

SUGGESTED CLAUSES REFERRING TO THE ICC RULES FOR THE ADMINISTRATION OF EXPERT PROCEEDINGS

Set out below are suggested clauses covering different situations. Parties should use whichever clause corresponds to their needs. It may be necessary or desirable for them to adapt the chosen clause to their particular circumstances.

At all times, care must be taken to avoid any risk of ambiguity in the drafting of the clause. Unclear wording causes uncertainty and delay and can hinder or even compromise the dispute resolution process. When incorporating any of the clauses below in their contracts, parties are advised to take account of any factors, such as the requirements of mandatory law, that may have an impact on their effect or enforceability under applicable law.

Clause A: Optional Administered Expert Proceedings

The parties may at any time, without prejudice to any other proceedings, agree to submit any dispute arising out of or in connection with [clause X of the present contract] to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce.

Notes: By including this clause, the parties acknowledge that proceedings under the ICC Rules for the Administration of Expert Proceedings are available to them at any time. This clause does not commit the parties to do anything, but the presence of the clause is designed to remind them of the possibility of using administered expert proceedings. In addition, it can provide a basis for one party to propose expert proceedings to the other party.

In order to use Clause A, the parties will need to replace the phrase “[clause X of the present contract]” in the suggested clause with a reference to the relevant contractual provision(s), so as to identify clearly the type of dispute(s) that may be referred to expert proceedings.

Clause B: Obligation to Submit Dispute to Non-Binding Administered Expert Proceedings

In the event of any dispute arising out of or in connection with [clause X of the present contract], the parties agree to submit the dispute to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce.

Notes: Under the ICC Rules for the Administration of Expert Proceedings, the expert's findings are not binding upon the parties unless the parties expressly agree to be bound by them. Clause B, by referring generally to the Rules, creates an obligation to refer a dispute to non-binding expert proceedings under the ICC Rules for the Administration of Expert Proceedings. It is designed to ensure that when a dispute of a specified type arises, the parties will attempt to resolve the dispute by submitting it to expert proceedings under the Rules.

Clause B may be appropriate, for example, where the parties intend to use the expert's non-binding findings as a basis for reaching an agreed settlement of the dispute that is the subject of the proceedings.

In order to use Clause B, the parties will need to replace the phrase "[clause X of the present contract]" in the suggested clause with a reference to the relevant contractual provision(s), so as to identify clearly the type of dispute(s) to be referred to the expert proceedings.

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Clause C: Obligation to Submit Dispute to Contractually Binding Administered Expert Proceedings

In the event of any dispute arising out of or in connection with [clause X of the present contract], the parties agree to submit the dispute to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce. The parties agree that the findings of the expert shall be contractually binding upon them.

Notes: Clause C provides a simple form of clause for binding expert proceedings, sometimes referred to as expert determination proceedings. Clause C creates an obligation to refer a dispute to binding expert proceedings under the ICC Rules for the Administration of Expert Proceedings. It is designed to ensure that when a dispute of a specified type arises, the parties will resolve the dispute by submitting it to expert proceedings under the Rules.

Clause C is appropriate where the parties want to be contractually bound by the expert's findings.

In order to use Clause C, the parties will need to replace the phrase “[clause X of the present contract]” in the suggested clause with a reference to the relevant contractual provision(s), so as to identify clearly the type of dispute(s) to be referred to the expert proceedings.

When Clause C is used, the parties should determine the effect under applicable law of their agreement to be contractually bound by the expert's findings.

A more complex tailor-made clause may be needed in certain cases (for example, where a price adjustment in an M&A contract is referred to an expert accountancy firm for determination). Such a tailor-made clause may still provide for the expert determination to be conducted pursuant to the ICC Rules for the Administration of Expert Proceedings.

Clause D: Obligation to Submit Dispute to Non-Binding Administered Expert Proceedings, Followed by Arbitration if Required

In the event of any dispute arising out of or in connection with [clause X of the present contract], the parties agree to submit the dispute, in the first instance, to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce. After the International Centre for ADR's notification of the termination of the administered expert proceedings, the dispute, if it has not been resolved, shall 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.

Notes: Clause D is appropriate where the parties intend to use the expert's non-binding findings as a basis for reaching an agreed settlement of the dispute that is the subject of the administered expert proceedings. If no settlement is reached, then the dispute is referred to ICC arbitration.

In order to use Clause D, the parties will need to replace the phrase “[clause X of the present contract]” in the suggested clause with a reference to the relevant contractual provision(s), so as to identify clearly the type of dispute(s) to be referred to the expert proceedings and subsequently to ICC arbitration proceedings.

If desired, Clause D can be modified to provide instead for judicial or other similar proceedings following the administered expert proceedings.

Specific Issues Concerning the Emergency Arbitrator Provisions

The parties should determine whether they wish to have recourse to the Emergency Arbitrator Provisions in the ICC Arbitration Rules under Clause D.

If the parties wish to exclude any recourse to the Emergency Arbitrator Provisions, the following wording should be added to Clause D:

The Emergency Arbitrator Provisions shall not apply.

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If the parties wish to have recourse to the Emergency Arbitrator Provisions, and want that recourse expressly to be available prior to the termination of the expert proceedings, the following wording should be added to Clause D:

The requirement to refer a dispute to administered expert proceedings, before referring a dispute to arbitration, shall not prevent the parties from making an application, prior to termination of the administered expert proceedings, for Emergency Measures under the Emergency Arbitrator Provisions in the Rules of Arbitration of the International Chamber of Commerce.

If the parties wish to have recourse to the Emergency Arbitrator Provisions, but only after termination of the administered expert proceedings, the following wording should be added to Clause D:

The parties shall not have the right to make an application for Emergency Measures under the Emergency Arbitrator Provisions in the Rules of Arbitration of the International Chamber of Commerce prior to the International Centre for ADR's notification of the termination of the administered expert proceedings.