, either at the commencement of proceedings or upon the appointment of the arbitral tribunal.
- Security is provided in the form of a cash payment.
- Failure to provide security will cause the Arbitration Board to terminate proceedings.
- As a general rule, the two parties will be asked to lodge identical amounts in security.
- If separate counterclaims are raised, additional security will have to be provided.
- If a respondent fails to advance the required security, the claimant will have to put up the full amount. The same provisions apply to counterclaims.

- In cases where the Arbitration Board proposes that the tribunal is to consist of a single arbitrator, the parties will be asked to provide security in a standardised amount.
- The security to be provided for the costs of the proceedings will be finally determined not later than 8 days before the oral hearing.
- See section 13 below on the liability of the parties in relation to the bill issued by the Arbitration Board for the arbitration case.

7. Expert opinions

Article 17 of the Rules of Procedure
The arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal. The arbitral tribunal may order a party to give the expert any and all relevant information and grant him access to inspect documents and other evidence.

Par. 2. At the request of a party, or if deemed necessary by the arbitral tribunal, upon the delivery of his written or oral report the expert may be required to attend the oral hearing during which the parties and the members of the arbitral tribunal will be given the opportunity to put questions to the expert.

Article 18 of the Rules of Procedure
Acting on its own initiative or upon request, the arbitral tribunal, or possibly only the expert arbitrators, may conduct a site inspection of the construction or civil works out of which the case has arisen.

Article 19 of the Rules of Procedure
The arbitral tribunal may on its own initiative decide to procure information and initiate investigations for use in its resolution of the case. The parties shall be notified of such a decision and shall be informed of the information obtained thereby, and they shall be allowed to voice their opinion.

- Building arbitration practice allows the use of expert opinions, provided that they are considered important to the resolution of the dispute. Depending upon the circumstances, expert opinions may be time-consuming. Accordingly, it is important for the parties to decide as soon as possible, preferably upon the submission of a statement of claim or statement of defence at the latest, whether or not they wish to make use of an expert opinion in the matter, thereby allowing the preparation of the case (the determination of deadlines for the submission of pleadings) and the fixing of the date of the oral hearing to be organised accordingly.

- The arbitral tribunal or the expert arbitrators may on their own initiative or upon request perform an inspection of the construction or civil works involved in the dispute. In practice such an inspection is performed where it is deemed appropriate for the tribunal to visit the site for the purpose of getting acquainted with the specific construction or civil works in clarification of the issues in the dispute. In some cases the tribunal's expert arbitrators will prepare a memo on any observations made during the site inspection. Such inspections may be performed during the preparation of the case or in connection with the oral hearing.

In minor cases where, for reasons of costs, it will be disproportionately expensive to arrange for an expert opinion to be made, and where it is possible to get an idea of the matters involved in the dispute by performing a site inspection, it will often be appropriate for such an inspection to take place as the

first step in the oral hearing. If required, the arbitral tribunal will report on any findings made during the inspection.

- Acting on its own initiative the arbitral tribunal may obtain information and arrange surveys for use in the resolution of the dispute. When the arbitral tribunal engages in such inquisitorial activities, the parties have to be notified and be given an opportunity to state their opinion on the surveys arranged and the information obtained. See also art. 19 of the Rules of Procedure. This provision is rarely used in building arbitration cases.

- An expert opinion may not necessarily have the same importance in a building arbitration case as an expert opinion in a case before an ordinary court of law. Because of the expertise of the expert arbitrators, the arbitral tribunal generally feels less bound by an expert opinion than an ordinary court of law. Consequently, it does happen – albeit rarely – that a building arbitration tribunal chooses to disregard some of the conclusions contained in an expert opinion. If, during the processing of the case, the arbitral tribunal finds that matters exist which are not borne out by an expert opinion and which are considered crucial to the resolution of the case, the parties will be informed accordingly and be invited to express their opinion thereon.

- It is important for the parties to cooperate loyally and reasonably in the formulation of the questions to be answered by the expert. The parties have to realise that the expert will answer questions of a technical and subject-related nature but not questions of a legal nature. The questions to the expert must be clear and unambiguous and must not be leading. Reference is made to the advice and guidelines on the phrasing of questions to experts contained in: ”A practical guide to the use of expert opinions” issued in Danish in 2004 by the Danish Arbitration Board for Building and Construction and the Danish Society of Engineers, as well as to the general advice on the preparation of expert opinions in ”Guidelines for experts” issued by the Arbitration Board in 1997. Also included in the guidelines are ”Rules for the appointment of experts by the Danish Arbitration Board for Building and Construction” (prepared by the Arbitration Board on 18 June 1998).

- The submission of documents for use in the preparation of an expert opinion.

Responsibility for providing the expert with the documents of importance to the preparation of the opinion lies with the parties. A request for the preparation of an expert opinion filed with the Arbitration Board must be accompanied by the questions to be answered by the expert and any documents enabling the Arbitration Board to appoint a suitably qualified expert.

- On the subject of unilaterally obtained expert opinions, see the comments in section 3 above.

- The appointment of experts

Based upon the request for an expert opinion and the questions to be answered therein, the Arbitration Board will appoint one or more experts who are able and willing to answer the questions raised. The parties will be given a deadline for any challenge to the expert on the basis of a conflict of interests. The Arbitration Board then considers whether or not the challenge is to be successful and, in the affirmative, appoints a new expert. Reference is made to ”Guidelines for experts” issued by the Arbitration Board in 1997 and to ”A practical guide to expert opinions” issued in 2004 by the Arbitration Board and the Danish Society of Engineers.

- The possibility of accommodating wishes from the parties

In the request for an expert opinion, the parties may make comments on the qualifications or educational background required from the expert, or the number of experts required. The Arbitration Board will consider such comments when making the appointment. It is not considered advisable for a party to name specific candidates for the appointment as experts or institutions or enterprises employing them. Such a procedure involves the risk of making the opponent sceptical, often with the

result that the person(s) in question will not be appointed. Reference is made to ”Guidelines for experts” issued by the Arbitration Board in 1997 and to ”A practical guide to expert opinions” issued in 2004 by the Arbitration Board and the Danish Society of Engineers.

On the possibility of access to the resume of experts, see the comments on expert arbitrators in section 5 above.

- The submission to the expert of the request for an expert opinion and the questions to be answered in it.

Initially only the request for an expert opinion is sent to the expert. This is followed by a period of 14 days within which any challenges to the phrasing of the questions for the expert or the documents produced must be put forward. Any disagreement will be decided by the arbitral tribunal or the Arbitration Board, primarily in a written procedure. In the absence of challenges, the questions for the expert and the documents will be forwarded to the expert with a request to commence work once the required security for costs has been provided.

- Urgent cases

In cases submitted to the secretariat and deemed by it as urgent, the general rules may be departed from as required to promote the processing of the case. Thus the parties must be ready to accept very short deadlines, for instance in relation to challenges to appointed experts, the phrasing of the questions to the expert, the presentation of documents or the fixing of a time for the expert’s inspection.

- The provision of security, including the liability issue

The party filing the request for an expert opinion must provide security for the costs thereof, including such costs as arise out of questions put by the other parties in the case in connection with the opinion. In the event that additional questions are put to the expert at a later stage, the Arbitration Board will decide which party that has to lodge the security for costs relating to the answering of these questions. Security is to be provided in the form of a cash payment. Unless the case is urgent, the expert is requested to commence working only when security has been lodged. As a general rule, the lawyer acting for the party requesting the opinion will be jointly liable with said party for the costs. Reference is made to ”Guidelines for experts” issued by the Arbitration Board in 1997 and to ”A practical guide to expert opinions” issued in 2004 by the Arbitration Board and the Danish Society of Engineers.

- The secretariat of the Arbitration Board will contact the expert to decide a deadline for the preparation of the opinion and will monitor its compliance.

- On preparatory meetings, see section 8 below.

8. Exchange of other pleadings. Preparatory meetings. Practice concerning postponement.

Article 7 of the Rules of Procedure

The parties shall be treated with equality and shall be given full opportunity to present their case.

Article13 of the Rules of Procedure

The parties may further exchange reply and rejoinder before a date is set for the oral hearing, and they must do so before the expiry of a deadline fixed by the arbitral tribunal.

Par. 2. Article 11(2) shall apply mutatis mutandis.

Article 14 of the Rules of Procedure
The arbitral tribunal may fix deadlines for all pleadings submitted in a case.

Article 15 of the Rules of Procedure
Either party may supplement its claim or defence, make new submissions or present new evidence (nova).
Par. 2. Nova presented later than 8 calendar days before the oral hearing shall not be considered in the case unless very special circumstances apply.

Article 16 of the Rules of Procedure
If a party is unable to meet a deadline fixed pursuant to art. 13 -14 above, it shall submit a reasoned request for an extension of the deadline to a specific later date well in time before the deadline.
Par. 2. The arbitral tribunal will decide whether to grant such extension in full or in part, possibly after having heard the opponent.

Article 20 of the Rules of Procedure
Questions on points of procedure may be decided by the presiding arbitrator alone.

Article 22 of the Rules of Procedure
Once it finds that the parties have been given opportunity to state their opinions and produce the necessary information, the arbitral tribunal shall fix a time for the oral hearing of the case.

Par. 2**.** The arbitral tribunal may decide prior to the closing of pleadings that a date be set for the oral hearing.

Par. 3. However, if it finds it appropriate and after having heard the parties, the arbitral tribunal may decide to decide the case on the basis of written submissions only.

Article 26 of the Rules of Procedure
If a party fails to appear at an oral hearing without showing sufficient cause, or if a party fails to contribute to the elucidation of the case or fails to give the case due attention, see art. 12 and 13, the arbitral tribunal may make its award on the basis of the information before it.

- The provision in art. 7 of the Rules of Procedure, which corresponds to the mandatory provision in s. 18 of the Arbitration Act, sets out the fundamental requirements to the processing of the case by the arbitral tribunal. It is stated partly that the parties must be treated with equality, partly that they must be given full opportunity to present their case. These are fundamental principles of the administration of justice in relation to equal treatment and access to become acquainted with the process matter of the case (the open trial principle) and to respond to claims and allegations made by the adversary (the adversarial principle).

- Not uncommonly in the preparation of an arbitration case, the need arises to arrange one or more meetings to solve practical problems or decide disputes arising during the preparatory process, for

instance in relation to the submission of documents, the formulation of questions to an expert, a.s.o. Such questions of procedure may be decided by the presiding arbitrator alone, see art. 20 of the Rules of Procedure. Preparatory meetings are held by appearance in person or by video or telephone conferences.

It is considered good practice to reply as soon as possible to enquiries from the secretariat with proposals for dates for a preparatory meeting so as to clarify which dates are available and which are not. In this way, the many people involved in the case (arbitrators, lawyers, experts, parties and witnesses) may make final bookings in their diaries of the dates that will be used for the meeting, leaving the other dates free for other arrangements. The parties are given the choice of two dates of which one will be used for the meeting. If a party is not free on the date set, it will have to send a substitute.

If a party has not responded by the deadline set, it shall have to accept that the meeting is held on one of the dates proposed.

- It is general practice for the parties to exchange reply and rejoinder in addition to statement of claim and statement of defence. See in section 3 above about statement of claim and statement of defence for the number of copies in which to submit reply and rejoinder and exhibits.

- In major cases involving complex issues the parties may exchange further pleadings

- The Arbitration Board/the arbitral tribunal will fix deadlines for the submission of statement of defence, reply and rejoinder and any other pleadings. The Arbitration Board/the arbitral tribunal may also fix deadlines for all pleadings submitted in a case.
See also art. 13 (1) and 14 of the Rules of Procedure.
It is general practice to fix an overall timetable for the processing of the case at the commencement of proceedings or after the submission of the statement of defence and also, if possible, to set a date for the oral hearing. Such a timetable will be determined by written procedure or at a preparatory meeting or in a telephone conference, possibly following discussions between the Arbitration Board or the arbitral tribunal and the parties. If it is deemed appropriate and after having heard the parties, the arbitral tribunal may decide to decide the case on the basis of written submissions only, see also art. 22(2 and 3) of the Rules of Procedure.

The exchange of pleadings must be finalised within a specified period of time sufficient to ensure that the case may be decided without unnecessary delays while, at the same time, giving the parties an opportunity to make submissions with due regard to their possibility of safeguarding their own interests.

If a party is prevented from observing a deadline, it must send a reasoned request for a time extension well before the expiry of the deadline. The arbitral tribunal will then consider whether to grant the extension if full or in part. A time extension will be granted only under special circumstances, as it means having to change the overall timetable for the submission of pleadings and the date fixed for the oral hearing as already agreed between the parties through the intervention of Arbitration Board/the arbitral tribunal. For example, a time extension is likely to be granted in case of illness, or if the parties have initiated serious negotiations to settle the case and agree on the request for a time extension.

If a request for a time extension is refused, the arbitral tribunal may determine to decide the case on the evidence before it. This may result in the case being resolved without the arbitral tribunal having considered a party's statement of defence, reply, rejoinder or other pleadings with attached exhibits,

thereby making the award only on the basis of the information available to it at the time, see art. 22(1) and 26 of the Rules of Procedure.

9. Fixing a date for and preparing the oral hearing

Article 22 of the Rules of Procedure
Once it finds that the parties have been given opportunity to state their opinions and produce the necessary information, the arbitral tribunal shall fix a time for the oral hearing of the case.

Par. 2. The arbitral tribunal may decide prior to closing the exchange of pleadings that a date be set for the oral hearing.

Par. 3. However, if deemed appropriate and after having heard the parties, the arbitral tribunal may determine to decide the case on the basis of written submissions only.

Article 9 of the Rules of Procedure
As a general rule, the oral hearing shall take place at the registered address of the Arbitration Board. However, when deemed practical under the circumstances, the arbitral tribunal may decide to hear the case elsewhere.

Article 23 of the Rules of Procedure
The parties should make sure that all persons capable of elucidating the case appear before the tribunal at the oral hearing. Not later than 8 calendar days before the oral hearing the parties shall notify the arbitral tribunal and the opponent of the identity of anyone appearing as their representative and of the witnesses they intend to bring forward.

Par. 2. The arbitral tribunal may direct the parties to appear in person and to make sure that anyone having been involved in the case at hand be brought before the arbitral tribunal as a witness.

- When the parties have been given an opportunity to state their opinion and produce the necessary information, the arbitral tribunal will decide on a date for the oral hearing of the case, see art. 22(1) of the Rules of Procedure.

Before doing that, the arbitral tribunal will inquire of the parties how much time they need at the oral hearing.

- If deemed appropriate, the arbitral tribunal may determine to decide the case on the basis of written submissions only. First the parties must be given an opportunity to state their opinion, see art. 22(3) of the Rules of Procedure.

- The arbitral tribunal may decide on the date for the oral hearing before the exchange of pleadings is closed, see art. 22 (2). As stated above in section 8, it is general practice to prepare an overall timetable for the processing of the case at the commencement of proceedings or after the submission of the statement of defence and also, if possible, to set a date for the oral hearing.

• It is considered good practice to reply as soon as possible to enquiries from the secretariat with proposals for dates for the oral hearing so as to clarify which dates are available and which are not. In this way, the many people involved in the case (arbitrators, lawyers, experts, parties and witnesses) may make final bookings in their diaries of the dates that will be used for the meeting, leaving the other dates free for other arrangements.

If a party has not responded by the deadline set, it shall have to accept that the oral hearing is held on one of the dates proposed. If a party is not free on the date set, it will have to send a substitute.

• The parties must make sure to convene all the representatives, witnesses and experts that they wish to bring as witnesses at the oral hearing. Accordingly, responsibility for making sure that the above persons attend the oral hearing at the right time lies with the parties themselves. Not later than 8 calendar days before the oral hearing the parties must notify the arbitral tribunal and the opponent of the identity of the persons appearing as their representative and of the witnesses they intend to bring forward, see art. 23(1) of the Rules of Procedure.

• The arbitral tribunal may decide that the parties have to appear in person and may order the parties to make sure that anyone having been involved in the case at hand be brought before the arbitral tribunal as a witness, see art. 23(2) of the Rules of Procedure.

• Depending upon the circumstances, it may be possible to involve the secretariat of the Arbitration Board, and possibly the presiding arbitrator, in questions concerning the organisation of the oral hearing. If such questions cannot be resolved immediately upon receipt of the request from the parties, a meeting – possibly a telephone conference – may be arranged.

• Evidence given before a court of law

The arbitral tribunal, or a party having obtained the prior approval of the arbitral tribunal, may ask the courts of law for assistance in the taking of evidence pursuant to the general provisions of the Administration of Justice Act, see s.27(1) of the Arbitration Act.

In practice this happens only rarely. Persons asked to appear as witnesses before an arbitral tribunal generally appear of their own free will. Also, it is preferable for the arbitral tribunal to hear the statements of witnesses at first hand.

In the event that the arbitral tribunal finds it necessary to request the taking of evidence by a court of law, it must submit a reasoned request to the relevant district court. The district court will then notify the parties of the time the taking of evidence will take place. After the evidence has been taken, the district court will forward a transcript of the court record of the statement(s) made before it to the arbitral tribunal and the parties for submission in the arbitration case.

• As a general rule, the oral hearing will take place in Copenhagen at the registered address of the Arbitration Board. However, when deemed practical under the circumstances, for instance when

inspections are performed in connection with the oral hearing, the arbitral tribunal may decide to hear the case elsewhere, see art. 9 of the Rules of Procedure.

In cases from Jutland and Funen the arbitral tribunal usually decides to hold the oral hearing in Jutland or on Funen.

- In principle, if the parties agree, inspections may be performed at any time during the proceedings in the arbitration case. However, inspections are generally performed in connection with the oral hearing so as to ensure that the observations made are still fresh in the memories of the arbitrators. It generally happens that arbitrators put questions of clarification in the course of the inspection.

- In keeping with general practice, the secretariat of the Arbitration Board will ask the parties to submit a statement of claim/defence and a timetable for the oral hearing to the opponent and the arbitral tribunal not later than 8 days before the oral hearing.

- It is considered appropriate to submit any supporting exhibits facilitating the processing of the case at the same time as the statement of claim/defence. Of special relevance to the understanding of a claim or plea are calculations, possibly in a spreadsheet format, showing the calculation trail of the claim made. It is conducive to the arbitral tribunal's understanding of the case to submit additional documentation in the form of photos, summary charts and drawings, descriptions of properties, a.s.o.

- It is also helpful for the arbitral tribunal if the parties indicate in which respects of the case they agree both in fact and from a legal point of view.

- In major cases with extensive pleadings and a substantial number of exhibits it may be appropriate for the parties to prepare a pleading in which they summarise their main points of view.

- In such cases it may also be appropriate – after the exchange of pleadings – to prepare exhibit bundles with page numbers.

10. The proceedings at the oral hearing

Article 25 of the Rules of Procedure

The oral hearing in the case shall be conducted in such manner as the arbitral tribunal sees fit.

Par. 2. If, after having set down the case for an award, the arbitral tribunal finds that it lacks information that is considered desirable for it to see before the award is made, the oral hearing shall be reopened. The parties shall be notified thereof and shall be given an opportunity to procure the information lacking. If the arbitral tribunal itself procures further information, the provision stipulated in the second clause of art. 19 shall apply.

Article 15 of the Rules of Procedure

Either party may supplement its claim or defence, make new submissions or present new evidence (nova).

Par. 2. Nova presented later than 8 calendar days before the oral hearing shall not be considered in the case unless very special circumstances apply.

Article 21 of the Rules of Procedure

At any time during the case the arbitral tribunal may attempt to mediate a settlement between the parties.

Article 7 of the Rules of Procedure
The parties shall be treated with equality and shall be given full opportunity to present their case.

Article 8 of the Rules of Procedure
The arbitral tribunal may conduct the arbitral proceedings in such manner as it considers appropriate.
Par. 2. The powers conferred upon the arbitral tribunal include the power to determine the admissibility of evidence and the actual circumstances upon which the case will be decided.

Article 9 of the Rules of Procedure
As a general rule, the oral hearing shall take place at the registered address of the Arbitration Board. However, when deemed practical under the circumstances, the arbitral tribunal may decide to hear the case elsewhere.

Article 24 of the Rules of Procedure
Records shall be kept of the proceedings in the case.

Par. 2. The records shall contain information on the meetings and hearings held in each individual case, stating time and place, the participants and the awards made or settlements concluded in each individual case.

Par. 3. The parties may demand transcripts of the entries recorded.

- The arbitral tribunal will organise the oral hearing in the way that it finds appropriate, see art. 25(1) of the Rules of Procedure.

- A building arbitration case is generally argued and decided in its entirety. However, it regularly happens that subquestions are argued and decided separately, for instance such as relate to the competency of the arbitral tribunal, time limitation a.s.o. Such separate closing arguments may be practical and save resources if the outcome may decide the case in its entirety. Requests for separate closings may be filed with the arbitral tribunal.

- The oral hearing is traditionally divided into a presentation of the issues of the case, a reading-out of the exhibits submitted in the case (presentation of evidentiary documents), witness statements and closing arguments.

- The purpose of the presentation of evidentiary documents is to give the arbitral tribunal an overview of the factual and legal issues of the case. It is appropriate to begin by a brief introduction to the main issues and the main points of dispute. In the great majority of cases a chronological presentation is most appropriate.

- The claimant gives an introduction to the issues at stake and reads out the relevant documents as required. The parties may assume that the arbitral tribunal is aware of the problems in the case and the general contents of the documents submitted in the case, including any expert opinions. When preparing for the oral hearing, the parties must take this into account so as not to prolong the presentation of the case unduly. It is appropriate for the parties to agree in advance which of the

exhibits in the case that must be read out. If such advance agreement is not possible, it is general practice that as soon as the claimant has finished reading out from an exhibit, the respondent will state which additional passages, if any, that it wishes to have read out.

It is considered appropriate for the lawyer performing the presentation to hand out on beforehand a list showing the sequence in which he intends to present the exhibits (e.g. exhibit 1, 3 December 1997, fax from the board of AA, exhibit 2, 11 December 1997, letter from BB to CC, exhibit A, 11 January 1998, note re meeting in DD, a.s.o).

- The parties may agree to replace an overall processing of the case consisting of a presentation, a reading-out of exhibits and closings with a theme-based presentation of the case, for instance dividing a case into themes such as delay, liability for defects, additional works, a.s.o.

In the latter case, the claimant will read out the exhibits relevant to the individual theme, followed by the examination of parties, witnesses and experts. Then the claimant will present its assessment of the evidence and its legal comments to the issues involved, followed by the respondent's assessment of the evidence and legal viewpoints. Such a theme-based structure of the proceedings may be combined with a presentation by the tribunal – if the parties so wish – of its view of the problems thus presented to it.

A theme-based presentation is particularly appropriate in cases involving multiple issues, for instance cases with a large number of claims. It offers the special advantage of allowing the presentation of the legal comments to the facts of the case immediately upon the presentation to the tribunal of these facts – and of enabling the tribunal to give an advisory opinion in the case immediately thereafter.

If a theme-based presentation is used, it may be appropriate for the exhibits submitted in the case to be reorganised so as to reflect the order in which the themes will be addressed.

- Nova. It happens on occasion that a party wishes to change its claim or plea, make new submissions, bring new witnesses or submit new exhibits.
The purpose of the prior preparation of the case is to organise the sequence and order of the parties' claims, submissions and evidence. Accordingly, it is most unfortunate and very inconsiderate to the opponent and the arbitral tribunal to submit nova shortly before the oral hearing. Nevertheless, it should always be remembered that an arbitral award is final and binding upon the parties and that, consequently, all relevant material should be made available to arbitral tribunal before it makes its award, see article 15(1) of the Rules of Procedure.

In practice it is difficult to strike the right balance in relation to all these opposing considerations. For that reason a deadline of 8 calendar days has been set for the submission of nova, and at the same time it is pointed out that this deadline will only be waived under very special circumstances.

If it cannot be resolved by negotiation, a question on, say, the submission of a new exhibit will have to be decided by the arbitral tribunal. This may require a postponement of the oral hearing, and that may have financial implications because of the impossibility of finalising the proceedings as planned.

- The presentation of evidence in the form of witnesses takes place after the reading-out of the exhibits submitted in the case (presentation of evidentiary documents). The parties usually agree on the procedure that they find most practical. Parties and their representatives are entitled to attend the oral hearing. In practice, witnesses may also be present at the oral hearing unless a party objects to it.

When experts give evidence, the first round of questions will be put by the party having requested their attendance at the oral hearing.

• Art. 8(2) of the Rules of Procedure provides that the arbitral tribunal has the power to determine the admissibility of evidence. The arbitral tribunal may rely on this provision when barring the unnecessary submission of evidence, see s.342 of the Administration of Justice Act. The arbitral tribunal may invoke the same provision when refusing to admit unilaterally obtained declarations. Questions of discovery, too, may be decided by the arbitral tribunal with reference to this provision.

• Once all the evidence has been presented, the tribunal will allow the parties to give their closing arguments; the claimant first, followed by the respondent. The closings end with a possible rebuttal by the claimant and surrebuttal by the respondent.

• Art. 8(2) of the Rules of Procedure establishes the principle of the freedom to assess evidence, meaning that, based on the proceedings and the evidence before it, the arbitral tribunal will decide the actual circumstances upon which it will decide the case.

• Records will be kept of the proceedings in the case, and the records will be authorised by the Arbitration Board. The records will begin with stating the identity of the parties and the claims made. It will also contain information on the meetings and hearings held in each individual case, stating time and place, the participants and the awards made or settlements concluded in each individual case. See also art. 24 of the Rules of Procedure.

The parties may demand transcripts of the entries recorded.

• In the award, or in an enclosure to the award, there will be a list of the pleadings submitted in the case and the dates they carry, as well as of other important documents in the case.

• If, after having set down the case for an award, the arbitral tribunal finds that it lacks information that is considered desirable for it to see before the award is made, the proceedings may be reopened. The parties will be notified thereof and will be given an opportunity to procure the information lacking. If the arbitral tribunal procures further information on its own account, the parties must be given an opportunity to state an opinion thereon, see art. 25(2) of the Rules of Procedure.

• Art. 21 of the Rules of Procedure provides that the arbitral tribunal may attempt to mediate a settlement between the parties at any time during the case. See section 11 below on the general procedure to be applied in connection with settlements.

• With regard to the fundamental requirements to the processing of the case by the arbitral tribunal as set out in art. 7 of the Rules of Procedure, reference is made to section 8 above.

11. Making the award

Article 27 of the Rules of Procedure
If, during the arbitral proceedings, the parties settle the dispute on their own or with the help of the arbitral tribunal, the arbitral tribunal shall terminate the proceedings.

Par. 2. The arbitral tribunal may render an oral or written opinion outlining its views on the case.

Article 28 of the Rules of Procedure
The arbitral award shall be made in writing, and a copy of it, signed by the members of the arbitral tribunal, shall be kept in the files of the Arbitration Board.
Par. 2. The arbitral award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given.
Par. 3. The arbitral award shall state its date and the place of arbitration. The arbitral award shall be deemed to have been made at that place.
Par. 4. The arbitral tribunal shall make its award as soon as possible and, if possible, not later than four weeks after the case was set down for an award.
Par. 5. Should the members of the arbitral tribunal fail to reach agreement, the case shall be decided in accordance with the majority of votes.

Par. 6. The members of the arbitral tribunal may demand that the award contain the different opinions as they were voiced in connection with the vote.
Par. 7. After the arbitral award has been made, the parties shall each receive a copy that has been authenticated by the Arbitration Board.

Article 29 of the Rules of Procedure
The arbitration case shall be terminated by the making of the final arbitral award, by settlement, see art. 27, or by a decision of the arbitral tribunal pursuant to par. (2) of this article or art. 32(4).
Par. 2. The arbitral tribunal may decide to terminate the case in the event that:

1) the claimant withdraws its claim, unless the respondent objects to the termination of the case and the arbitral tribunal recognises that the respondent has a legitimate interest in obtaining a final resolution of the dispute,
2) the parties agree to terminate the proceedings, or
3) the arbitral tribunal finds that for other reasons a continuation of the proceedings has become unnecessary or impossible.

Par. 3. The mandate of the arbitral tribunal shall cease with the termination of the arbitral proceedings, however see art. 30.

Article 30 of the Rules of Procedure
Within thirty calendar days of receipt of the arbitral award a party may send a request to the arbitral tribunal, with a copy to the other party, asking it to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature. If the arbitral tribunal considers the request to be justified, it shall make the correction within thirty calendar days of receipt of the request.

Par. 2**.** The arbitral tribunal may correct any errors of the types referred to in par. (1) of this article on its own account within thirty calendar days of the date of the award.
Par. 3. Within thirty days of receipt of the award a party may send a request to the arbitral tribunal, with a copy to the other party, asking it to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty calendar days of receipt of the request.
Par. 4. The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction or an additional award pursuant to par. (1) and (3) of this article.
Par. 5**.** The provisions of art. 28 (1-3) and (5-7) shall apply to corrections and to additional awards.

Article 31 of the Rules of Procedure
Unless objected to by a party, the Arbitration Board may arrange for awards or advisory opinions to be published in the specialist press without indication of names.

Article 33 of the Rules of Procedure
The arbitral tribunal may order a party to indemnify the other party in full or in part for the costs incurred by the latter in connection with the arbitration case.

- Art. 28 of the Rules of Procedure states the formal rules on the arbitral award, which must

- be in writing, stating the date and the place of arbitration. The arbitral award is deemed to have been made at that place.
- be signed by the members of the arbitral tribunal in one copy to be kept in the files of the Arbitration Board.
- state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given.
- be made as soon as possible and, if possible, not later than four weeks after the case was set down for an award.
- be decided in accordance with the majority of votes in cases where there is a difference of opinion between the members of the arbitral tribunal,

- reflect any differences of opinion between the members of the arbitral tribunal at the request of the dissenting member(s).

- be forwarded to each party in a copy authenticated by the Arbitration Board.

In major cases where the parties ask for a full award, the period of four weeks may be exceeded.

- It follows from building arbitration practice that a case may be resolved in different ways:

1) A settlement concluded after the arbitral tribunal has rendered an oral advisory opinion

Pursuant to art. 21 of the Rules of Procedure, at any time during the proceedings in the case the arbitral tribunal may attempt to mediate a settlement between the parties. A sizeable number of cases are resolved by the parties settling the dispute immediately upon the conclusion of the oral hearing, after the arbitral tribunal has rendered an oral advisory opinion in the case.

2) A settlement concluded after the arbitral tribunal has rendered a written advisory opinion

Other cases are settled after the arbitral tribunal has stated its view of the case in a written advisory opinion. Written advisory opinions are generally accompanied by a remark to the effect that the outcome of an award is likely to be the same as the outcome of the settlement proposed in the opinion.

3) A summary award

In a summary award, the arbitral tribunal will confine itself to a presentation of the case, typically including a rendition of the claims of the parties, the main submissions and the full premises upon which the award was made.

4) A full award

A full award contains a rendition of the claims and submissions made by the parties, the written and oral evidence considered important by the arbitral tribunal, the closings of the parties, the premises upon which the award was made and the conclusion of the arbitral tribunal.

The parties may choose between the above types of award.

● Art. 29 of the Rules of Procedure contains a full list of the ways in which arbitral proceedings may be terminated. The case is terminated if and when:

- the final arbitral award is made. It should be noted that pursuant to art. 26 of the Rules of Procedure, the arbitral tribunal may make a final award if a party fails to appear at an oral hearing without showing sufficient cause, or if a party fails to contribute to the elucidation of the case or fails to give the case due attention,
- the parties settle the claim, see art. 26 of the Rules of Procedure,
- no security is provided for the costs of the arbitral proceedings, see art. 32(4) of the Rules of Procedure,
- the claimant withdraws its claim, unless the respondent objects to the termination of the case and the arbitral tribunal recognises that the respondent has a legitimate interest in obtaining a final resolution of the dispute, see the first clause of art. 29(2) of the Rules of Procedure,
- the parties agree to terminate the proceedings, see. par. 2 of Article 26(2) of the Rules of Procedure,
- the arbitral tribunal finds that for other reasons a continuation of the proceedings has become unnecessary or impossible, see par. 3 of art. 29(2) of the Rules of Procedure.

• The mandate of the arbitral tribunal ceases with the termination of the arbitral proceedings, however see art. 30 of the Rules of Procedure, which is mentioned below. This means that once the arbitral proceedings have been terminated, the arbitral tribunal cannot reopen the case. On the possibility of the arbitral tribunal to reopen the case after having set it down for an award, reference is made to art. 25(2) of the Rules of Procedure and to section 10 above.

• According to art. 30(1) of the Rules of Procedure, within thirty calendar days of receipt of the arbitral award a party may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or similar errors. This relates to cases where the content of the arbitral award does not reflect the intentions of the arbitral tribunal.

However, it is not possible to have corrections made on the grounds that the arbitral tribunal have misinterpreted the evidence or applied the law incorrectly.

According to art. 30(2) of the Rules of Procedure, the arbitral tribunal may correct any errors of the types referred to in par. (1) on its own initiative within thirty calendar days of the date of the award.

These rules generally correspond to the provisions of s. 221(1) of the Administration of Justice Act.

• It follows from Article 30(3) of the Rules of Procedure that within thirty calendar days of receipt of the award a party may ask the arbitral tribunal to make an additional award in claims presented in the arbitral proceedings but omitted from the award. The practical purpose of this provision is to prevent a new case from being commenced in relation to claims that were given attention during the proceedings in the case, but which – typically by mistake – were not included in the arbitral award. New claims that were not mentioned in the arbitration case cannot be raised.

• In connection with the resolution of the case the arbitral tribunal will also consider the question of legal costs and payment of the costs of the arbitral proceedings.

According to art. 33 of the Rules of Procedure, the arbitral tribunal may order a party to indemnify the other party in full or in part for the costs incurred by the latter in connection with the arbitration case.

When determining the costs of the case the arbitral tribunal will apply the practice followed by the ordinary courts of law according to which, as a general rule, the party in whose favour the award was made will obtain reimbursement of its costs by the other party.

Reference is made to section 12 below about the determination of the costs of the arbitral proceedings conducted by the Arbitration Board.

In connection with agreements relating to private building projects it will often be possible to obtain cover of the costs of conducting the case, including cover of legal costs, by means of legal expenses insurance.

• The Arbitration Board may arrange for awards or advisory opinions to be published in the specialist press without indication of names, see art. 31 of the Rules of Procedure.

The parties are requested to notify the Arbitration Board if they object to the publication of an advisory opinion or an award. In the absence of objections from the parties, the advisory opinion or the award will be sent to the editors of the KFE magazine (about awards relating to property) and the TBB journal (on housing and building law), respectively. The editor in question will then select the awards that are believed to be of general interest to practitioners. The awards are published without indication of

names. Moreover, advisory opinions and awards are available in Retsinformation (the online legal information system of the Danish State), also without indication of names.

12. Settlement of costs

Article 32 of the Rules of Procedure

The parties shall provide security for all costs estimated to arise out of the case, including a fee to the Arbitration Board in cover of its handling costs for the case.

Par. 2. Security shall be provided as soon as the Arbitration Board has determined the size and nature of the security to be provided, using as a basis therefor the financial scope of the case. Should it later turn out that such scope is wider than originally anticipated, the Arbitration Board may demand the security to be increased.

Par. 3. As a general rule, the two parties shall be required to put up identical security. Failure by a claimant to advance the required security shall cause the case to be dismissed. Failure by a respondent to advance the required security shall result in the claimant having to put up the full security. The same provisions shall apply to counterclaims.

Par. 4. Failure to provide the required security may cause the Arbitration Board to terminate the proceedings.

Article 34 of the Rules of Procedure

Upon the termination of the arbitration case, the arbitral tribunal shall submit to the Arbitration Board an account of all costs arising out of the arbitral proceedings. The size of the fee payable to the arbitrators shall be subject to the approval of the Arbitration Board, which will then produce a statement of the total costs of the arbitration case, including the fee stipulated in art. 32, and settle the costs with the parties.

Par. 2. Upon recommendation of the arbitral tribunal, the Arbitration Board may decide that a party having failed unreasonably to give the case due attention or having otherwise protracted the proceedings must pay a special fee to the Arbitration Board of up to 100 per cent of the fee mentioned in par. (1) of this article, regardless of the general apportionment of costs in the case.

Par. 3**.** The parties shall be jointly and severally liable for the payment of the total costs, with the exception of the fee mentioned in par. (2) of this article, regardless of the apportionment of costs stipulated in the award and whether or not the amount is higher than the security provided. If, as a result, one party has to pay for the other party, the former shall have a right of recourse against the latter.

Article 35 of the Rules of Procedure

The separate issue of the determination of costs payable to the arbitral tribunal may be brought before a court of law by a party within 30 calendar days of said party's receipt of notice of the costs. If the costs of the arbitral proceedings are reduced, the reduction shall also apply to a party not having brought the issue before a court of law.

• Upon the termination of the arbitral proceedings, the arbitral tribunal prepares a statement of costs arising out of the proceedings and sends it to the Arbitration Board. The size of the fee to the arbitrators must be approved by the Arbitration Board, see art. 34(1) of the Rules of Procedure.

The Arbitration Board has prepared a set of guidelines on the calculation of arbitrator fees which is available on the Board's website at www.voldgift.dk.

• The Arbitration Board will calculate the total costs of the arbitration case, including the fees stated in art. 32(1) of the Rules of Procedure as well as rent of premises, meals, etc., and will settle the amount with the parties.

The fee is calculated as a percentage of the total fee to the arbitral tribunal as fixed by the Arbitration Board.

As a general rule, the costs of the arbitration case will be paid by the losing party to the Arbitration Board.

• According to art. 34(2) of the Rules of Procedure, upon recommendation of the arbitral tribunal the Arbitration Board may decide that a party having failed unreasonably to give the case due attention or having otherwise protracted the proceedings must pay a special fee to the Arbitration Board of up to 100 per cent of the fee mentioned in art. 34(1).

This is not to be considered a penalty clause as such, but merely a provision enabling the Board to obtain payment of the estimated costs arising out of the secretariat's handling of the case in the event that a party fails unreasonably to help processing the case or in other ways protracts it. The fee may be charged regardless of the outcome of the arbitration case.

• The parties are severally and jointly liable for payment of the total costs, however to the exclusion of the fee mentioned in art. 34(2) of the Rules of Procedure, regardless of the assignment of costs in the award and whether or not the amount is higher than the security provided. If a party thus has to pay on behalf of the other party, the former will have a right of recourse against the latter.

13. Simplified arbitration proceedure

The Arbitration Board has adopted "Rules of simplified arbitration procedure for disputes relating to building and construction (VBA – simplified arbitration 2007)". The purpose of these rules is to allow parties to resolve their disputes in a simple and fast manner. There are no requirements with regard to the maximum amount that a case may involve in order to be resolved by simplified arbitration. It is up to the parties to decide whether or not they wish to use the simplified procedure.

For a case to be eligible for simplified arbitration, the parties must have agreed not only to submit the dispute to the Arbitration Board for Building and Construction, but also – in a separate agreement – that the case is to be resolved by means of the rules of simplified arbitration procedure. Such an agreement may be signed for existing or future disputes.

The simplified procedure has the following special characteristics:

• The tribunal consists of one arbitrator, generally an expert arbitrator

- The parties submit only one written pleading each
- The statement of defence must be submitted not later than 30 calendar days upon receipt of the statement of claim
- The case will involve no expert opinions, but the arbitral tribunal will perform a site inspection of the construction or civil works involved in the case
- The oral hearing must take place not later than 90 calendar days after proceedings commenced
- Whenever possible, the award in the case will be made within 14 calendar days of the case having been set down for an award
- Security is provided in the form of a standardised amount, see above in section 12.

As stated above, the purpose of the simplified procedure is to enable parties to resolve their disputes in a fast and simple manner. Consequently, the parties cannot expect the rules to be waived, for instance in relation to deadlines, once they have been adopted.

The awards in these cases are assumed to be short, without a presentation of the case, a rendition of the evidence produced or the closings by the parties.

14. The impact of the Arbitration Act on the Rules of Procedure

Article 36 of the Rules of Procedure
It follows from Act no. 553 of 24 June 2005 on arbitration that the provisions of Parts 1-2 and 8-10, and the provisions of art. 11(3), the first clause of art. 13(3), the second clause of art. 14(1), the second clause of art. 16(3), art. 27, art. 34(3), art. 12, the second clause of art. 16(4), art. 18, art. 31(1) and (3), and art. 33(5), see art. 31(1) and (3), cannot be waived by agreement. Accordingly, the above provisions shall apply to arbitral proceedings within building and construction to the extent that they are relevant.

- The provisions of the Arbitration Act also apply to proceedings in cases before arbitral tribunals. Accordingly, those rules of the Arbitration Act that cannot be waived by agreement between the parties will apply to arbitral proceedings in building and construction insofar as they are relevant to the processing of the cases, see art. 36(1) of the Rules of Procedure. The non-mandatory rules of the Arbitration Act will apply insofar as they have not been waived in the Rules of Procedure and are important to the processing of the arbitration case.

15. Adoption, approval, publication and entry into force of the Rules of Procedure

"Rules of Arbitration Procedure for Disputes Relating to Building and Construction (VBA – Arbitration Rules 2006)" were adopted on 25 July 2006 by the Arbitration Board for Building and Construction in accordance with the Bye-Laws of the Arbitration Board for Building and Construction of 14 July 2004. "Rules of simplified arbitration procedure for disputes relating to building and construction (VBA - rules of simplified arbitration 2007)" were adopted by the Arbitration Board for Building and Construction on 4 April 2007.

"VBA – Arbitration Rules 2006" were approved by the Danish National Agency for Enterprise and Construction on 25 July 2006.

"VBA – Rules of simplified arbitration procedure 2007" were approved by the National Agency for Enterprise and Construction on 11 June 2007.

The rules will be published on Retsinformation (the on-line legal information system of the Danish State) and on the website of the Arbitration Board at www.voldgift.dk. Upon the commencement of arbitral proceedings, a copy of the present rules is sent to the parties involved in the case.

"VBA – Arbitration Rules" became effective on 1 October 2006, and "VBA – Rules of simplified arbitration procedure" became effective on 11 June 2007. The rules apply to arbitration cases brought before the Arbitration Board for Building and Construction after those dates.

"Rules of procedure for the settlement of disputes by the arbitral tribunals set up by the Danish Building and Construction Arbitration Board" of 3 August 2001 have been rescinded, however they remain in force with regard to arbitration cases brought before the Arbitration Board prior to 1 October 2006.

This is a translation into English of the original guidelines in Danish. In the event of discrepancies between the two texts, the Danish original text shall be considered final and conclusive.