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# Effective Conflict Management



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## Introduction

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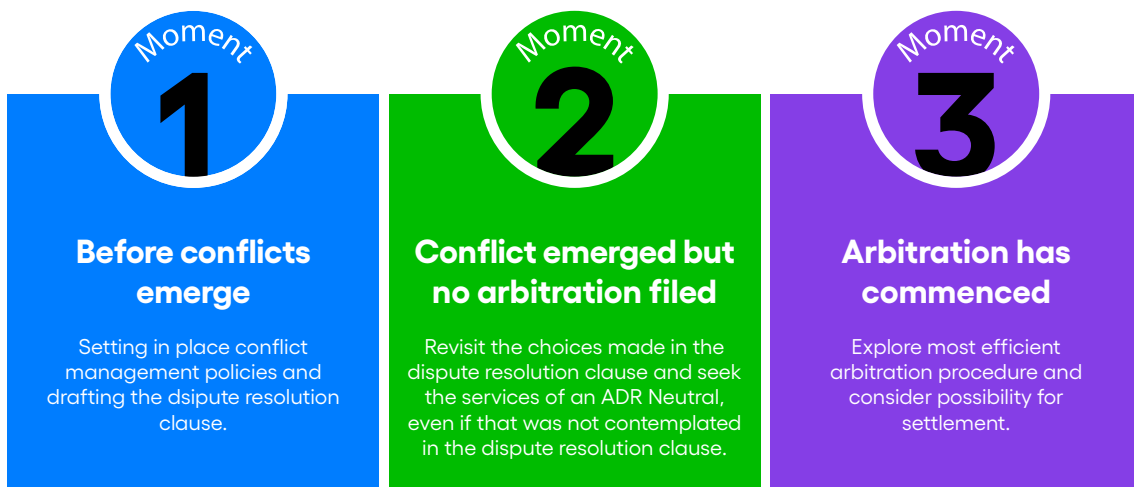
1. Because disputes may arise, conflict management should be an integral part of business administration. Effective and proactive management of nascent and actual disputes can significantly contribute to reducing costs, achieving a satisfactory outcome and preserving business and contractual relationships.
2. Over the years, in response to the need for efficiency in cost and time, ICC has developed an array of dispute resolution services to be used by businesses around the world when managing their disputes. Those services focus on assisting businesses seeking to avoid the escalation of disputes and on efficiently resolving disputes that could not be avoided.
3. [ICC Dispute Resolution Services](#) ('ICC DRS') includes [ICC Arbitration](#) administered by the [International Court of Arbitration](#) (the 'ICC Court')<sup>1</sup> and [ADR services](#) ('ICC ADR Services') administered by the [ICC International Centre for ADR](#) (the 'ICC ADR Centre' or the 'Centre'). In this 'Effective Conflict Management' Guide (the 'Guide'), the focus is on the following ICC ADR Services:
  - [Mediation](#),
  - [Expert Proceedings](#) — including non-binding expert evaluation and binding expert determination and the proposal and appointment of an expert or neutral,
  - [Dispute Boards](#),
  - [Documentary Instruments Dispute Resolution Expertise](#) (DOCDEX).
4. ICC ADR Services, each with its unique features, may be used as standalone tools to resolve disputes, or together as part of a **conflict management system**. Certain services can be used to explore the possibility of settlement after arbitration proceedings have commenced.
5. The cost of disputes is difficult to measure, in terms of both direct and indirect costs. The cost is usually lower when the dispute is settled between the parties themselves or with the aid of a third-party neutral, than when the parties delegate decision-making to an adjudicator or arbitrator.
6. The parties' goal is to resolve disputes quickly and at the lowest cost possible. The saved cost can be applied to productive business activities.
7. In the life of a dispute, there are **key moments** when parties can influence the overall cost of managing it:
  - 1) **Before conflicts have emerged, parties may consider setting in place conflict management policies and the drafting of the dispute resolution clause** ([Section I 'Proactive conflict management'](#)).<sup>2</sup> Because, as a general rule, anything other than court litigation requires consent, and consent is more easily found prior to any dispute, Moment n°1 is the optimal time for the parties to consider and agree on the suitable method(s) for resolving any disputes arising during the administration of their agreement.

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1 Or the ICC Court acting as Appointing Authority only, under the [Rules of ICC as Appointing Authority in UNCITRAL or Other Arbitration Proceedings](#).

2 In international commercial transactions, parties often opt out of court litigation. Arbitration is more frequently chosen for dispute resolution.

- 2) **The conflict has emerged but has not resulted in the filing of a request for arbitration** (Section II ‘Assisted Conflict Management’). At this point, the parties, acting alone or together, can revisit the choices made in the dispute resolution clause and seek the services of an ADR Neutral, even if that was not contemplated in their dispute resolution clause.
- 3) **Arbitration proceedings have been commenced** (II.B.4 ‘Using ADR to facilitate settlement in arbitration’). At this point, the parties can jointly explore the most efficient procedure for their arbitration and consider the possibility of settlement.



8. This Guide is meant to provide easy-to-understand guidance for business managers and decision makers, as well as in-house and external counsel who may not be well-versed in all aspects of the currently available ICC ADR Services.
9. The Guide seeks to offer businesses, including SMEs, and State entities an overview of the available ICC ADR Services and give recommendations on the relevant policy and practice considerations to be taken into account when deciding to use these services. It is divided into two main parts. **Section I ‘Proactive Conflict Management’** covers the ways in which businesses can approach conflict management without assistance. **Section II ‘Assisted Conflict Management’**, covers ICC ADR Services and how and when to effectively use them, both before and during arbitration proceedings.
10. The Guide’s recommendations aim at helping businesses manage disputes and access/select the right ICC ADR Services at the right time. The recommendations set out a range of options and reflect the view that there is no single way in which disputes should be managed. It also contains several recommendations to arbitrators regarding specific steps they can take to facilitate settlement in the context of an arbitration.<sup>3</sup>
11. Included throughout the Guide are boxes with additional information and examples of cases administered by the ICC ADR Centre or others (**Box 1, Box 2, etc.**).

<sup>3</sup> See II.B.4 ‘Using ADR to facilitate settlement in arbitration’. See also the Report ‘Facilitating Settlement in International Arbitration’ also prepared by the ICC Commission Task Force ‘ADR and Arbitration’.

## Overview of main recommendations

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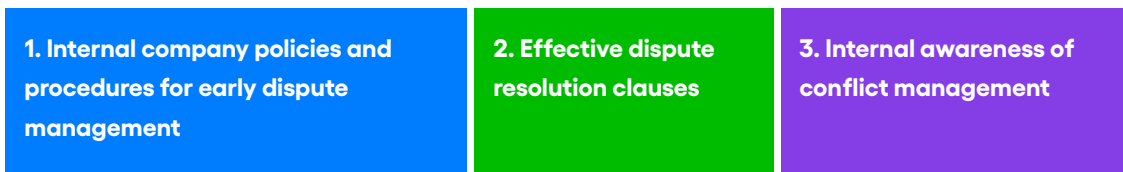
12. Businesses would benefit from viewing ADR services as **business tools**. Using the appropriate ADR service at the right time improves the prospects for effective dispute management and successful business administration.
13. It is good business practice to identify issues early and to attempt to avoid or de-escalate disputes early.
14. Every dispute is different (although many disputes have familiar patterns) and businesses are likely to benefit from reviewing the range of available ICC ADR Services and considering what they want from the neutral or the expert and how much control they want to maintain in deciding the outcome of their dispute.
15. Specific recommendations are made regarding the use of particular tools, for example:
  - In long-term contracts, parties may consider the use of a dispute board or standing mediator to assist in avoiding or resolving disputes ([II.B.1 'Using ADR to avoid disputes'](#)).
  - The combination of two or more tools may be effective for certain disputes (e.g. the use of an early non-binding expert evaluation followed by mediation) ([II.B.2 'Using ADR to promote settlement of disputes'](#)).
  - Expert determination may be used to obtain a timely and cost-efficient final decision on a specific issue in dispute ([II.B.3 'Using ADR for near real-time dispute resolution'](#)).
16. Specific recommendations are also made for enhancing the possibility of negotiated settlement after arbitration has been commenced, for example:
  - Pro-active participation of in-house counsel or other party representatives in establishing an arbitration procedure that facilitates settlement is encouraged (in particular, participation at early case management conferences) ([II.B.4\(ii\) 'Party engagement during arbitration proceedings'](#)).
  - Parties may consider including mediation/negotiation windows in their dispute resolution clauses ([II.B.4\(iii\) 'Mediation/negotiation windows'](#)).
  - Parties may consider using the sealed offer mechanism to encourage constructive settlement offers being made and accepted in the course of arbitration proceedings ([II.B.4\(iv\) 'Sealed offers'](#)).



## I. Proactive conflict management

17. Proactive conflict management tools and practices include:

- **Developing and implementing internal company policies and procedures for early dispute management.** These policies and procedures aim at proactively addressing and potentially avoiding emerging disputes. They also contain decision-making processes for identification of appropriate strategies for addressing disputes once they have arisen.
- **Drafting and deploying effective dispute resolution clauses.** (i) Creating clauses geared to ensure that the dispute resolution procedures included within contracts are tailored to both contain disputes and to address them efficiently when they do arise; and (ii) Administering the contract in a way that ensures that the contract clauses are followed in practice.
- **Increasing internal awareness of conflict management.** Companies should ensure that their stakeholders in the dispute resolution process are aware of the policies and procedures in place and observe their implementation.



### 1. Internal company policies and procedures

18. The creation of **effective policy and practices** to develop a healthy culture of conflict management is important for the efficient management of disputes and may include:
- a) Setting a 'tone from the top', with senior management expressing their commitment to effective early conflict management.
  - b) Identifying and enabling an 'ADR Champion' (see paras. 37-38 below).
  - c) Ensuring that those charged with implementing company policies are trained on ADR policies and procedures.
  - d) Creating a corporate culture and a way-of-working that encourages employees to identify and communicate concerns that may give rise to disputes.
  - e) Creating a culture of psychological safety that encourages an open dialogue and showing through lived experience that employees who report on nascent disputes are rewarded for their contribution to dispute management and not punished for 'delivering bad news'.
  - f) Raising awareness of the benefits of early notification (e.g. preservation of insurance rights and giving timely notices required under existing contracts and the law).
  - g) Building a technology platform to make such reporting easy and painless.
  - h) Establishing a company-standard for dispute resolution contract clauses and when and how to use them, raising awareness of the need to include them without modification (unless assisted by expert legal advice).
19. Internal corporate policies on conflict management should encourage more open dialogue between the different stakeholders in the company, such as business managers, operative personnel in charge of the day-to-day implementation of the agreement, and in-house counsel. Encouraging managers to share the circumstances of their dispute with their legal team at an early stage may prevent the escalation of disputes, reduce their scope, and enable preservation of rights and proper document handling to facilitate the management of a possible ensuing dispute. Dialogue between all stakeholders at the early stages of a dispute is also essential to ensure that the chosen dispute resolution strategy takes all the company's business interests into account.
20. The benefits of a healthy corporate culture may extend beyond the corporation if it creates goodwill in relationships with business partners. In longer-term relationships, there may be scope for business parties to develop cross-contract or cross-project dispute resolution frameworks<sup>4</sup> or to adopt an alliancing type of contract in which the alliance members commit to establishing a culture of 'no dispute'.

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<sup>4</sup> E.g. the Conflict Resolution Agreement between *Alstom S.A. and Bombardier Inc.* referred to in C. Duve, H. Eidenmüller, A. Hacke and M. Fries, *Mediation in der Wirtschaft* (Third ed., 2019), p. 311. See also U. Hagel 'The Value Add of Legal Departments in Disputes: Making a Business Case Rather Than Providing Pure Legal Advice', in *Liquid Legal, Management for Professionals*, K. Jacob et al. (eds) (Springer, 2017).



## 2. Effective dispute resolution clauses

21. While the general benefits of a well-drafted dispute resolution clause are acknowledged, what is at times less understood by commercial players is that the investment of time in proper drafting of the contract can also prevent disputes. Early engagement of in-house counsel and responsible business/contract managers at the negotiation stage can help ensure that an appropriate and clear contract is drafted, with conflict and dispute avoidance mechanisms that (i) anticipate potential disputes, and (ii) can be efficiently employed when necessary.<sup>5</sup> The importance of a carefully considered standard company clause cannot be overstated as the dispute resolution specialists may not be present at the time the transaction is negotiated. Too many arbitrations have started with a costly and time-consuming argument over a pathological dispute resolution clause that is not enforceable or cannot be implemented as intended.
22. When selecting a standard dispute resolution clause or drafting a bespoke clause, a company should consider (i) what types of disputes and issues they may face in their transaction; (ii) the dispute resolution methods that may address such issues; and (iii) any business objectives and constraints. Companies may develop such a matrix either from their own experience or with the benefit of available off-the-shelf tools,<sup>6</sup> or external advice.
23. It is recommended that parties start by consulting the standard clauses that are published by ICC for use in different circumstances. ICC provides a variety of model clauses for [ICC Arbitration](#), [ICC Mediation](#), [ICC Expertise](#), and [ICC Dispute Boards](#) exactly for this purpose.<sup>7</sup>
24. ADR tools may be used individually or together. When a dispute resolution provision provides for the use of more than one tool in a sequential series, it is commonly referred to as a multi-tier dispute resolution clause. Multi-tier clauses may create a mandatory sequence so that each successive step may be taken only after engaging in the prior steps.

**Box 1: Multi-tiered clause – ICC Mediation Model Clause D: Obligation to refer disputes to mediation under the ICC Mediation Rules, followed by arbitration if required<sup>8</sup>**

‘In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the [ICC Mediation Rules](#). If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the [Rules of Arbitration of the International Chamber of Commerce](#) by one or more arbitrators appointed in accordance with the said Rules of Arbitration.’

<sup>5</sup> Contract drafting is not always a purely unassisted exercise.

<sup>6</sup> An interactive tool developed by a consortium of companies in Germany, the Round Table on Mediation and Conflict Management (RTMKM) (<https://www.rtmkm.de/>) may provide support. RTMKM’s tool is designed to allow clients to identify (i) what criteria matters to them most in a given context (e.g. speed, confidentiality, enforcement concerns, the the business relationship); and (ii) through a percentage scale, how suitable various dispute resolution alternatives are to their needs).

<sup>7</sup> There is no need to include a reference to the [ICC DOCDEX Rules](#) in a contract if the parties wish to resolve their dispute by ICC DOCDEX Proceedings. The use of an agreement that provide for the application of ICC Banking Rules make the DOCDEX Rules applicable (Art. 2, DOCDEX Rules).

<sup>8</sup> See [ICC Model Mediation Clauses](#).

25. Whatever service or combination of services is required, it is important to ensure that an appropriate and workable dispute resolution clause is included in the contract. However, parties should always remember that if the contractually agreed dispute resolution procedure is no longer in the interests of the parties, they are free to agree to choose an alternative procedure that is more suitable but not provided for in the clause.<sup>9</sup>
26. The ICC ADR Centre is available to provide support to parties in drafting dispute resolution clauses in accordance with ICC Rules by explaining the different services it provides.<sup>10</sup>
27. Furthermore, in-house counsel or business unit personnel involved with contract administration may consider developing an internal process by which collective experience in drafting and operating dispute resolution clauses can be shared. When assessing the efficiency of different dispute resolution mechanisms, it is worth bearing in mind that even if a dispute were not to be entirely resolved through the parties' chosen ADR mechanism(s), the greater understanding of the dispute that can flow from the use of such mechanism can be beneficial. For example, it may enable subsequent arbitration proceedings to be more focused and enable stakeholders to justify the time and cost of arbitration in knowing that pre-arbitration avenues to settlement have been explored.
28. Good practice at the drafting stage includes:
- a) Ensuring that drafting is clear, well thought through, and workable (i) using the guidance and standard/model clauses provided by dispute resolution institutions; and (ii) confirming/ensuring that the entry and exit requirements for each tier/step of any multi-tiered dispute resolution clause are clear.
  - b) Considering the business parameters, cost and speed of resolving the dispute, and the need for enforcement and confidentiality.
  - c) Considering whether the contract would benefit from a system of reporting and trigger mechanisms: when a dispute arises, the right people get around the table at the right time and with the right information to give them a good chance of dispute containment or near real-time dispute resolution.<sup>11</sup>
  - d) Performing systematic early-stage pre-action risk assessment.<sup>12</sup>

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9 Even if a clause is not included in the contract, parties can still agree on ICC Dispute Resolution Services later on.

10 ICC does not have a 'clause generator' and caution is advised when approaching clause generators, as the downside risk associated with a deficient clause, or one that is unsuited to the relevant jurisdiction or circumstances, often justify the costs of obtaining advice on the matter.

11 An example of such a contractual mechanism is contained in the FIDIC standard forms of contract for major works, which require claims to be notified within 28 days and then for the engineer to work with the parties in an effort to reach agreement in the first instance.

12 See 'Pre-Action Risk Assessment' at p. 41.

**Box 2: Non-compliance with a multi-tiered clause**

The dispute resolution clause in the parties' contract provided for mediation as a mandatory step prior to arbitration. The claimant commenced arbitration proceedings before the period for mediation prescribed in the dispute resolution clause had expired. It argued that in the circumstances of the case and given the wording of the clause and the nature of the relief that the claimant was seeking, that period was inapplicable. The respondent submitted that the arbitrator appointed had no jurisdiction because the arbitration proceedings had been commenced too soon. Ambiguity in the drafting of the parties' dispute resolution clause gave rise to a jurisdictional dispute that required a ruling from the arbitrator which created uncertainty and increased costs.

29. It is recommended that regardless of the dispute resolution clause that is in place, companies should pause to gain perspective before initiating formal dispute resolution procedures. Many companies require an internal cost-benefit analysis or early case assessment before legal expenditure on a formal dispute resolution process is approved, either in all instances or above a pre-determined value threshold — and they are right in doing so. Indeed, companies benefit from having in place an early risk assessment process that they employ systematically when a dispute arises.
30. Early risk assessment by a party involves forming an opinion on the legal risks and merits of the issues in dispute. It requires the management team to form a view as to the risk profile of the dispute at an early stage<sup>13</sup> and to develop — or attempt to develop — a realistic sense of the costs of running a dispute through an adjudicative process.<sup>14</sup> As a result, early risk management may assist in creating a preference for settlement (either through negotiations or an ADR process),<sup>15</sup> as the risks and costs of an adversarial dispute become apparent. It also allows a party to assess the appropriateness of using specific ADR tools and whether they were contemplated in the dispute resolution clause.
31. An example of an early risk assessment method is a form of 'decision tree' model, which can be used to assist a party in: (i) identifying the most likely outcomes of the dispute if it is fought out; (ii) attributing probabilities and financial values to each outcome; and (iii) using decision analysis techniques such as probability weighted averaging and sensitivity testing. The outputs of such analysis can help the company identify its settlement range by providing a better understanding of its risk if the dispute is litigated or arbitrated.<sup>16</sup> Of course, care must be taken when using models, as small changes to the probabilities used or in the identification of the correct branches in the 'decision tree', can make material differences to the bottom-line output.

13 Where a risk assessment is done at an early stage, there will necessarily be material uncertainty about the inputs that are fed into the model (e.g. prospects of success on key issues, likely financial value of different outcomes, cost and timescale), but equally a greater opportunity to avoid the costs and strife of a protracted dispute. Further, even where such an exercise does not lead to avoidance of the dispute, it can help to manage expectations within the organisation about likely outcomes, which may itself make consensual resolution of the dispute more likely at a later stage.

14 ICC provides parties with a good sense of what its fees will be for an arbitration or for some ADR process (for arbitration, see the [ICC Costs Calculator](#)) However, the majority of the costs will be external to ICC — particularly external counsel, experts and other disbursements. As the costs of a dispute will vary significantly by case, company, sector and geography, companies will need to discuss with their external counsel what the likely costs will be for their dispute at hand.

15 For more substantial disputes or for organisations without in-house counsel this may often involve engaging external counsel.

16 See e.g. [Decision Analysis](#) ([www.herbertsmithfreehills.com](http://www.herbertsmithfreehills.com), 3 Sep. 2019). See also U. Hagel, *supra* note 4, at p. 237. Various legal technology companies also offer services using data to help inform legal risk assessments, which may (to a greater or lesser degree) claim to be able to predict the outcomes of disputes, thus facilitating early settlement. See, e.g., *Dispute Resolution*

32. Statistical databases are another form of legal risk assessment model. They calculate the success rate of claims along with average case duration and costs.<sup>17</sup> Assessments based on probability, even where there is little or no data of similar past situations to form a statistical database,<sup>18</sup> may be utilised in evaluating potential legal risk and can offer guidance for companies considering how to take their dispute forward. Artificial intelligence ('AI') tools can also be used to predict the likelihood that the case at hand will prevail by taking into account specific features of a particular case and comparing them against the database of past cases.<sup>19</sup> For particularly complex disputes, a standardised model may be difficult to adopt and bespoke solutions may be required. It is thus important to note that the use of AI in the realm of dispute resolution has not replaced a party's need for legal advice.
33. This Guide recommends that procedures be put in place to undertake this pre-action assessment systematically and suggests that focus should be maintained on making such procedures 'user friendly' to in-house counsel and business managers. *Ad hoc* assessment is recommended when such systematic procedures are not in place, or the dispute at hand is particularly complex or otherwise unusual to the company's business.
34. It is recommended to use early-stage pre-action risk assessment, whether conducted on an *ad-hoc* basis or as part of a systematic procedure, to assess *inter alia*, the following:
- a) The legal merits of the dispute: What are the strengths and weaknesses of a party's case?
  - b) Are there relevant considerations that go beyond legal claims? Will options contemplated fit with business strategy and corporate purpose, governance and reporting risks?
  - c) The financial dimensions of the dispute: What is the value of what is being argued over, and what are the costs involved in resolving the dispute through the different available routes? Attorney costs? Cost of experts? Costs of third party neutral or arbitrator? Cost impact of the uncertainty, e.g. on the company's financing possibilities, stock price or standing in the market?
  - d) Is there a risk of diverting internal resources that could otherwise be employed in productive company business? Indirect cost resulting from other work being derailed because of employees' time being spent on the dispute?
  - e) Is there a continuing or future business relationship that could be harmed by the continuation of the dispute? Do the parties still need to work together while the dispute is being resolved?
  - f) Are there risks of adverse publicity or demands on management time that outweigh the potential benefits of succeeding in the dispute?
  - g) Is an adjudication of the dispute required to set a precedent in which a party has an interest?

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*Data* (for international arbitration), *Solomonic* (England), *Premonition* (United States), and *Blue J Legal* (Canada). Task Force members had the opportunity to hear from *Case Law Analytics*, a legal technology company using neural networks designs to analyse past French cases to identify the likely outcomes of a new case with given attributes.

17 Including *Dispute Resolution Data* (for international arbitration). Similar offerings are available for English commercial litigation (e.g. <https://www.solomonic.co.uk/>).

18 See, e.g., P. Tetlock, D. Gardner, *Superforecasting: The Art and Science of Prediction* (2015, Crown Publishers)

19 Offerings of this type include *Premonition* in the United States, and *Blue J Legal* in Canada.

### 3. Raising awareness and training

35. Lack of familiarity with ADR tools results in reluctance (i) to provide for them in dispute resolution clauses in contracts or (ii) to integrate them in a company's internal disputes management toolbox. There is also a need for business managers to know how to use them fully when they are provided for.
36. Education and awareness of proactive dispute avoidance and the various ADR options available and their relative benefits are essential for those responsible to make decisions about (i) the design of internal claims and dispute management procedures, and (ii) the appropriate ADR tools to include in a dispute resolution clause. Education and awareness are also required for business and contract managers to ensure that the personnel responsible for administering the contract know how to operate the clause and how to follow the internal procedures.
37. Accordingly, it is recommended that awareness and training programs be conducted internally for all in-house personnel participating in contract drafting and execution. It is recommended that companies first identify the level of skills and training required for all internal personnel involved with dispute management. The use of an 'ADR Champion' can be effective in promoting the use of ADR across the business. However, to be effective in its role, the 'ADR Champion' must have in-depth knowledge of both proactive dispute tools and the ADR Services available. They must also know how to best deploy them within their organisation and embed them into their contract clauses. They should also possess the skill and fluency to provide effective ADR leadership to all internal personnel involved with the management of disputes.<sup>20</sup>
38. In addition, the ICC ADR Centre is available to make free presentations to companies on its services. The training for the operational teams can then be designed and delivered by the 'ADR Champion' in conjunction with their in-house legal team; a so to speak 'train-the-trainers' approach.

## II. Assisted conflict management

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39. The important point when selecting an ICC ADR Service is that the appropriate ADR service is the one that will help the parties manage their dispute in an appropriate and economic manner, considering the circumstances of the conflict, including the parties' business relationship. This Section II introduces the services of the ICC ADR Centre (II.A), and then addresses when and how parties can use these services during the life cycle of a contractual relationship or dispute (II.B).

### II.A. The Services of the ICC ADR Centre

40. The ICC ADR Centre offers a range of dispute resolution services, including (i) administering mediations and other forms of amicable dispute settlement; (ii) proposing/appointing experts and neutrals and administering expert proceedings; (iii) assisting parties in setting up and running dispute boards e.g., collection of deposits and payment of fees and expenses; (iv) administering DOCDEX proceedings, i.e. expert decisions on dispute related to trade finance instruments, including documentary credits; and (v) providing free of charge assistance and guidance notes on using ICC ADR Services and in drafting dispute resolution clauses in accordance with ICC Rules.

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<sup>20</sup> There is a wide choice of trainings available, both on-line and in-person. The choice of ICC courses available can be found at [iccwbo.org/dispute-resolution/professional-development/](http://iccwbo.org/dispute-resolution/professional-development/).

## 1. ICC Mediation

41. Mediation is a frequently utilised service provided by the ICC ADR Centre. In 2022, 25 new requests for Mediation were filed with the ICC ADR Centre involving 55 parties from 23 countries and all continents. The disputes concerned a wide range of business sectors, with construction and engineering, and energy and telecommunication dominating. The value of the disputes ranged from approximately US\$ 110, 000 to over US\$ 95 million (with an average amount in dispute of approximately US\$ 14.5 million), confirming the suitability of mediation for both lower and high-value disputes.<sup>21</sup>
42. The [ICC Mediation Guidance Notes](#) explain why and how to engage in mediation and describe mediation as:
- ‘a flexible settlement technique, conducted privately and confidentially, in which a mediator acts as a neutral facilitator to help the parties try to arrive at a negotiated settlement of their dispute. The parties have control over both the decision to settle and the terms of any settlement agreement.’<sup>22</sup>
43. A key feature of the mediation process is that parties are encouraged to adopt a commercially driven approach, transcending legal limitations, and to agree to solutions which would be unavailable through a contentious process such as arbitration or court litigation. A settlement agreement reached through mediation can be forward-looking, without fault or liability being attributed to any party.

### Box 3: Commercially driven dispute settlement

In a mediation where the parties were represented by in-house counsel alone, the responding party paid a partial amount due under the contract, in relation to which the requesting party waived interest fees, and the parties considered those matters resolved. The mediation continued with regard to outstanding claims made by the requesting party, and a final settlement was reached less than three months after the appointment of the mediator.

44. Mediation can be a very cost-effective form of dispute resolution. The costs of the proceedings are fixed by the Centre when the proceedings are terminated. They include the fees and expenses of the mediator, the filing fee and the administrative expenses of ICC.<sup>23</sup>

21 In 2021, 44 new requests were filed with the ICC ADR Centre, involving 149 parties from 38 countries and all continents and the value of disputes ranged from approximately US\$ 60,000 to over US\$ 480 million (with an average amount in dispute of US\$ 56 million).

22 [ICC Mediation Guidance Notes](#), ‘What is Mediation’ para. 1.

23 These costs do not include counsel fees.

**Box 4: Cost effective dispute resolution**

• **Case 1:** The contract between the parties did not provide for ICC Mediation; the dispute resolution clause only provided for ICC Arbitration. When a dispute arose, several negotiation meetings followed, but failed, and one party informed the other that it was commencing an arbitration. After further exchanges, the parties referred their dispute to ICC Mediation and subsequently filed a joint Request for Mediation pursuant to Article 2 of the [ICC Mediation Rules](#) ('Commencement Where there is an Agreement to Refer to the Rules'). The parties did not reach a settlement agreement during the mediation proceedings itself, but their dispute settled a few weeks after termination of the mediation proceedings. The final costs of the mediation, which include the mediator's fees and expenses and the Centre's administrative expenses, were fixed at 1% of the amount in dispute.

• **Case 2:** The parties jointly commenced a mediation in accordance with their multi-step dispute resolution clause, which provided for mandatory mediation with a time limit of 30 days prior to commencing arbitration proceedings. After three days of mediating, the parties were US\$ 1,000,000 apart from reaching a settlement, but no settlement was reached within the 30-day time limit. The mediation was terminated as the parties did not agree to extend the mediation proceedings, but shortly thereafter, the ICC ADR Centre was informed that the parties had settled. The Centre fixed the costs of the proceedings at 0.14% of the amount in dispute.

• **Case 3:** A dispute arose over incurred costs for additional works in an infrastructure construction project involving private companies and a state entity. The parties first engaged in amicable negotiations through which they managed to reduce the disputed amount. However, the parties still contested the difference, and the amount in dispute was high. The contract provided for arbitration as the sole dispute resolution mechanism, but the parties agreed to refer their dispute to ICC Mediation and submitted a joint Request for Mediation pursuant to Article 2 of the [ICC Mediation Rules](#). The parties signed a settlement agreement at the in-person mediation session and the total costs of the proceedings were fixed at 0.027% of the amount in dispute.

45. Under the [ICC Mediation Rules](#), mediation may take place at any moment during the life of an agreement, as a required step before an arbitration is initiated, or after the commencement of an arbitration operating in parallel to arbitration. Parties may agree to mediate during a specific window set aside for mediation during an arbitration or litigation, with the arbitration or litigation proceedings paused.<sup>24</sup>
46. Under the [ICC Mediation Rules](#), mediation is the default mechanism among the available settlement techniques which the Centre can administer, but other settlement techniques can be administered under the Rules.<sup>25</sup>

<sup>24</sup> In arbitration proceedings, the timing of such window(s) may be agreed, at any time, but it is recommended that it be agreed early on in the arbitration proceedings (ideally at the first case management conference, see paras. 113 *et seq.* below).

<sup>25</sup> See Art. 1(3), [ICC Mediation Rules](#).

47. An effective and distinguishing feature of the [ICC Mediation Rules](#) is Article 7, which sets out an ‘obligation’ for the parties (who agreed to refer their dispute to [Mediation Rules](#)) to participate in the process until they have discussed with the mediator what they expect from the procedure and until the mediator establishes a ‘Note’ to the parties laying out the proposed conduct of the mediation proceedings. This ‘Note’ requirement provides for a minimum commitment to the process, at least until the parties have understood what the process would involve. This unique feature of ICC Mediation helps balance the voluntary nature of mediation with the desirability of an appropriate commitment to, and involvement, in the process.<sup>26</sup>
48. The procedure under Article 7 also allows for the mediation process to be structured to meet the specific needs of the parties and the dispute. The parties and the mediator can, for example, discuss and agree at this juncture whether the mediator will take a purely facilitative role, or whether they will provide, if needed, some form of evaluation on the merits, or offer recommended terms of settlement (the latter approach being described in some legal cultures as ‘conciliation’). As is confirmed in the [ICC Mediation Guidance Notes](#), the process of mediation as referred to in the [ICC Mediation Rules](#) is a concept sufficiently broad to encompass all these different approaches.<sup>27</sup>
49. In administering a mediation under the [ICC Mediation Rules](#), the ICC ADR Centre plays an important role in facilitating the mediation, including with respect to the financial management of the mediation (e.g. collection of deposits and payment of fees and expenses). The Centre also ensures that the parties adhere to the procedural framework, with the necessary safeguards (e.g. Art. 9, [ICC Mediation Rules](#) providing for confidentiality) and that the procedure is efficiently progressed.
50. To the extent that parties have not agreed upon certain essential aspects of the mediation, institutions can facilitate this process as well. The [ICC Mediation Guidance Notes](#) offer guidance on issues that deserve attention when choosing and organising mediation.
51. Under the [ICC Mediation Rules](#), an agreement to mediate is not required before a Request for Mediation is filed with the Centre. Article 3 allows a party to file a Request for Mediation with the Centre even in the absence of any agreement, in which case the Centre will inform the other party of the proposal. The ICC ADR Centre may assist the parties in their consideration of the proposal to mediate.
52. When selecting a mediator, it is recommended that parties keep in mind that a mediator is not tasked with taking any decision on the merits of the dispute like an arbitrator. As such, specialised or expert knowledge in the specific subject area of the dispute is not strictly necessary for a mediator acting purely in a facilitation role. Characteristics to consider when selecting a mediator include:
- Ability to gain trust and respect of all parties;
  - Experienced in mediation proceedings;
  - Communication, organisation and negotiation skills;

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26 Art. 7(2), [ICC Mediation Rules](#) provides: ‘After such discussion, the Mediator shall promptly provide the parties with a written note informing them of the manner in which the mediation shall be conducted. Each party, by agreeing to refer a dispute to the Rules, agrees to participate in the Proceedings at least until receipt of such note from the Mediator or earlier termination of the Proceedings pursuant to Article 8(1) of the Rules’.

27 Internationally, the terms ‘conciliation’ and ‘mediation’ are used sometimes to describe the processes that are substantively the same and sometimes to describe processes that are similar but have some differences. Where there are differences, there is no uniform understanding of what those differences are. That is why ICC Mediation, as referred to in the [ICC Mediation Rules](#), is sufficiently broad to encompass both mediation and conciliation.



- Ability to prepare parties, at both a substantive and psychological level, to bridge their gap;
  - Ability to assist parties (i) to identify opposing views and to weigh options, risks, and arbitration costs should settlement not be successful; (ii) to focus on their interests rather than their legal positions; and (iii) to negotiate constructively, taking into account any contrasting negotiation styles of the parties (whether derived from differences in culture or otherwise); and
  - Language ability and cultural fluency.
53. The ICC ADR Centre can help parties with identifying and appointing suitable mediators.
54. Parties are well advised to keep in mind that they themselves play the key role in the success of a mediation. A successful mediation requires that parties commit to the process and ensure that:
- Company representatives are engaged in the mediation process and take an active role;
  - The right people with decision making power participate in mediation sessions; and
  - Adequate time and resource commitment is made to the mediation process.

**Box 5: ICC Mediation commenced in the absence of any agreement to refer to the Rules**

- **Case 1:** A dispute arose from an agreement for the purchase and sale of equipment, after one party terminated the agreement on the basis of the other party's multiple alleged failures, which in turn disputed its liability and the termination of the agreement. There was no mediation clause in the parties' agreement or any other form of agreement to mediate established prior to the dispute in accordance with [ICC Mediation Rules](#), so the Request for Mediation was submitted pursuant to Article 3 of the [Mediation Rules](#) ('Commencement Where there is No Prior Agreement to Refer to the Rules'). Responding party accepted the offer of mediation. The mediation took place, and the case settled a few months after the filing of the Request for Mediation. The final costs of the mediation were fixed at 0.74% of the amount in dispute.
- **Case 2:** In a contract between a state and a company, the parties had agreed on arbitration to resolve any dispute between them. But when a dispute arose, the company proposed mediation to the state. As there was no prior agreement to mediate, the Request for Mediation was filed pursuant to Article 3 of the [Mediation Rules](#). The mediation lasted longer than average mediation proceedings; two months elapsed between the notification of the Request for Mediation to the state and the state's agreement to participate. During this time, the Centre had to identify the appropriate contact person within the state for communication purposes and assisted state representatives through the mediation process by explaining the principles governing mediation, provisions contained in the Rules, the ICC Mediation procedure and the differences with other settlement techniques. Although the mediation proceedings did not result in a settlement agreement, the mediation helped the parties re-establish communication, potentially leaving the door open to future business opportunities. The total costs of the proceedings were fixed at 1.66% of the amount in dispute.
- **Case 3:** The dispute arose after the requesting parties asserted that the responding parties' termination of the contract on the basis of force majeure was unjustified and constituted a breach of the contract. As there was no agreement between the parties to refer their disputes to ICC Mediation, the Request for Mediation was notified under Article 3 of the [Mediation Rules](#). The Centre granted 15 days to the responding parties to indicate if they were willing to participate in the proceedings. The responding parties requested an extension of the time limit to submit their comments. Following the notification of the Request, the parties and their counsel began engaging in informal talks that led to formal negotiations. Before the deadline for the responding parties to submit comments expired, both sides asked the Centre to suspend the proceedings as they were close to an agreement. The parties informed the Centre one month later that they had reached a settlement, and therefore the Centre could terminate the case.

**Box 6: ICC Mediation commenced where there is an agreement to refer to the Rules**

In a dispute arising out of a construction contract, the contract contained a multi-tiered dispute resolution clause that required mandatory mediation for 45 days followed by arbitration if mediation was unsuccessful based on [ICC Mediation Model Clause D](#) (quoted in Box 1 above). The parties also agreed that the Centre propose a list of mediators, from which they might jointly nominate the mediator with specific sector qualifications. The parties jointly nominated the mediator from the list of three candidates proposed by the Centre, and the mediator helped the parties arrive at a settlement. The initial time limit for the proceedings (45 days from the filing of the Request for Mediation with the Centre) was mutually extended by just one week. Mediation can be particularly efficient when the parties jointly nominate the mediator from the list provided promptly by the Centre. The final costs of the mediation were fixed at 0.16% of the amount in dispute.

**2. ICC Expert Services**

55. Experts can assist in the resolution of disputes in a number of different ways. There are three distinct roles of experts under the [ICC Expert Rules](#):<sup>28</sup>
- Providing a non-binding expert evaluation, referred to herein as an ‘evaluation’, on one or more issues in dispute. This service can be provided to one party alone to assist it in evaluating its case. The service can also be provided to both/all parties, to provide them with a basis for negotiating a settlement of some or all of their dispute.
  - Providing a binding expert determination on one or more issues in dispute to the parties.
  - Providing an expert opinion for use in arbitration or litigation. This service can be provided to a party or to the tribunal.
56. The ICC ADR Centre offers three distinct services:
- Proposing experts with the necessary expertise and attributes.
  - Appointing experts (where the parties anticipate difficulty in agreeing on an expert).
  - Administering ICC expert proceedings (which can either be non-binding or binding).
57. Where the ICC ADR Centre administers expert proceedings, it (i) appoints the expert in the absence of a joint nomination by the parties, (ii) coordinates between the parties and the expert, (iii) reviews the expert’s mission, (iv) initiates the appropriate steps to encourage the expeditious completion of the expert proceedings, (v) supervises the financial aspects of the proceedings; and (vi) scrutinises the expert’s report, proposes modifications as to the form of the report and, without affecting the expert’s liberty of decision, draws the expert’s attention to points of substance, which includes ensuring that the expert’s finding falls within the scope of their mission.

28 See also, ICC Commission Report [‘Issues for Experts Acting Under the ICC Expert Rules or the ICC Rules of Arbitration’ \(2021\)](#).

58. Unlike mediation, where the neutral is a facilitator, expert proceedings, as the term suggests, involve the use of experts as neutrals to assist parties in becoming better informed, determine an issue or resolve a disagreement between the parties. The expert is selected for their expertise within a specific field, tasked by either one party or parties together to give an opinion or decide on a specific issue (e.g. the application of a contract, or a specific technical, financial, other matter). The expert may be a physical person or a legal person such as a company or a partnership.
59. The expert's findings may, by party agreement, be binding or non-binding. Although the [ICC Expert Rules](#) do not use such terminology, when an expert's findings are non-binding, the process is commonly referred to as '**non-binding evaluation**'. When the expert's findings are binding, the process is commonly referred to as '**binding expert determination**'. ICC Expert Services can be used as a standalone tool, or as an input in settlement negotiations or at a later stage in the parties' chosen dispute resolution procedures. Parties in the following industries have made use of the ICC Expert Services: construction, industrial equipment, energy, chemicals, telecommunications, finance, insurance, transportation, industrial services and leisure and entertainment.

#### **i) Non-binding evaluation**

60. Where one party wishes to obtain an independent and expert evaluation on a particular issue or on the entirety of a dispute, it can engage an expert under the [ICC Expert Rules](#) to provide a non-binding evaluation.<sup>29</sup> The evaluation is confidential to that party for a use as it sees fit. Sometimes, a party may find such an evaluation useful as part of an internal early case assessment when deciding what approach to take to the resolution of a dispute.
61. Non-binding evaluation can also be used by both or all parties. In this scenario, the parties together can engage a third-party neutral to provide an evaluation of the parties' differences in order to help promote settlement of a dispute. The evaluation can be of a specific technical issue, or of the whole dispute. Where an evaluation of the whole dispute is required, the expert neutral may, for example, be a lawyer who is expert in dispute resolution, rather than a technical expert, such as an engineer or accountant. In both cases, the non-binding evaluation can then serve as a basis for negotiation between the parties, thereby moving the matter forward or, if the parties so decide, can be memorialised by the parties in a settlement agreement.

#### **Box 7: Appointment of an expert for a non-binding evaluation**

The parties submitted a joint Request for the appointment of an expert to issue non-binding recommendations on potential liability for losses incurred by the parties. With this joint Request, including the attributes of the expert's profile, the Centre could immediately proceed with identifying suitable candidates, skipping the initial step of requesting comments. As the requested attributes were relatively general (a qualified attorney in a specific jurisdiction, with expertise in the specific sector of the dispute), the Centre was able to identify suitable profiles from its own resources and swiftly complete the appointment. Although not required by the [ICC Expert Rules](#), the Centre received a subsequent update from the expert indicating that the expert had issued the requested recommendations a few months after the appointment.

<sup>29</sup> Art. 8.2, [ICC Rules for the Administration of the Expert Proceedings](#) provides: 'The findings of the expert shall not be binding on the parties, unless all of the parties expressly agree in writing that such findings shall be contractually binding upon them'.

## ii) Binding expert determination

62. Binding expert determination is a procedure whereby an expert neutral is tasked by the parties to provide a binding determination on an issue. The expert's jurisdiction and the binding force of the expert's determination are a creature of the parties' contract and, in some countries, are also regulated by statutory provisions. Binding determination is typically used in M&A, accounting, finance, engineering, IT, construction, energy or life sciences.
63. Expert determination may offer a quicker and less expensive decision on a narrow but important issue, without the need to engage in arbitration or litigation proceedings. For example, binding expert determinations can be used to provide a decision by an expert accountant on price adjustments following the sale of a business, while any disputes whether, for instance, there has been a breach of warranties or indemnities under the business sale agreement and the consequences thereof would be referred to arbitration.
64. Care must be taken in referring broad contractual disputes to binding expert determination, which could lead to uncertainty as to the appropriate tools that an expert should use to resolve, for example, disputed factual issues.

### Box 8: Expert appointment leads to prompt binding expert determination

In a dispute over the amount payable to a company by a state, the underlying contract included a clause providing that amount could be revised by an expert appointed in accordance with the [ICC Expert Rules](#). The Centre appointed a qualified expert who rendered a binding decision in less than a month.

### Box 9: Expert Appointment becomes Administered Expert Proceedings

The ICC ADR Centre initially registered the case as a Request for Appointment of an Expert (under the [ICC Rules for the Appointment of Experts and Neutrals](#)) pursuant to the parties' agreement to such request during arbitration proceedings.

In corresponding with the parties, the Centre offered the parties to administer the Expert proceedings under the ICC Rules for the Administration of Expert Proceedings (as it appeared to better suit their needs). The parties subsequently agreed to refer the dispute to the Rules for the Administration of Expert Proceedings.

## iii) Expert opinion for use in arbitration or with other ADR Services

65. For clarity and avoidance of doubt, the use of ICC Expert Services is not limited to a point in time prior to a reference to arbitration. In fact, many requests for a proposal of experts received by the Centre are connected to arbitration proceedings, where the parties or the arbitral tribunal require an expert to provide an expert opinion.<sup>30</sup> Notably, if the request for a proposal of an expert is made by an arbitral tribunal acting in an ICC-administered arbitration, the services of the ICC ADR Centre are provided free of charge.<sup>31</sup>

30 See ICC Commission Report '[Issues for Arbitrators to Consider Regarding Experts](#)' (2021).

31 The proposal of the first expert for ICC arbitral tribunals in an ICC Arbitration is free of charge (see para. 227, [ICC Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration](#)). The same service is free of charge when provided to a

66. Parties and ADR service providers, as well as national courts may also request the ICC ADR Centre to propose an expert with specific characteristics and qualifications.

**Box 10: Multiparty expert proceedings**

- The ICC ADR Centre often receives requests for expert determination proceedings involving multiple parties. In 2022, the ICC ADR Centre received six requests involving more than two parties (out of a total of 31 requests filed under the [ICC Expert Rules](#)). The highest number of parties in one case was five.
- In one case, a subcontractor first filed a Request for the Appointment of an expert in a construction dispute with the contractor. The case was soon suspended as one of the parties claimed that the amicable settlement period provided in the parties' contract had not started, which was prerequisite for any subsequent expert proceedings.
- After the case had been suspended for approximately eight months, the subcontractor requested the Centre to resume and requested that the employer join the expert proceedings pursuant to terms agreed upon by the parties. The employer agreed to join the expert proceedings and the Centre appointed an expert. Although the [Expert Rules](#) are silent on the matter of additional parties joining expert proceedings, this sample case illustrates the flexibility of the [Expert Rules](#) when parties agree to the joinder.

**iv) Tailoring ICC ADR Services to special classes of disputes**

67. ICC Rules are flexible and may be tailored to a particular class of dispute. For example, in relation to disputes arising out of 'ICANN' (Internet Corporation for Assigned Names and Numbers), the Centre administered [expert determination proceedings](#) under its [Expert Rules](#) tailored to the specificities for the resolution of disputes concerning generic Top-Level Domain Names ('gTLDs'). Successful tailoring depends on whether and how the parties' needs can be accommodated under the particular ICC Rules at issue. Parties or institutions seeking to tailor ICC Rules to meet their specific needs should contact and work with the ICC ADR Centre to explore whether and how ICC Rules and services may meet their needs. Failure to work with the Centre may result in changes that cannot be accommodated under ICC Rules.

**Box 11: Successfully adopting ICC Expert Rules (gTLD dispute resolution)**

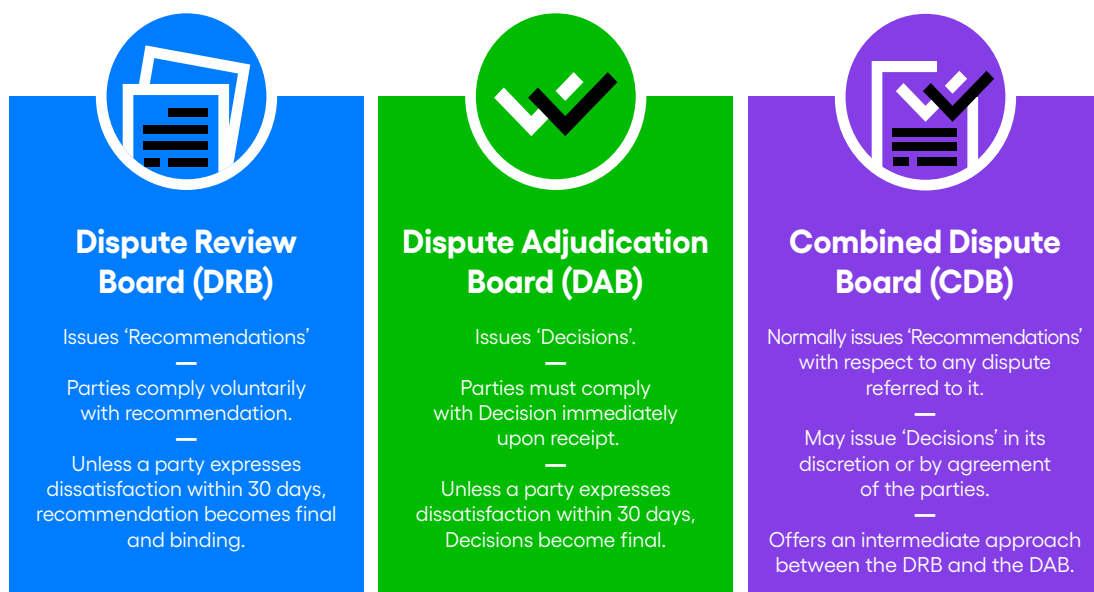
- In an effort to protect and support a stable Internet, ICANN implemented a program for the introduction of new gTLDs. Disputes arising out of applications for new gTLDs were resolved following the programme's dispute resolution procedure: the gTLD Dispute Resolution Procedure.
- The ADR Centre administered the Procedure under the [ICC Expert Rules](#), as supplemented by a '[Practice Note on the Administration of Cases under the Procedure](#)' under the New gTLD Dispute Resolution Procedure.
- [ICC Expert determinations](#) related to gTLD disputes are published online.

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mediator acting in ICC Mediation proceedings. If such a service is required, it is recommended that the tribunal contacts the [ICC International ADR Centre](#) ahead of making such a request at +33 1 49 53 29 03 or [adr@iccwbo.org](mailto:adr@iccwbo.org).

### 3. ICC Dispute Boards

68. Dispute boards ('DBs') are ADR panels created by the parties to provide near real-time decisions or recommendations (as opposed to resolving a dispute well after the events took place). Commonly used in construction projects, the [ICC Dispute Board Rules](#) consist of a comprehensive set of provisions for establishing and operating a dispute board. One important distinction is between 'standing' DBs (which are appointed at the beginning of the contract) and 'ad hoc' DBs (which are only appointed if and when a dispute arises) (see paras. 80-85 below).
69. The [ICC Dispute Board Rules](#) give parties a choice between three different types of dispute board, distinguished by the type of conclusion such DB issues upon a formal referral. Dispute Review Boards (DRB), on the other hand, issue recommendations, which are not immediately binding on the parties but become so if no party objects within 30 days. Dispute Adjudication Boards (DAB) issue decisions, which must be complied with immediately. Combined Dispute Boards (CDB) offer an intermediate solution between the DRB and the DAB: they normally issue recommendations but may issue decisions if a party so requests and no other party objects, or the dispute board so decides based on criteria set out in the Rules. The role of each type of DB may be of value in helping to reduce the risk and cost of disruption to the parties' contract.



70. The ICC ADR Centre does not administer DB proceedings, but is available to provide any of the following services:
- Appointing DB members,
  - Reviewing DB Decisions prior to issuance,
  - Acting as a depository of funds,
  - Deciding on challenges of DB members, and
  - Fixing the fees of DB members.

71. In addition to covering such matters as the appointment of the dispute board member(s), the services they provide and the remuneration they receive (the cost of which is generally shared equally between the parties), the [ICC Dispute Board Rules](#) provide a model DB agreement and spell out the three basic functions of DBs. These functions emphasise the importance of both informal and formal approaches to disputes. The Rules explicitly provide that, upon perceiving a potential disagreement, the DB may:

- Encourage the parties to overcome it on their own (see Art. 16 'Avoidance of Disagreements', [ICC Dispute Board Rules](#)).
- If the disagreement is too entrenched, the DB can (i) intervene with informal assistance to help the parties resolve the matter by agreement on their own (see Art. 17 'Informal Assistance with Disagreements'); or (ii) determine a dispute through a recommendation or a decision issued after a formal referral (see Art. 18 'Formal Referral for a Conclusion', [ICC Dispute Board Rules](#)).<sup>32</sup>

#### **Box 12: Appointment of dispute board members**

Several issues arising under a construction project were referred to a DRB pursuant to the [ICC Dispute Board Rules](#). One of the parties applied to the Centre to proceed with the constitution of the DRB. The clause was silent on the qualifications of the DRB members. The Centre invited the parties' comments. After carefully reviewing all information available on the dispute and in the absence of parties' agreement, the Centre appointed a DRB constituted by two engineers and one lawyer.<sup>33</sup>

#### **Box 13: Review of the dispute board decision**

In one case, the Centre was requested to review a draft decision by a DAB related to a construction case. As the decision would be binding on the parties, the parties filed a joint request for the Centre to scrutinise the draft decision. The Centre proceeded with reviewing the draft decision and promptly provided comments after the draft decision was received.

32 A decision of a DB under the [ICC Dispute Board Rules](#) is final and binding unless a written notice of dissatisfaction with the decision is given by a party within 30 days of receiving it. Where such a notice is given, the dispute is finally settled by arbitration, if the parties have so agreed, or if not, by a competent court (see Arts. 4(3), 4(6) and 5(3), 5(6), [ICC Dispute Board Rules](#)).

33 The Centre shall be assisted by the Standing Committee in deciding on the challenge of a Dispute Board Member (see Appendix I 'Statutes of the Standing Committee', [ICC Dispute Board Rules](#)).



**Box 14: Acting as a depository of funds**

The Centre can also provide additional services to the parties other than those expressly mentioned by the [ICC Dispute Board Rules](#). Such additional services include the Centre acting as a depository of the DB Members' fees. Such a request may come from either the parties or the DB members, but the Centre will only act as depository upon agreement of the parties and DB members. Said agreement may include terms on the payment mechanism (e.g. when the Centre may make the payments, if there can be advance payments, and if so, what are the conditions for such advance payments). The Centre charges a filing fee and thereafter an annual fee for providing such service.

72. The [ICC Dispute Board Rules](#) are flexible and may be tailored to a particular class of disputes. While most commonly used in construction projects, every long-term commercial relationship would benefit from access to the early intervention that DBs make possible. Early efforts to resolve disputes through a DB as soon as they begin to emerge maintains relationships among business partners, enables the successful continuation of the business endeavor and typically will provide enormous costs savings as disputes are resolved without turning to arbitration or litigation. The nature of the commercial relationship for which a DB process would be appropriate and helpful include any longer-term relationship such as joint ventures, joint research and development projects, collaborations, distributorships, longer-term purchase and sale relationships, and service agreements. A DB process can be written into the initial contract or agreed to early in the contractual relationship.

**Box 15: A tailored dispute board**

Dispute Boards can be used in any context. Here, the parties entered into a contract for a supply of goods in quantities to be requested and supplied over a period of two years, which included a Dispute Board clause.

At the start of the relationship there were, as a result of the pandemic, serious issues with the seller's ability to supply goods due to personnel shortages and supply chain disruptions. As provided in the contract, the three-member dispute board met with the parties weekly and then semi-weekly. The DB facilitated a conversation among the participants and assisted them in engaging with each other and establishing avenues of communication that enabled the parties to resolve issues as they arose and move forward together to accomplish their common business objectives. The process achieved its goal and maintained a relationship that was fraught with tension at the start by providing a forum for communication and guidance for avoiding escalations of conflicts.

**Box 16: ICC ADR Centre decides challenges filed against FIDIC DAAB Members**

- The ICC was selected by the International Federation of Consulting Engineers — more commonly known by its French acronym FIDIC — as the trusted dispute settlement body to decide on challenges filed against its Dispute Adjudication/Avoidance Boards (DAAB) Members.<sup>34</sup>
- A request for a decision on the challenge of a DAAB Member or Members should be submitted to the Centre by the challenging party within 21 days of learning of the facts and circumstances upon which the challenge is based. After informing the challenged DAAB Member(s) and inviting all interested parties to submit their comments, the Centre, with assistance from its Standing Committee, will decide on the challenge. Decisions on challenges will be final and conclusive.

**4. ICC DOCDEX**

73. The [ICC DOCDEX Rules](#) were introduced in 1997 as a special set of [ICC Expert Rules](#) for the international banking community. The DOCDEX Rules were updated in 2015 and provide parties with a specific resolution procedure that leads to an independent, impartial and prompt non-binding expert decision<sup>35</sup> in settling disputes involving trade-finance-related instruments.<sup>36</sup>
74. The specialised DOCDEX procedure focuses on efficiency, both as to costs and time. Unlike other dispute resolution procedures, there is a capped cost.<sup>37</sup> DOCDEX cases proceed on an expedited basis, with no opportunity for the oral examination of fact or expert witnesses, or for oral submissions at a hearing (see Art. 2(4), [ICC DOCDEX Rules](#)).
75. Each DOCDEX case is decided by a panel of three impartial and independent experts from a list maintained by the ICC Banking Commission. The experts must possess extensive experience in and knowledge of trade finance. Each decision issued in a DOCDEX case is scrutinised in draft form by one of the ICC Banking Commission's technical advisors. The technical advisor may require modifications as to the form of the draft decision and, without affecting the appointed experts' liberty of decision, may also draw their attention to points of substance. Anonymised DOCDEX decisions are published and widely distributed to enable practitioners to avoid commonly made errors in trade finance-related disputes and also in the interest of setting future precedents.<sup>38</sup>

34 'ICC to decide DAAB challenges under 2017 FIDIC contracts' (www.iccwbo.org, 11 Oct. 2018). See [ICC Dispute Board Rules](#), Appendix III 'Challenge of DAAB Member(s) under the 2017 FIDIC Contracts'.

35 DOCDEX decisions are non-binding by default. However, the parties can agree that a decision shall be binding on them (Art. 2(6), [ICC DOCDEX Rules](#)).

36 Trade-finance-related instruments include: a documentary credit; a standby letter of credit; a bank-to-bank reimbursement; a collection; a demand guarantee or counter-guarantee; a forfaiting transaction; a bank payment obligation; or any other trade finance-related instrument, undertaking or agreement.

37 This cap is US\$ 5,000 and US\$ 10,000, depending on the amount in dispute.

38 Examples of cases decided by expert panels under the [ICC DOCDEX Rules](#) can be accessed in the [ICC Dispute Resolution Library](#) and in the Collected DOCDEX Decisions. See e.g. [2013-2016 Collected DOCDEX Decisions](#) (ICC Publication No. 786E, 2017).

**Box 17: DOCDEX in action**

• **Case 1:** Claimant acted as the nominated and advising bank of a letter of credit subject to UCP 600<sup>39</sup> issued by Respondent payable at sight. The letter of credit included a clause referring to an underlying contract and the requirements thereunder without indication of any document for compliance. Shortly after issuance, Respondent sent a request for cancellation to the advising bank. Prior to the expiry date of the letter of credit, the beneficiary presented documents under the credit, which the nominated bank forwarded to Respondent. Respondent returned the documents as they considered the credit as cancelled. Claimant filed a DOCDEX claim and requested a decision on whether Respondent ought to pay Claimant despite a request for cancellation sent by Respondent prior to the presentation of documents.

The Centre notified the claim to Respondent and invited it to submit any comments within 25 days according to the [ICC DOCDEX Rules](#). In the meantime, together with the Technical Advisor the Centre constituted a Panel of Experts. Upon the submission of the answer, the Centre transferred the file to the Panel for a draft decision within 30 days. On receipt of the draft the decision, the Centre and the Technical Advisor reviewed the decision which was subsequently notified to the parties.

• **Case 2:** DOCDEX may be utilised alongside other dispute resolution procedures. In at least one case, an ICC arbitral tribunal referred to a DOCDEX Decision in order to interpret the terms of a letter of credit and adopted the same interpretation of the terms as used in the DOCDEX Decision.

• **Case 3:** Claimant is a beneficiary under four advance payment guarantees issued by Respondent. Claimant filed four DOCDEX Claims against Respondent. The issues to be decided in the DOCDEX proceedings were whether (i) Claimant's demands under the bank guarantees were compliant, and (ii) Respondent was precluded from raising discrepancies.<sup>40</sup> In the four DOCDEX cases, the panel of Experts decided that Claimant's demands were compliant, and, in any event, Respondent was precluded from raising discrepancies. The panel of Experts concluded that the rejection notices were invalid, and Respondent should honor Claimant's demands. After the DOCDEX decisions were notified to the parties, Claimant informed the Centre that the decisions helped the parties settle their disputes amicably.



**II.B. Effectively using ICC ADR Services**

76. As noted earlier, each of the ICC ADR Services may be used as a standalone tool to resolve disputes, or as part of a conflict management system, or to explore the possibility of settlement after arbitration proceedings have been commenced.
77. In selecting the appropriate ICC ADR Service, and deciding when and how to deploy it, it is important to recall the spectrum of ICC ADR Services available to parties and to keep in mind that the primary feature that distinguishes them from each other is the service that is required from the ADR Neutral. The ADR Neutral can serve in a variety of roles including facilitation, making

39 [Uniform Customs and Practice for Documentary Credits \(UCP\)](#). See also [eUCP Version. 2.0](#), a supplement and digital companion to the UCP 600.

40 Under the [ICC Demand Guarantee Rules \(URDG\)](#).

recommendations, deciding disputes, or some combination of these. For example, the ADR Neutral can give a finding that is binding or non-binding, or the neutral can be required to play a purely facilitative role during the parties’ negotiation. When empowered to do so, a mediator appointed under the [ICC Mediation Rules](#) may also offer a view on the merits and/or suggest possible settlement terms.<sup>41</sup> When serving as a dispute board member, the ADR Neutral can provide the parties with binding or non-binding conclusions to help avoid disputes in the first instance and resolve those that cannot be avoided.<sup>42</sup>

	 <b>Role</b>	 <b>Focus of service</b>
<b>Mediator</b>	Facilitate the parties’ negotiations, and if the parties agree, offer a view on the merits or suggest possible settlement terms.	Help parties to reach their own negotiated settlement.
<b>Expert</b>	Non-binding evaluation for one party. — Non-binding evaluation for both/all parties. — Binding determination.	Evaluation of the strengths and weaknesses of the party’s case. — Provide a basis for negotiated settlement. — Binding resolution of one or more issues in dispute.
<b>Dispute Board Member</b>	Provide opinion on issues that have potential to cause disputes (standing DBs only). — Provide recommendations on disputes (DRB). — Provide contractually binding decisions on disputes (DAB).	Avoidance/de-escalation of disputes. — Dispute resolution assistance. Binding resolution of disputes, which may be revisited in arbitration or litigation.
<b>DOCDEX Expert</b>	Non-binding expert’s decision, unless otherwise agreed by the parties.	Unless otherwise agreed by the parties, a non-binding resolution of disputes arising out of a trade finance instrument undertaking or agreement.

78. Dispute management systems should ideally provide for (i) early identification of potential disputes and (ii) the possibility to avoid disputes and to have near real-time dispute resolution, while providing for resolution of formal disputes that remain unresolved. Notably, the factor having the greatest influence on avoiding disputes is the timely flow of information from the moment that tensions become apparent, enabling the right people to be brought around the table.

41 Where a neutral offers a view on the merits and/or suggests possible settlement terms, the process is described by some as ‘evaluative mediation’ or ‘conciliation’ (see para. 48 above).

42 In the table below, ‘Expert’ is considered as an ‘ADR Neutral’. It should be noted that under the [ICC Expert Rules](#), a distinction is made between Expert and Neutral.

79. Disputes do not happen spontaneously. They evolve from controversy, to conflict, to dispute. The point of intervention in the dispute evolution cycle matters:

- Avoidance requires early intervention in the dispute evolution cycle.
- Resolution, or de-escalation, calls for deploying ICC ADR Services after disputes have crystallised.

### 1. Using ADR to avoid disputes

80. DBs are one of the ICC ADR Services that provide for dispute avoidance. Many contracts in construction projects and other complex long-term projects provide that the DB is to be appointed at the beginning of the contract, within a prescribed time from contract signature or contract commencement, and that it is to operate throughout the lifetime of the contract. Such boards are described as 'standing' dispute boards.
81. A standing DB will receive regular progress updates, meet with project personnel and make site visits at intervals to be agreed with the parties. The dispute avoidance function of the standing DB, which might be described as the relationship function of the DB, can help maintain relationships between parties involved in contracts where success requires collaboration for many years. The powers of a standing board often include a dispute avoidance role as well as the adjudication of disputes.<sup>43</sup>
82. In practice, once constituted, standing DBs serve as a dispute avoidance mechanism by giving the parties immediate access to experienced experts before issues have escalated into disputes. For example, standing DBs can provide the parties with well-informed job-site opinions in a very short time, allowing contract execution to proceed without undue interruption, while preserving the parties' rights to seek a determination from the DB of a dispute that could not be avoided.
83. The use of standing DBs in high-value long-term contracts offers potential for enhanced conflict management and improved success in the execution of the contract. It is therefore encouraged to use standing DBs in all sectors (not only the construction sector). DBs may consist of three or more members or a sole member, with a sole member DB recommended for smaller projects.

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<sup>43</sup> [ICC Dispute Board Rules](#) are flexible. Under the existing Dispute Board Rules, parties may decide to have a DB that serves only to facilitate negotiations and assist the parties in reaching consensus. This is particularly recommended for collaborative type contracts, in which the parties' success is dependent on continual collaboration over many years (see Art. 15 'Powers of the DB' and Art. 16 'Avoidance of Disagreement' for the powers of a DB that relate to its dispute prevention role).

**Box 18: Standing DBs and ICC Emergency Arbitration deployed in furtherance of environment, health and safety goals — ‘World Bank Contractor Disqualification enforces World Bank initiative to prevent gender-based violence’<sup>44</sup>**

- Through direct consultation with the World Bank, ICC dispute resolution tools have been adopted in a manner specifically tailored to meet the objectives of the World Bank in developing and deploying a robust disqualification mechanism, aimed at strengthening the prevention of gender-based violence.
- The disqualification mechanism, which is in the Bank’s Standard Procurement Documents, uses ICC Emergency Arbitration as an appeal mechanism against DAB decisions available before the Bank’s decision to disqualify a contractor/subcontractor, thereby ensuring fairness and standard due process for contractors.

84. As an alternative to a ‘standing DB’, a ‘standing mediator’ can be used and would be available to help parties to a contract resolve issues as and when they arise.
85. In deciding on a standing DAB, DRB or mediator, the parties should try to foresee what type of services they may need from the standing neutral — facilitation, recommendations or decisions — and if proceeding under the [ICC Dispute Board Rules](#), choose between a DRB, DAB or CDB. If parties wish to proceed with a standing mediator, they are advised to contact the Centre directly.

## 2. Using ADR to promote settlement of disputes

86. Early neutral evaluation is a long-established technique whereby parties engage the services of an ADR Neutral, e.g. a neutral providing services under ICC ADR Services, be it an expert or a dispute board to provide a non-binding preliminary evaluation of the parties’ dispute. Gaining early insight into the relative strengths and weaknesses of the parties’ positions can lead parties to conclude that it is unnecessary — or in some circumstances, undesirable — to pursue the dispute further. Even if the dispute is not resolved, an expert opinion may aid in narrowing the list of issues in dispute.
87. An opinion or early neutral evaluation of an ADR Neutral is not binding on the parties, unless the parties themselves agree to be bound by it. Generally, settlement is more likely if the parties become better informed about the dispute and the risks involved in any escalation to arbitration.
88. For the ADR Neutral to be able to give an evaluation that is meaningful, a procedure will need to be established to provide the neutral with the necessary facts and, if relevant, legal and/or technical submissions from the parties. Reasoned early neutral evaluations are recommended as they will help the parties become better informed, and thereby promote settlement.
89. Unless otherwise agreed, the ADR Neutral’s evaluation may then be used by the parties in their settlement negotiations, with or without the assistance of an ADR Neutral acting as a facilitator of their negotiations. For example, the parties can first seek a non-binding evaluation from a DRB (under the [ICC Dispute Board Rules](#)) or an Expert (under the [ICC Expert Rules](#) or [ICC DOCDEX Rules](#)). They can then use that evaluation as a starting point to their settlement negotiations in a mediation (under the [ICC Mediation Rules](#)).

<sup>44</sup> [‘World Bank Contractor Disqualification enforces World Bank initiative to prevent gender-based violence’](#) (www.worldbank.org, Press Release 25 Nov. 2020); [‘Strengthening Prevention of Gender-Based Violence \(GBV\): Contractor Accountability and Disqualification’](#). (www.worldbank.org, last updated 10 Aug. 2022).

90. Early neutral evaluation, followed by facilitated negotiations, involves bringing the parties to the negotiating table, but only after they have been equipped with better insight into the relative strengths and weaknesses of their case. The objective is for the early neutral evaluation to clarify issues early and help parties realign their expectations with the realities of their transaction early in their negotiation. The facilitator/mediator can help structure and facilitate the parties' negotiations and enable the parties to reach agreement on solutions which could not be achieved through an adversarial process. For example, the optimal solution to a particular contractual dispute may be for the parties to renegotiate the terms of the contract. This approach is well suited to industries in which the parties are engaged in long-term contracts, exposed to time and budget constraints, and hope to preserve their relationship.
91. Positive features of negotiated settlements which have been facilitated by ADR Neutrals include:
- The agreements they reached are perceived to be fairer and easier to implement.
  - The process is voluntary and always within the control of the parties to a dispute.
  - Key personnel do not waste time on detailed preparation of arguments, evidence and attendance at hearings.
  - The parties select the neutral person, and can remove that person at any time.
  - Business reputations are preserved and so are on-going relationships, which are likely to be damaged in the adversarial atmosphere of an arbitration.
92. Combining several ADR services may give the parties the best chance of a negotiated settlement and an opportunity to maintain their business relationships. While these services are far less costly than arbitration, the costs can nonetheless be significant. For example, a non-binding evaluation procedure can involve written submissions, evidence and potentially a hearing.
93. Resolving disputes, either by negotiating settlements or otherwise, requires consideration of the law, and legal advice or representation where warranted. A settlement agreement needs to be drafted in such a way that its terms are easily enforceable.<sup>45</sup> In the context of the settlement agreement arising from arbitration proceedings reached with the assistance of a mediator, the 2018 UN Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention") is relevant. The Singapore Convention is currently merely ratified by Belarus, Ecuador, Fiji, Georgia, Honduras, Kazakhstan, Qatar, Saudi Arabia, Singapore and Turkey.<sup>46</sup> The emphasis however is on involving the parties and their advisers as joint problem solvers to develop mutually acceptable outcomes and possibly safeguard their long-term relationships.
94. Even if a dispute proceeds to arbitration, the time and effort the parties have put into attempts at a negotiated settlement is unlikely to have been wasted. The parties and their legal advisers may be better prepared and better able to assist the arbitral tribunal to make an efficient final decision on the outstanding issues.

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45 Where a settlement is concluded during arbitration, any concerns regarding enforcement can usually be addressed by embodying the terms of settlement in a consent award (see para. 102 below). As provided by its Art. 1(3)(b), the [Singapore Convention](#) does not apply to a settlement concluded during arbitration and recorded as a consent award, which is as such enforceable as a consent award.

46 See [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements/status](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status).

**Box 19: Settlement negotiations based on an ICC expert report**

Pursuant to a multi-step dispute resolution clause, the parties first submitted their dispute arising out of a construction contract to administered expertise in accordance with the ICC Rules for Administration of Expert Proceedings. The disputed issues related to extension of time and related costs, liquidated damages as well as the date of effect of the provisional acceptance certificate. The parties' agreement provided details on aspects of the expert determination including the expert's qualifications, scope of the expert's work, language and place of proceedings and a time limit for the expertise. Following the rendering of a non-binding expert report, the parties' agreement provided for a 30-day amicable settlement period. Thus, the parties' agreement reflected their intent to use the expert report as a point of bargaining and negotiation with a view towards settlement. If the 30-day settlement window was not successful, the parties could proceed to arbitration.

95. Further, points to keep in mind when considering early neutral evaluation are:

- **Being realistic when setting the timeframes.** The expert's evaluation will not be of value to the parties unless the expert has a proper opportunity to evaluate the material points in issue.
- **Selecting and appointing the appropriate expert.** Consider seeking assistance from the ICC ADR Centre.
- **Whether the evaluation is more or less likely to promote settlement.** An evaluation which concludes that party A's case is stronger than party B's, can have the undesirable impact of entrenching the position of party A who feels emboldened to proceed to arbitration or litigation rather than seek a settlement.

96. Requesting the services of a mediator, with or without early neutral evaluation obtained beforehand, can have the effect of creating an environment where the likelihood of settlement is increased and can help preserve the parties' relationships. Undertaking a proper risk analysis and a realistic assessment of the relative merits of their case prior to mediation and revisiting this risk analysis and assessment of merits/costs throughout a dispute resolution process, are part of prudent case management and can increase the prospect of reaching a settlement. The following cases highlight such possibilities.



**Box 20: Evaluative mediation to preserve long-term commercial relationships**

- In a dispute between a state and a private company arising out of a contract awarded after a tender, the contractor submitted a request for a price adjustment and reimbursement, claiming it incurred additional costs due to delays attributed to the state.
- Although the contract provided for ICC Arbitration, the company had an interest in continuing the project and being considered in future tenders with the state. Both parties wanted to maintain a positive working relationship and reach an amicable agreement. Accordingly, they agreed to refer their dispute to mediation under the [ICC Mediation Rules](#).
- The parties agreed to jointly nominate a mediator who was subsequently confirmed by the Centre. Less than three months after the Request for Mediation was submitted to the Centre, the parties reached a complete settlement of all disputed issues in this matter, before the time limit for the proceedings had expired and after only two days of mediation sessions totaling roughly 20 hours of the mediator's time.
- The mediator, a retired judge with experience in chairing arbitrations, suggested an amount for the price readjustment based on what he would have decided had he presided over the case under the capacity of a judge or arbitrator. Following the settlement, the parties continued their business relationship on good terms and incorporated the settlement as an amendment to the contract, thereby avoiding potential issues with enforceability. The total costs of the proceedings were fixed at 0.28% of the amount in dispute.

**Box 21: Active engagement of in-house counsel, without external representation**

The possibility of achieving success in ADR through different arrangements is illustrated by a mediation where the parties were represented by in-house counsel alone.

Following the Request for Mediation, the Responding party paid a partial amount due under the contract, in relation to which the Requesting party waived interest fees and the parties considered those matters resolved. The mediation continued with regard to outstanding claims made by the Requesting party, and a final settlement was reached less than three months after the appointment of the mediator.

**Box 22: Settlement post-mediation**

- Parties entered into an agreement for the purchase and sale of equipment. In accordance with the dispute resolution clause providing for a mandatory mediation step with a 30-day time limit prior to commencing arbitration proceedings, the parties commenced a mediation.
- After a three-day mediation, the parties were US\$ 1,000,000 apart from reaching a settlement. As no settlement was reached within the 30-day time limit and no extension was agreed to, the mediation was terminated as the parties did not agree to extend the mediation proceedings. The Centre fixed the costs of the proceedings at 0.14% of the amount in dispute. Shortly after the termination of the mediation proceedings, the Centre was informed that the parties had settled.
- This scenario occurs frequently in mediation. Parties engage in mediation sessions for one, two or three days but do not immediately reach a settlement. After a short cool-off period, the parties are often able to settle their dispute.

**3. Using ADR for near real-time dispute resolution**

97. There are disputes in which a negotiated settlement is not possible and the parties require a binding decision within a limited timeframe.
98. Binding determinations made by an expert can be obtained under [ICC Expert Rules](#) and [ICC Dispute Board Rules](#). By using binding expert determination appropriately (see paras 62-64 above), parties can either avoid costly litigation or arbitration, or narrow the issues that need to be referred to litigation or arbitration.
99. It is important for parties to recall that in some jurisdictions, the Expert's jurisdiction and any binding force of the Expert's determination derive from the parties' agreement. Obtaining precontracting advice of legal counsel on the enforceability of a binding DAB decision or an expert determination in the specific jurisdiction is advised.
100. In the case of DABs and CBDs, the [ICC Dispute Board Rules](#) call for the DB to reach its decisions within 90 days. This short timescale is seen as one of the major benefits of using DBs. In the context of a multi-tiered clause, a DB intervention is often a pre-condition to arbitration.

**4. Using ADR to facilitate settlement in arbitration**

101. The objective of any arbitration is to resolve a dispute between the parties. However, the commencement of arbitration proceedings does not mark the end of attempts to settle a dispute using ADR techniques. If the parties maintain a 'hands-on' approach and remain proactively engaged with their counsel during the arbitration proceedings, they can make their arbitration more simple and speedy and less expensive. The following case is an example of how the cost of arbitration may be mitigated when parties use ADR tools, even after the arbitration has commenced.

**Box 23: Arbitration proceedings becoming administered expert proceedings**

Arbitration proceedings were initiated in a multi-party dispute with a number of procedural challenges that led to delays in the constitution of the arbitral tribunal. The parties entered into a partial settlement agreement and opted for expert determination under the [ICC Rules for the Appointment of Experts and Neutrals](#) on the remaining issues.

The parties disagreed on whom to designate as expert and even considered the appointment of multiple experts if a suitable individual could not be found. The Centre proceeded with the identification of potential candidates and appointed the expert who had the attributes agreed upon by the parties. Subsequently, the parties also agreed that the Centre would administer the expertise pursuant to the [ICC Rules for Administration of Expert Proceedings](#).

The expert proceedings lasted a year; it was a very complex case with voluminous submissions. An interim report was sent to the parties and a hearing took place.

As is the case with the [Rules of Administration of Expert Proceedings](#), the Centre's Standing Committee scrutinised the expert's draft report prior to it being notified to the parties.

102. A key benefit of reaching a settlement during arbitration proceedings is that parties may obtain a consent award. By a consent award, the tribunal records the settlement of the parties in the form of an arbitral award, which may be enforceable as an arbitral award under the New York Convention.<sup>47</sup> A settlement agreement reached with the assistance of a mediator during the arbitration proceedings but not recorded in a consent award may be enforceable under the Singapore Convention.<sup>48</sup>

**i) Party engagement before commencement of arbitration**

103. For settlement to become a reality after arbitration has commenced, the parties' proactive approach must be supported by their counsel, and possibly by the arbitrators and the rules under which they operate. The view that seeking a settlement goes hand in hand with an arbitrator's mandate, although not a globally settled view,<sup>49</sup> is reflected in the [2021 ICC Arbitration Rules](#). Specifically, Appendix IV, empowers arbitrators to 'encourage the parties to consider settlement'. Likewise, the Task Force's Pilot Survey shows that close to 70% of participants were of the view that arbitrators should inform the parties about ADR options during the first case management conference.
104. While arbitrators encourage settlement (they may or may not play an active role facilitating settlement), in all circumstances counsel will be instrumental in settling the case. Accordingly, when selecting counsel, the parties are advised to consider the skills and temperament required to facilitate settlement, specifically:
- Does counsel understand the line of business?
  - Does counsel have a commercial perspective?

<sup>47</sup> [New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards](#) (1958).

<sup>48</sup> See para. 93 above and note 45.

<sup>49</sup> The viewpoint that the role of the arbitral tribunal is to decide the case in an enforceable award, not to settle it, has been challenged and largely displaced by the view that the arbitral tribunal should take a proactive role in facilitating the settlement of the parties' dispute, to the extent required by the parties and their case (see the discussion at paras. 3-11 of the ICC Commission Report 'Facilitating Settlement in Arbitration').

- Is counsel able to understand what ‘winning’ means for the party from a strategic perspective?
- Does counsel demonstrate that they can anticipate issues and estimate risks, including safety, security, reputational, regulatory, and legal?
- Does counsel have a broad knowledge-base and experience of available ADR services?
- Does counsel have a background in reaching negotiated settlement?
- Would counsel consider alternative fee arrangements?

## ii) Party engagement during arbitration proceedings

105. The discussion of settlement after arbitration proceedings have commenced has not been the tradition in every jurisdiction. It is now recommended that the discussion of settlement should be a standing item on the agenda between parties and their counsel throughout the duration of a dispute, including during arbitration proceedings.<sup>50</sup>

106. The first case management conference (‘CMC’) in arbitration is often perceived to be a good time for the parties, their counsels and the arbitral tribunal to ensure that the first procedural order and the accompanying procedural timetable are purpose-built.<sup>51</sup> Steps for facilitating settlement should be considered,<sup>52</sup> and in-house counsel/client representatives would ideally be involved in setting the agenda and attending the first CMC.<sup>53</sup> It is recommended that parties and their counsel consider including the following items on the agenda regarding settlement facilitation:

- Is it appropriate to include a mediation/negotiation window in the procedural calendar?<sup>54</sup>
- Are there other procedural steps in the arbitration that may facilitate settlement, such as requesting an order or award on one or more preliminary issues?<sup>55</sup>
- Can provision be made for the submission of sealed offers?<sup>56</sup>
- Asking the arbitral tribunal to address if, and if so how, it envisages to build settlement facilitation into the arbitration procedure.
- Scheduling of further CMCs after key stages in the arbitration (e.g. after the parties’ first exchange of pleadings or memorials, after document production, or after a tribunal decision on a strategic preliminary issue). In addition to reviewing the procedure in the arbitration, such mid-stream conferences provide a prompt to parties to confirm or reassess their expectations of the outcome and their commitment to arbitration. This may lead to renewed efforts to engage in settlement discussions with the other side, with or without the assistance of a mediator or other ADR Neutral.

50 Perhaps because arbitration results in an imposed decision, which is generally final and not subject to appeal, lawyers have in turn been cautious and tended to follow the most familiar procedures. The result is that arbitration that may sometimes become more expensive than need be, in terms of time and money, and relationships.

51 See Art. 24 ‘Case Management Conference and Procedural Timetable’, [ICC Arbitration Rules](#).

52 Some in-house counsel have raised a concern that if arbitrators raise settlement issues later in the proceedings, this can raise concerns about their actual or perceived neutrality.

53 Art. 24(4), [ICC Arbitration Rules](#) provides that the arbitral tribunal may request the attendance at any case management conference of the parties in person or through an internal representative.

54 See the discussion on mediation/negotiation windows at paras. 107-117 below, and at Section III of the ICC Commission Report ‘Facilitating Settlement in International Arbitration’.

55 See the discussion on bifurcation at Section II, sub-section 2.2, of the ICC Report ‘Facilitating Settlement in International Arbitration’.

56 See the discussion on sealed offers at paras. 118-124 below.

**iii) Mediation/negotiation windows**

107. In some circumstances, parties may require the threat of arbitration to prompt them to engage in settlement negotiations. While arbitration proceedings are ongoing, mediation or unassisted negotiations can be initiated at any time. The Centre can assist the parties in finding a suitable mediator. The appointment of a mediator by the Centre made at the joint request of all parties in an ongoing ICC Arbitration is provided free of charge.<sup>57</sup>
108. Access to mediation during arbitral proceedings can be assisted/promoted by using mediation windows. As noted in the [ICC Mediation Guidance Notes](#), mediation windows may be an important way of facilitating access to mediation without disturbing ongoing arbitral proceedings:
- ‘29. Where mediation takes place in the course of arbitration proceedings, it may be appropriate for the arbitration to be stayed to allow time for conducting the mediation (such a stay or pause in the proceedings is sometimes referred to as a mediation window). This enables the parties to focus on the mediation without being distracted by the need to take steps in the arbitration and incurring the costs of those steps when a settlement may be imminent. In other cases, the parties may prefer to conduct the mediation without requiring a stay or pause in the arbitral proceedings.
30. The suggestion that mediation be used during the arbitration proceedings may be made by one of the parties. Whether or not it is helpful to build a mediation window into the timetable for the arbitration proceedings — and, if so, when that window should occur — is also a topic which may be discussed between the parties and the arbitral tribunal at the first and subsequent case management conferences provided for in Article 24 of the [ICC Arbitration Rules](#).’
109. The alternative to agreeing to mediation windows after the commencement of arbitral proceedings is for the dispute resolution clause to provide for a mediation window to be included in the arbitration procedure. Such a clause would commit the parties to using mediation during the arbitration proceedings in accordance with an agreed mediation window procedure.
110. The advantage of a mediation/negotiation window clause is that it ensures that mediation/settlement negotiation is given attention at a specified point in time during the arbitration. The clause may specify a time when the parties anticipate that the dispute might be ripe for settlement. This could be, for example, after the first round of substantive submissions has been completed and the parties have had the opportunity to assess the merits of their positions. The clause could also specify other matters such as whether the arbitration proceedings should be suspended while the mediation takes place, and in what circumstances the mediation should come to an end.
111. The aim of (a) mediation/negotiation window(s) is to encourage the parties to settle in the course of an ongoing arbitration. Such mediation/negotiation window(s) occurs during the arbitration, after the parties will have gained more information on the other side’s case and will have been able to reassess their own positions.

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<sup>57</sup> See Art. 3 of Appendix II to the [ICC Rules for the Appointment of Experts and Neutrals](#) and para. 273 of the [ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration](#).

112. When setting up (a) mediation/negotiation window(s), the following should be considered:

- Whether to opt for a close-ended mediation window or for an open-ended mediation that will run in parallel to the arbitration;
- when the mediation(s) should take place;
- whether the tribunal will be informed about the existence of parallel negotiation/mediation windows;
- whether there should be a pause in the arbitration procedure while the mediation is taking place; and
- whether other matters regarding the mediation can be agreed at an early stage (e.g. how the mediator will be chosen, whether mediation sessions will take place in person or remotely, and who will attend the mediation from each party).

113. Consideration of the length of any mediation window gives rise to an important distinction between two alternative approaches to the mediation itself. One approach is for the mediation to take place over a relatively short period, often with one or more mediation sessions at which negotiations take place. Another approach is for the mediation to be an on-going process, and 'on-going parallel mediation' without any predetermined endpoint, with dialogue continuing for as long as it takes to reach agreement (or until one or both parties concludes that further discussions are not worthwhile).

114. One of the advantages of the [ICC Mediation Rules](#) is that they offer complete flexibility. Whether there is to be an 'on-going parallel' mediation process or a shorter mediation is something that the mediator and the parties can discuss and which can then be reflected in the note that the mediator produces under Article 7 of the [Mediation Rules](#).<sup>58</sup>

115. Where a shorter time-limited mediation with one or more mediation sessions at which negotiations take place, the parties may find it helpful for there to be a genuine window (i.e. a 'cease-fire') in the arbitration proceedings. This will enable them and their advisers to focus on the mediation without being distracted by competing deadlines in the arbitration.

116. If there is a pause in the procedural steps to be taken in the arbitration while the mediation takes place, this may result in the arbitration taking longer to get to an award. Whether or not any delay is meaningful in the context of the timetable for the full arbitration process will vary from case to case. If any pause in the arbitration procedure is scheduled after both parties have completed a major milestone, it may also have limited impact on the overall duration of the proceedings.

117. If a longer open-ended mediation procedure is foreseen, it may be less appropriate to stay the arbitration. In that circumstance, the better approach may be for the mediation and the arbitration to run in parallel, with developments in the arbitration hopefully increasing, rather than reducing, the prospects of settlement.

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<sup>58</sup> The procedure under Article 7 is discussed earlier in this report at paras. 47-48.

**iv) Sealed offers**

118. Sealed offers are an additional tool available to parties in ICC arbitration proceedings.<sup>59</sup> The sealed offer mechanism is designed to encourage parties to accept reasonable settlement offers made by an adverse party. This in turn encourages all parties to make such offers and thereby increases the prospects of a negotiated settlement.
119. Sealed offers promote settlement by putting pressure on the party receiving the offer to settle instead of running the risk of bearing more of the costs of the arbitration.<sup>60</sup> In summary:
- a) Sealed offers are aimed at (i) encouraging settlement in the course of an arbitration; and/or (ii) directing the allocation of costs after the final award.
  - b) A party that rejects a sealed offer that is either equal or more advantageous to it than the final award may be ordered to bear the costs, or more of the costs, of the proceedings — regardless of which party wins the arbitration.
  - c) The ICC Court's Secretariat may assist the parties to put information relating to certain unaccepted settlement offers, and related correspondence, commonly referred to as sealed offer(s), before an arbitral tribunal at the appropriate time (i.e. after the tribunal has decided the merits and is about to decide the issue of costs and how they are to be allocated). The Secretariat may also assist with any counter-offer(s) made as sealed offer(s) by the offeree.<sup>61</sup>
  - d) Once the arbitral tribunal has informed the Secretariat that it is ready to apportion costs under Article 38, the Secretariat will send to the arbitral tribunal all the correspondence held by the Secretariat related to the sealed offer(s).<sup>62</sup>
  - e) Sealed offers are in principle not binding on the arbitrators, so arbitrators do not have to allocate the costs in strict accordance with such offer.
120. Sealed offers work in the following way. Consider a scenario where a sealed offer to settle the dispute (expressed as being 'without prejudice save as to costs') is made by Party A and rejected by Party B. The arbitration proceeds, and the tribunal issues its decision on liability and quantum. The tribunal must then decide on costs. At that stage, Party A is entitled to disclose the sealed offer to the tribunal (and it can use the services of the ICC Court's Secretariat to do this in the manner set out in the [ICC Note to Parties and Arbitrators on the Conduct of the Arbitration](#)). If Party A can show that its rejected offer was as good as or even better than the final award, then the rejected offer is a valid fact to be taken into account by the tribunal in deciding what costs order should be made.
121. Sealed offers can be effective whether they are made by the respondent or by the claimant. This can be demonstrated via the example given above.

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59 Sealed offers (or 'Calderbank offers') have been commonly used in both state court litigation and domestic arbitration in England and Wales and other common law jurisdictions for many years. It is the experience in England and Wales that the sealed offer mechanism has been effective in facilitating settlement.

60 See ICC Report '[Decisions on Costs in International Arbitration](#)' (2015), Section VII 'Unsuccessful settlement negotiations: associated costs and unaccepted offers', at paras. 96-100.

61 [ICC Note to Parties and Arbitrators on the Conduct of the Arbitration](#) ('ICC Note'), para. 267.

62 [ICC Note](#), para. 270(f).

- a) If Party A was the respondent and the award was in favour of the claimant, Party B, and the tribunal awarded a lesser amount to the claimant than the respondent had offered by way of settlement, then the respondent can argue that even though it 'lost', it should not have to pay any of the claimant's legal costs incurred after the claimant rejected its offer of settlement.
- b) If Party A was the claimant, and it was awarded more by way of damages than it had offered to accept by way of settlement, then it can argue that every element of its incurred legal costs should be reimbursed by the respondent, Party B (i.e. including elements of those costs that might otherwise have been considered unreasonable or unrecoverable by the tribunal). The claimant might also argue that the respondent should pay interest at a material level on the legal costs incurred in the arbitration by the claimant.
122. Parties may avoid the imposition of an adverse decision on legal costs when sealed offers are revealed to the tribunal,<sup>63</sup> by making realistic settlement offers to begin with and abstaining from 'gambling' to continue the arbitration even after a good settlement offer has been made.
123. The arbitral tribunal should also consider consulting the parties at an early stage (e.g. at the first case management conference pursuant to Art. 24, [ICC Arbitration Rules](#)) and inviting them to agree on a procedure for the possible use of sealed offer(s) in the arbitration.
124. The [ICC Note to Parties and Arbitrators on the Conduct of the Arbitration](#) sets out how the ICC Court's Secretariat can help implement the use of sealed offers.<sup>64</sup>

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63 The [ICC Note](#) sets out possible assistance by ICC Secretariat by informing the arbitral tribunal of the existence of any sealed offers after it has reached its conclusions on all issues other than costs but before it has made its final award. In this way, its decision on costs can take into account any sealed offers, but its decisions on the merits will not have been improperly influenced by privileged information regarding the terms of any such offers.

64 [ICC Note](#) (1 Jan. 2021), para. 267 et seq. See also C. Seppälä, M. Coulet-Diaz, P. Brumpton, [The New Assistance ICC Provides to Protect the Confidentiality of a 'Sealed Offer'](#), *ICC Dispute Resolution Bulletin*, issue 2017-1.



## Pre-Action Risk Assessment

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When considering whether to commence an assisted dispute resolution process, parties will inevitably undertake some degree of cost-benefit analysis. Given the significant element of uncertainty in dispute resolution, this will often take the form of a risk assessment.

When undertaking such analysis, the parties may wish to take into account the following considerations:

- (a) cost implications
- (b) quantifiable outcome implications; and
- (c) other (unquantifiable) implications.

### a) Cost implications

The costs involved in undertaking dispute resolution efforts will be significantly affected by the mode(s) of dispute resolution chosen, the applicable rules, and the circumstances of the dispute. They may also vary by geography and sector.

While the Report does not attempt to set out a formula or method by which parties can predict the likely cost implications of their dispute resolution choices, the present assessment illustrates what considerations parties should take into account when seeking to calculate their likely costs.

In-house counsel may wish to use the following matrix<sup>65</sup> to help them evaluate the different elements of cost for which they should be prepared. This can be used as a checklist, to ensure that different elements have been considered. Parties may also wish to collect these records (with original budgeted figures as well as after-the-fact actuals) to use as reference points when preparing estimates for future cases.

When going through this quantification exercise, the parties should not underestimate the impact of 'hidden' costs that are difficult to quantify but nevertheless play a role in the management of a dispute.

This is the case, for example, with the disruption factor caused by the internal management of a dispute and the rerouting of resources (e.g. project managers, commercial directors, etc.) who are distracted from their normal operational tasks.

Another example is the level of anxiety and emotional stress through which factual witnesses of a party may have to go through when testifying in front of an arbitral tribunal and undergoing a tough cross-examination at a hearing.

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<sup>65</sup> This matrix, which was shared with Task Force members in the course of the preparation of this Report, is inspired by the publication: U. Hagel, 'The Value Add of Legal Departments in Disputes: Making a Business Case Rather Than Providing Pure Legal Advice', *Liquid Legal: Management for Professionals*, K. Jacob et al. (eds.) (Springer, 2017).

**Cost estimation exercise****Phase 1: Claim preparation**

<b>Internal costs</b>	<b>External costs</b>
In-house / Corporate lawyers (deemed hourly rate, budgeted time required)	External counsel
Commercial team (deemed hourly rate, budgeted time required)	Expert input(s) (if required)

**Phase 2: Negotiation**

<b>Internal costs</b>	<b>External costs</b>
As above	External counsel

**Phase 3: ADR Techniques**

<b>Internal costs</b>	<b>External costs</b>
As above, plus costs resulting from management/board involvement	External counsel
	Mediation / ADR fees

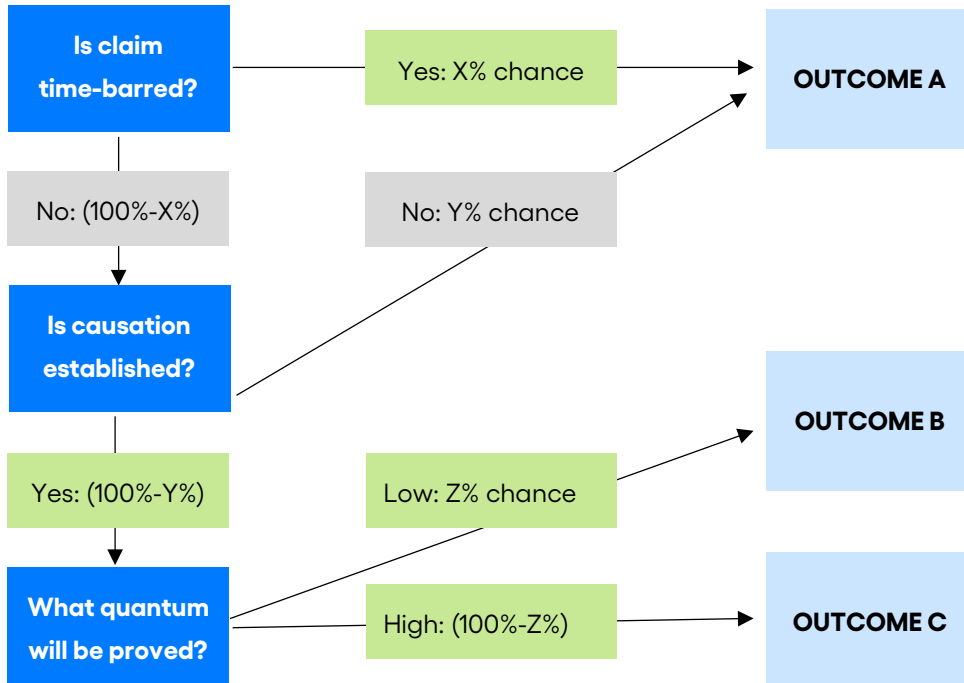
**Phase 4: Arbitration / Litigation**

<b>Internal costs</b>	<b>External costs</b>
As above, including sufficient time for witness preparation	External counsel
	Expert input(s)
	Arbitration / Litigation costs, including (e-)discovery, transcriptions, hearings, meetings, travel, accommodation

**b) Quantifiable outcome implications**

Having ascertained the costs of different processes, parties should then consider what outcomes may emerge from a given process.

A party that may become involved in an arbitration claim can use a decision tree model to set out and understand the different possible pathways that the dispute might follow. This is equally relevant for potential claimants and potential respondents. For illustration purposes, in a dispute with issues of statute of limitation (time-bar), causation and quantum, a party could evaluate the dispute by way of a decision tree as follows:



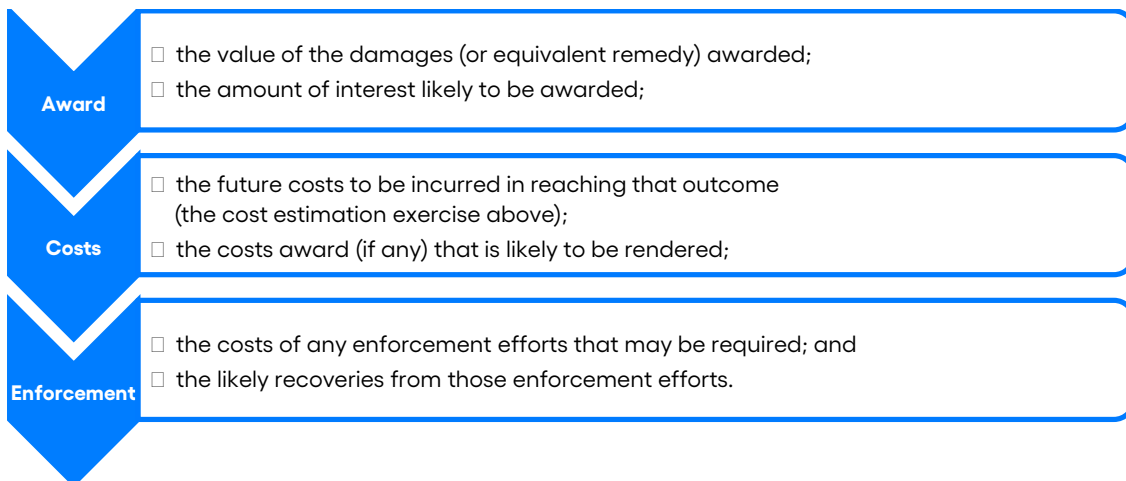
Of course, many disputes will have many more possible outcomes. In order for such analysis to be useful, it is not necessary to include each and every outcome, however unlikely, in the model. The analysis can still be useful provided that:

- the modelled outcomes are reasonably representative (as far as can be ascertained, given the stage of the proceedings) of the possibilities in the case;
- a sufficiently wide range of outcomes is reflected, so the parties can contemplate the reasonable worst and reasonable best-case outcomes; and
- the level of complexity is suitable for the case at hand (relatively straightforward cases can be represented by three or four possible outcomes, while the most complex cases may involve thousands of branches).

The key tasks in such analysis will include:

<p>1. deciding what questions, and what possible answers, to include in the model;</p>	<p>2. deciding what probabilities to assign (X%, Y% and Z% in the above example); and</p>	<p>3. how to attribute financial values to the different outcomes (A, B and C in the above example).</p>
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When considering what financial values to attribute to each outcome (A, B and C in the above example), the following factors will generally be relevant:



Such financial values should usually be measured at their present value, i.e. discounted by the client's cost of capital to reflect their value in today's money. *For example*, if the client might win \$10 million in a year's time, but its cost of capital is 8%, that win is only worth  $\$10,000,000 / 1.08 = \$9.26$  million.

The analysis above may suggest that, for a particular dispute, an arbitration process would lead to a range of outcomes for the claimant. *For example*, where a range of outcomes is between negative \$2 million and positive \$15 million (on a present-value basis, net of costs), the claimant may — by attributing probabilities to each of the different modelled outcomes — consider that its average outcome is \$8 million. Such analysis can provide a useful benchmark when considering whether to embark on a consensual ADR technique, and if so, what sorts of settlement levels it might accept.

### c) Other (unquantifiable) implications

When deciding whether to pursue an assisted dispute resolution process, all the implications may not be capable of being readily measured in financial terms. *In the example above*, if the claimant considers that the average outcome of pursuing arbitration is, for instance, \$8 million, and it receives the respondent's 'best and final offer' of \$5 million, the claimant will also wish to consider non-financial factors that were not incorporated in its calculations, such as:

- reputational impacts;
- lost profits resulting from management (decision-makers and witnesses) focusing on the dispute rather than on the core business of the company (including impacts on employee wellness and stress);
- unwelcome attention from regulators, auditors, investors and other stakeholders;
- the value of avoiding the uncertainty of an adjudicative process; and
- whether the pursuit of the dispute is consistent with the company's stated policy objectives including in relation to Environmental, Social and Governance matters.

Such factors may be difficult (or impossible) to quantify and incorporate into the decision tree analysis in section (b) above, but they should be considered when, in the example above, the claimant assesses whether the difference between an (estimated) average arbitration outcome of \$8 million and a settlement outcome of \$5 million is sufficient to justify engaging in a protracted conflict.

The 'Effective Conflict Management' Guide is a product of the ICC Commission on Arbitration and ADR ('Commission'). The Guide was prepared by the Task Force 'ADR and Arbitration' and was approved at the Commission's meetings of 12 December 2022 (virtual) and 28 March 2023 in Paris.

## Acknowledgements

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**Aisha Nadar, Susanne Gropp Stadler, Victoria Orlowski**, Vice-Chairs and Steering Committee Liaison, ICC Commission on Arbitration and ADR. **Melanie van Leeuwen**, Chair, ICC Commission on Arbitration and ADR, and former Chair **Carita Wallgren-Lindholm**.

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Advisory Board, chaired by **Gabrielle Kaufmann Kohler** and comprised of **Cyril Dumoulin, Alya Ladjimi, Michael McIlwrath, Edna Sussman, Hannah Tumpel**.

The Task Force was structured in four Tracks who held 14 further smaller track-specific meetings. Track 1 'decision trees and protocols' led by **Ulrich Hagel, Pierrick LeGoff** and **Donny Surtani**. Track 2 'ADR Services' led by **Sara Aranjo, Eric Franco** and **Lindy Patterson**. Track 3 'settlement in arbitration' led by **Kelvin Poon, Andres Romero-Delmaestro** and **Anke Sessler**. Track 4 'national courts and ADR' led by **Adrian Cole, Funmi Roberts, Valentina Wong**.

In addition, the Report draws on several further input:

- Approximately 35 sample cases were collected by the **ICC ADR Centre** and the Commission Secretariat to demonstrate how ICC ADR Services have been or could be used.
- A series of approximately 30 'Virtual In-house Counsel Open-Mic Sessions' moderated by **Aisha Nadar** and **Kathleen Paisley**, were held and created a platform for diverse and globally based corporate users and candidly discuss their views on early and effective dispute resolution and discussed the work and recommendations proposed by the Task Force.
- An ICC Pilot Survey on Practice and Preferences in ADR and Arbitration prepared by **Tuuli Timonen** and **Marlen Estevez Sanz** were held over summer 2021 and sought input from 533 participants and users of ICC Dispute Resolution Services.
- A questionnaire was sent to all **ICC National Committees** to learn about court initiatives or innovative projects from national legislators or institutions on the use of ADR, as well as to identify specific dispute resolution needs in their respective jurisdictions.

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## Relevant ICC DRS Publications

### ICC Rules, Suggested Clauses and Practice Notes

[2021 Arbitration and 2014 Mediation Rules](#)

[Arbitration Clauses](#)

[Mediation Clauses](#)

[Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration \(1 Jan. 2021\)](#)

[Guidance on Mediation of Belt and Road Disputes \(2019\)](#)

[2015 Expert Rules](#)

[Suggested clauses referring to the ICC Rules for the Administration of Expert Proceedings](#)

[Suggested clause providing for ICC as appointing authority for expert proceedings](#)

[2015 Dispute Board Rules](#)

[Dispute Board Clauses](#)

[Model Dispute Board Member Agreement](#)

[2015 DOCDEX Rules](#)

### ICC Commission on Arbitration and ADR Reports

2023 [Facilitating Settlement in International Arbitration](#)

2023 [Effective Conflict Management](#)

2022 [Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings](#)

2021 [Issues for Arbitrators to Consider Regarding Experts](#)

2021 [Issues for Experts Acting Under the ICC Expert Rules or the ICC Rules of Arbitration](#)

2020 [Accuracy of Fact Witness Memory in International Arbitration](#)

2019 [Resolving Climate Change Related Disputes through Arbitration and ADR](#)

2019 [Emergency Arbitrators Proceedings](#)

2019 [Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management](#)

2019 [ICC Guide to National Procedures for Recognition and Enforcement of Awards under the New York Convention \(Third Ed.\)](#)

2015 [Decisions on Costs in International Arbitration](#)

2014 [Effective Management of Arbitration: A Guide for In-House Counsel and Other Party Representatives](#)

2014 [Mediation Guidance Notes](#)

2012 [Techniques for Controlling Time and Costs in Arbitration \(Second Ed.\)](#)

### Resources at [www.iccwbo.org](http://www.iccwbo.org)

[ADR](#)

[Arbitration Rules and Procedures](#)

[Arbitration Costs Calculator](#)

[Case information](#)

[Commission on Arbitration and ADR](#)

[Professional Development](#)

[Hearing Facilities](#)

[DRS Statistics](#)

### ICC COMMISSION ON ARBITRATION AND ADR

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This ICC global commission brings together experts and practitioners in the field of arbitration and ADR with currently over 1,300 members from some 100 countries. The Commission holds several plenary sessions per year, at which proposed rules and Commission Reports are discussed, debated, and voted upon. Between these sessions, the Commission's work is often carried out in smaller [task forces](#). The Commission's products are made available at [www.iccwbo.org](http://www.iccwbo.org) and in the [ICC Dispute Resolution Library](#).

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- Develops tools for efficient and cost-effective dispute avoidance and settlement by means of arbitration, mediation, expertise and dispute boards and enables ICC dispute resolution to respond effectively to users' needs.
- Creates a link among arbitrators, mediators, experts, academics, practitioners, counsel and users of dispute resolution services from all over the globe and a forum to exchange ideas and experiences with a view to improve dispute resolution services.

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