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Président, directeur de la publication: John Denton

Head Office  
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Directeur général, directeur adjoint de la publication:  
Emmanuel Jolivet

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# Issues for Arbitrators to Consider Regarding Experts

## An Updated Report of the ICC Commission on Arbitration and ADR

This Report of the ICC Commission on Arbitration and ADR is an update of a 2009 Report prepared by the Task Force 'Guidelines for ICC Expertise Proceedings'. The Report has been updated by Erik Schäfer and David B. Wilson, co-chairs of the initial Task Force, and is now aligned with the 2021 ICC Rules of Arbitration, the ICC Expert Rules in force as from 1 February 2015, as well as recently released Commission Reports.

### I. Introduction

This text is intended to help guide arbitrators on issues that they should consider regarding tribunal-appointed and party-appointed experts in arbitrations under the ICC Rules of Arbitration ('Rules of Arbitration'). The text may also be useful in arbitrations to which the Rules of Arbitration do not apply. Specifically, the text explores how to use experts effectively and efficiently, with an eye toward avoiding certain approaches that may cause problems during or even after the arbitration.

In ICC Arbitrations, experts may be used to prove or establish facts that are relevant to the merits of the parties' dispute. Experts also may be used to help arbitrators understand relevant issues of law that will govern the tribunal's decision on the merits (e.g. where the arbitrators are unfamiliar with the laws applicable to the dispute).

The Rules of Arbitration include two distinct mechanisms for the appointment and use of experts. Under Article 25(2), the tribunal may hear testimony from experts whom one or more parties appoint to offer testimony relevant to the parties' dispute. Under Article 25(3), after consulting with the parties, the arbitral tribunal may retain one or more experts directly, define their terms of reference, receive their reports, and permit the parties to question them at the hearing. Whether the expert is party-appointed or tribunal-appointed, the Rules of Arbitration give the tribunal considerable flexibility regarding how experts may be used in the arbitration, and likely more flexibility than would be available in national courts.

### II. Party-appointed experts

#### A. What is a party-appointed expert's role and status?

Although parties also may retain expert consultants who will not be called to testify, the only party-appointed experts who are likely to concern the arbitral tribunal are those retained to testify before the tribunal as witnesses. Experts may be appointed by one or more parties.

It is up to the party to decide whether to attempt to prove its case through evidence from a party-appointed expert. The party or parties who retain the expert are responsible for defining the expert's tasks and for arranging remuneration and other practical issues with the expert.

Regardless of which party or parties appoint them, party-appointed experts are witnesses – nothing more and nothing less. As with any other witness, the arbitral tribunal may reasonably expect and require that a party-appointed expert tell the truth when he or she testifies. The expert's duty to testify truthfully overrides any other duty that an expert might believe that he or she owes to a party (Section II(F) below).

Whatever the expert's qualifications, the expert is not the decision-maker in the arbitration. The arbitral tribunal remains solely responsible for determining the facts of the case and applying the law to the facts to resolve the parties' dispute. The tribunal cannot delegate its role to an expert.

Thus, the arbitral tribunal is and remains responsible for giving whatever weight it deems appropriate to an expert witness's testimony, just as the tribunal would for any other witness in the arbitration. When weighing an expert's testimony, the arbitral tribunal should consider factors such as:

- > the factual and legal issues presented in the arbitration;

- > the expert's qualifications and experience;
- > the care and attention that the expert used when formulating his or her opinions;
- > whether the expert is biased towards a party or conclusion;
- > whether the expert's opinions were derived based on a methodology recognized by other experts in the field;
- > whether the expert reached unreasonable or irrelevant findings;
- > whether the expert's answers to questions from opposing counsel or the tribunal reduce the value of the expert's opinions;
- > the expert's overall credibility while testifying; and
- > other factors that the arbitral tribunal deems relevant.

### **B. What directions, if any, should the arbitral tribunal issue concerning experts before a party appoints an expert?**

Subject to the arbitral tribunal's oversight and direction (Section II(C) below), the parties may agree on the timing and method of presenting expert evidence. If the parties do not agree, the arbitral tribunal usually will discuss these issues with the parties and issue appropriate directions. Usually, this is done early in the arbitration during the Case Management Conference at which the time schedule for the proceedings is established, although the tribunal may decide to issue directions later in the proceedings if the tribunal believes that it does not yet have sufficient information about the need for expert testimony.

Moreover, if the circumstances warrant and subject to any prior agreements between the parties, the arbitral tribunal, after consulting the parties and in accordance with Article 22(2) of the Rules of Arbitration, may establish an explicit rule requiring any expert to certify that the findings set forth in the expert's report are true and that the opinions expressed are correct to the best of the expert's knowledge. This duty may or may not exist in the national legal systems with which the expert is familiar. The tribunal can provide further clarifying directions, as necessary. By providing early notice of this requirement, the tribunal can help to avoid surprises later in the proceedings.

### **C. Must the arbitral tribunal agree to hear testimony from an expert witness if one or more parties wish to offer expert evidence?**

No. Under Article 25(2) of the Rules of Arbitration the arbitral tribunal retains discretion to decide whether to hear expert evidence from party-appointed experts. Nonetheless, under Article 22(4) of Rules of Arbitration, the arbitral tribunal is responsible for ensuring that each party has a 'reasonable opportunity to present its case'. Thus, the arbitral tribunal may be reluctant to refuse a party's request to offer expert testimony, out of concern that it might deprive the party of its rights and expose the arbitral award to the risk of being set aside. As a practical matter, expert evidence concerning specific, disputed matters that are relevant to the arbitral tribunal's decision normally should be heard.

The tension between Article 22(4) and Article 25(2) often can be resolved through guidance from the arbitral tribunal, as discussed in subsection (D) below.

### **D. When should the arbitral tribunal encourage or discourage the parties from relying on expert evidence?**

When formulating the terms of reference and otherwise in administering the arbitration, it is entirely appropriate for the arbitral tribunal to provide guidance to the parties on whether expert evidence is likely to help the tribunal to resolve disputed issues in the arbitration. If the tribunal indicates that expert evidence is unlikely to be helpful, most parties will not attempt to offer it. Likewise, the tribunal may indicate the need to narrow the scope of the expert's evidence to specific relevant issues.

When deciding what guidance to provide, the arbitral tribunal may wish to consider the following questions:

#### **(i) Does the resolution of the parties' dispute require technical or other specialized knowledge?**

In many cases, the answer to this question will be no. In this case, expert evidence will be unnecessary. For example, although a dispute over defects in the construction of a power plant is likely to require technical or other specialized knowledge, a dispute involving a routine claim for breach of a commercial contract will not, except perhaps with regard to damages.

**(ii) Does the tribunal already possess the necessary technical or specialized knowledge?**

Even where technical or other specialized knowledge is required to resolve the parties' dispute, expert evidence may be unnecessary if the tribunal itself has the needed expertise. Thus, for example, if the dispute involves an issue of Swedish law and the tribunal includes Swedish attorneys, it may not be helpful for the tribunal to hear testimony from attorneys or law professors on Swedish law. Likewise, if the dispute involves a dispute over construction defects, it may not always be helpful to hear expert evidence if the arbitrator is an engineer with expertise in the area relevant to the parties' dispute and thus understands the relevant technical issues without the need for further explanation from a party-appointed expert.

If the dispute involves specialized knowledge other than the applicable law (which falls squarely within the tribunal's duties) and only one member of a three-arbitrator tribunal possesses the required expert knowledge, the situation becomes more complex because of the need to avoid a de facto in camera expertise proceeding. In other words, unless the parties expressly agree, it is neither expected nor recommended that one arbitrator will perform an independent expert investigation or evaluation on which the other arbitrators would rely in making their decision. Many problems exist with this approach, not the least of which is that it reduces the parties' ability to comment on, ask questions about and, if appropriate, challenge what the expert has done.

In some arbitrations, all parties have intended that the tribunal should include arbitrators with certain expert skills, so as to avoid the need to educate the arbitral tribunal on specific issues through a retained expert. In these circumstances, the arbitral tribunal should ensure that:

- > adequate procedural protections can be implemented to avoid what would amount to an in camera expertise proceeding;
- > the scope of expert fact-finding activities can be delegated and carried out by the arbitrator(s) concerned in a more cost and time-efficient manner than could a tribunal-appointed or party-appointed expert; and
- > the relationship among the arbitrators is such that they are comfortable entrusting one of their number with the task.

**(iii) Are the parties' employees or officers able to testify competently concerning the disputed issues?**

Evidence from retained experts is not necessary in every arbitration. Officers or employees of the parties may be experts in the relevant industries and thus able to testify competently on technical matters in a manner that helps the arbitral tribunal understand and resolve disputed factual issues.

**(iv) What impact will expert evidence have on the costs of the arbitration?**

Retained expert witnesses do not work for free, nor are they inexpensive. Expert witness fees can materially increase the overall costs of the arbitration, even without taking into account the corollary impact on attorneys' fees and hearing time. The potential benefit of a party-appointed expert should thus be evaluated in the light of these increased costs.

**(v) How else can the arbitral tribunal help the parties to save time and costs when retaining experts?**

To reduce time and costs, the arbitral tribunal may wish to encourage the parties jointly to retain a single expert on a particular subject, rather than one expert on each side.

The arbitral tribunal should candidly discuss all of these issues with the parties and try to obtain a consensus on whether these costs are likely to be worthwhile given the particular issues in dispute.

**E. How should the arbitral tribunal communicate with party-appointed experts?**

In general, the tribunal does not communicate directly with a party-appointed expert, except when the expert is testifying at a hearing. If the tribunal has a question regarding a procedural matter, it should raise this question through counsel to the party who engaged the expert.

**F. What duties does the expert owe to the arbitral tribunal?**

The tribunal should insist that the expert testify truthfully in response to all questions from the arbitral tribunal and the parties' respective counsel.

The expert must comply with the tribunal's directions regarding expert testimony, including for example, whether expert testimony will be allowed, the form of the expert's work product, when the work product

is due, whether the witness will be accepted as an expert, how long the expert will be permitted to testify, directions to answer particular questions; and so forth.

In some countries, an expert witness also may have certain obligations to the tribunal under the regulations of a professional body or licensing authority to which the expert is subject or otherwise under national law.

In some national court systems,<sup>1</sup> party-appointed experts who are designated as testimonial witnesses are deemed to have an affirmative duty to assist the court that overrides the expert's duty to the appointing party. Apparently, this duty is construed to be broader than the expert's duty to testify truthfully.

Neither the Rules of Arbitration nor arbitration laws, such as those based on the UNCITRAL Model Law on International Commercial Arbitration, presently include an explicit rule to this effect.

Although the parties may agree on such a procedural rule (e.g. in the agreement to arbitrate or in the terms of reference signed by all parties), it is far from clear whether arbitrators may or should establish or apply a rule of this kind.

Some arbitrators and arbitration practitioners argue that the arbitral tribunal should issue directions establishing an affirmative 'duty to assist the tribunal' upon party-appointed experts in ICC Arbitration. The proponents of this approach argue that establishing such a duty will encourage experts to be independent and thus more likely to help the tribunal determine the true facts and issue a just award. Although the proponents acknowledge that such a duty is not specified in the Rules of Arbitration, they argue that unless the parties agree otherwise, the tribunal has the power to establish the duty through an order under Articles 22(2) and 25(1) of the Rules of Arbitration. The proponents of this approach argue that enabling the arbitral tribunal to issue instructions directly to the expert is a practical solution to a possible 'battle of experts', which might otherwise cause the tribunal to appoint its own expert as permitted under Article 25(3) of the Rules of Arbitration.

Other arbitrators and arbitration practitioners argue that imposing an affirmative duty to assist the tribunal upon party-appointed experts ignores the distinction in the Rules of Arbitration between party-appointed experts and tribunal-appointed experts. Although Article 25(3) gives the arbitral tribunal the right to define the terms of reference for tribunal-appointed experts, Article 25(2) does not mention a similar

right with respect to a party-appointed expert. When appointing an expert under Article 25(3), the tribunal, in consultation with the parties, defines the expert's mission. By contrast, a party-appointed expert's mission is negotiated between the expert and the party or parties who appoint the expert, taking into account factors such as:

- > the expert's expertise and how the expert can help the party prove its case;
- > the expert's fees for performing the needed analysis; and
- > the time required to perform that analysis.

The distinction between party-appointed experts and tribunal appointed experts is important when one tries to understand precisely what the 'duty to assist' the tribunal would entail. Because the Rules of Arbitration do not mention such a duty, the arbitral tribunal must define the duty's scope directly or by reference to some body of law. As a practical matter, this means that the duty's scope would vary from case to case and from tribunal to tribunal. Under either scenario, if the duty to assist is broader than the duty to testify truthfully, serious problems exist in connection with defining any objective standard for the duty's limits. For example, would the duty require the expert to perform analyses that interest the tribunal, but which (a) the appointing party cannot afford or considers irrelevant; (b) would delay the arbitration's timely completion; or (c) would go beyond the expert's defined mission? Further, if the arbitral tribunal believes that the expert has testified truthfully but has not sufficiently 'assisted' the tribunal, is the appointing party subject to some sort of consequence (e.g. adverse inferences)?

In summary, opponents of the 'duty to assist' approach argue that if the arbitral tribunal is concerned that a party-appointed expert would not be sufficiently independent or 'helpful', the tribunal should consider appointing an expert itself. If the tribunal believes that a party-appointed expert is slanting his or her findings or testimony for the benefit of the appointing party, the tribunal may properly decide to give the expert's testimony little or no weight (Section II(A) above). The tribunal will need to weigh testimony and judge the credibility of expert witnesses regardless of whether the tribunal establishes a duty to assist.

<sup>1</sup> These include the United Kingdom, Hong Kong, Australia and New Zealand, but not the USA.

## G. What directions, if any, should the arbitral tribunal issue regarding the expert's report or other work product?

The tribunal has discretion to decide whether to require the expert to provide a report or other work product in advance of the hearing and the form that the report or other work product should take. Tribunals frequently order reports in one of two forms:

- > a detailed narrative report of the expert's analysis and conclusions, or
- > a witness statement setting out the expert's analysis and conclusions in the form of an affidavit or declaration.<sup>2</sup>

In almost all arbitrations, directions from the tribunal requiring the expert to submit his or her work product in advance of the hearing will be helpful to the tribunal and the parties. This approach is also likely to shorten the time needed for the hearing.

The arbitral tribunal should require the expert's work product to be communicated to all parties in accordance with a set or agreed time schedule. Normally, it will help to expedite the hearing and focus the issues if the tribunal also gives the parties the opportunity to comment on or rebut the opposing party's expert's report before the hearing and to supplement the expert's report to clarify issues that the opposing side raises (Sections (H) and (I) below).

### (i) What can the arbitral tribunal do if a proposed expert lacks the qualifications to testify competently, if the expert's methodology is unsatisfactory, or if the expert's report is otherwise deficient?

The tribunal has discretion to decide how to address and resolve these sorts of issues.

When doubts arise regarding the witness's qualifications to testify as an expert or the methodology that the witness used to reach his or her conclusions, the question is usually whether the tribunal should refuse to permit the expert to testify at all or whether the tribunal should address these concerns when weighing the witness's testimony. Thus, where the tribunal believes that the witness is not really an expert or where the witness's methodology is fatally flawed, the tribunal might permit the witness to testify, but choose to give the witness's testimony little or no weight.

On the other hand, if the expert's qualifications are not in dispute, but the expert fails to comply with the tribunal's directions regarding the submission of a satisfactory pre-hearing report or witness statement, the question is whether the expert's failure to comply prejudices the opposing party's ability to prepare for and present its case at the hearing. Under these circumstances, the tribunal might issue remedial directions, such as barring the expert from testifying (at least until the deficiency is corrected) or limiting the expert's testimony to the material specifically addressed in the report or witness statement.

### (ii) How does the arbitral tribunal resolve a party's objections to another party's party-appointed expert or an expert jointly retained by both parties?

The arbitral tribunal should resolve objections after hearing from the parties, and taking into account each party's right to have a reasonable opportunity to present its case. Objections can take several forms, including for example:

#### *a. Objections alleging a conflict of interest*

A party may object based on the allegation that the expert has a conflict of interest that would preclude the expert from testifying.

**Prior service to, or relationship with, the party who retained the expert.** Where the basis of the alleged conflict is the expert's prior service to, or relationship with, the party that calls the expert, the tribunal usually will find that the conflict does not preclude the expert from testifying, but may affect the weight that the arbitral tribunal gives to the expert's testimony.

**Prior service to, or relationship with, the objecting party.** Where the objecting party alleges that the expert's prior service to, or relationship with, the objecting party should preclude the expert from testifying, the issue usually is whether the expert previously obtained trade secrets or other confidential information from the objecting party, and is precluded by contract or applicable law from using or disclosing that information. This fact pattern can be difficult to resolve, and requires the arbitral tribunal to evaluate factors, including:

- > the dates, nature and duration of the prior relationship between the objecting party and the expert;
- > whether the expert obtained trade secrets or other confidential information from the objecting party;

<sup>2</sup> See Annex II below and 'Issues for Experts Acting Under the ICC Expert Rules or the ICC Rules of Arbitration' available at [www.iccwbo.org/commission-arbitration-ADR](http://www.iccwbo.org/commission-arbitration-ADR) and <https://library.iccwbo.org/dr-commissionreports.htm>.

- > contractual or legal prohibitions on the disclosure of that information;
- > the nature of the expert's engagement in the arbitration;
- > the likelihood that the expert will use or disclose the protected information when serving the opposing party; and
- > whether the objecting party has waived the conflict.

**Prior service to, or relationship with, one or more members of the arbitral tribunal.** Here, a party objects to the opposing party's expert because the expert has a personal or professional relationship with one or more members of the tribunal that is alleged to compromise the tribunal's ability to hear and weigh the expert's testimony objectively and impartially. Examples of relationships that might result in objections include:

- > an existing or previous business relationship with one or more of the arbitrators (e.g. expert and arbitrator both partners in the same firm), and
- > an existing or prior consulting or other relationship with one or more of the arbitrators (e.g. the arbitrator is currently using the expert in a case in which the arbitrator is counsel; the expert is acting as arbitrator in a case in which the arbitrator is counsel; the expert retained the arbitrator in some capacity, etc.).

In these circumstances, the arbitral tribunal must decide whether allowing the expert to testify would create the appearance of impropriety; and the hardship that would result to the party who retained the expert if the expert is not permitted to testify. Arbitrators should deal with these situations with due regard to the specific case and the parties' legitimate expectations. If any doubt exists as to whether a party might object, the relationship with the expert should be disclosed to the parties as soon as practicable.

#### *b. Objections to the expert's qualifications*

Based on the expert's professional biography or statements made by the expert orally or in writing a party may object to the opposing party's expert's qualifications (Section G(i) above).

#### *c. Objections to the expert's methodology*

A party may argue that expert's methodology is not a proper basis for the expert's opinion (Section G(i) above).

#### *d. Objections based on contacts between the expert and counsel for the party who retained him or her*

A party may sometimes challenge the opposing party's expert's credibility based on contacts between the expert and the party who appointed him or her. These contacts occur in almost every case because counsel usually needs to be educated by the expert concerning the subject matter of the expert's expertise, in order for counsel to present his or her client's case competently. In common law systems, this approach is completely appropriate and acceptable. The retaining party would otherwise also need to retain an additional expert (a so-called 'shadow expert') to assist counsel, thus resulting in additional costs.

Thus, the question may arise as to whether and to what extent information exchanged between counsel and the expert must be disclosed. Opinions are divided in this regard. In many civil law systems, only court-appointed experts are regarded as acceptable and any *ex parte* contacts between a party and an expert is inappropriate. Common law systems allow such contacts, but usually require communications between counsel and expert to be disclosed when the expert is endorsed as a testimonial witness. Communications with experts who are not expected to testify (i.e. consulting experts) remain privileged and non-disclosable. In systems where privilege may be waived, this sometimes results in extensive requests for discovery and extensive questioning of the expert during testimony concerning the expert's communications with the appointing counsel.

The Rules of Arbitration, most *lex arbitri*, and arbitration practice do not provide guidance in this regard. Thus, the issue of privilege should be resolved by agreement of the parties or if the parties do not agree, by the arbitral tribunal under Article 21(1) of the Rules of Arbitration, whenever practicable, after hearing from the parties.

The following approach is recommended:

- > The issue should be addressed and resolved as early as practicable and before testimonial expert witnesses are named in the arbitral proceedings.
- > Experts who give evidence should be required to disclose the facts upon which they rely in forming their opinions, including the source from which these facts have been obtained (e.g. test results, project documentation and any other source).

- > Where the information provided to the expert involves trade secrets or other non-public business information, the arbitral tribunal may enter an appropriate protective order that would preclude the opposing party from using or disclosing the information outside of the arbitration. If the party asserting a trade secret or other confidential information refuses to disclose the information provided to the expert, the arbitral tribunal may choose to preclude the expert from testifying or to limit the weight given to the expert's testimony.

#### **H. What techniques may the arbitral tribunal employ to reduce conflicts in the opinions of party-appointed experts?**

When each side calls its own expert and the experts disagree on one or more material issues, the arbitral tribunal may find it difficult to determine which (if either) expert should be believed and how to weigh the experts' testimony. This is because the arbitrators usually do not have the same technical expertise as the experts.

For example, the experts may differ in the structure of their respective work product, their basic underlying data, or their methodology. Conflicting expert opinions are particularly challenging for the tribunal to resolve where the tribunal cannot find flaws in the experts' methodologies or findings that would enable the tribunal to conclude that one expert's conclusions are more likely to be correct than the others.

To avoid the difficulty that 'dueling experts' sometimes create, some arbitral tribunals appoint their own experts instead of or in addition to party-appointed experts or use witness conferencing (Section II(K) below).

#### **I. May the arbitral tribunal direct party-appointed experts to work together to bridge disagreements and, if so, how?**

Another approach is to require the experts to meet in private to attempt to narrow specific areas of disagreement, which the arbitral tribunal should identify to them. Where the differences cannot be bridged, the arbitral tribunal may require the experts to explain to the tribunal and the parties, in writing, the reasons for the differences and whether the experts' differing approaches both can withstand peer review.

If practicable, this approach works best after the tribunal has received written expert opinions and any comments the parties may have provided, thereby helping the tribunal to focus the hearing on the relevant issues concerning which the experts disagree.

#### **J. What directions, if any, should the arbitral tribunal issue on questioning experts at the hearing?**

The Rules of Arbitration give the arbitral tribunal broad discretion regarding how to conduct the hearing. If the case warrants, the arbitral tribunal will discuss appropriate directions with the parties at a pre-hearing conference (Section II(B) above). In most cases, after the experts have submitted their written reports, the arbitral tribunal will summon the experts to attend a hearing, either because a party requests a hearing or because the arbitral tribunal finds that a hearing would be helpful.

The order and duration of the questioning is up to the arbitrators, unless the parties have agreed otherwise. For example, the arbitral tribunal may direct that counsel for the party who retained the expert should go first, followed by the opposing party's counsel, and then the tribunal. Or the arbitral tribunal may permit the opposing party's counsel to go first, followed by the counsel for the party who retained the expert, and then the tribunal. The tribunal may also decide to ask its questions first, intervene with questions at any time, or ask its questions once the parties have asked their questions.

If the tribunal believes it appropriate, the tribunal may direct or authorize an expert to put questions to other experts or witnesses in relation to the subject matter of the expert's assignment.

#### **K. What is witness conferencing and how can this technique be used?**

If there are several party-appointed experts, the tribunal alternatively may direct that a so-called 'witness conference' be conducted during which the expert, the other experts and any knowledgeable fact witnesses will be heard together. The arbitral tribunal directs the experts and witnesses present in the hearing room to address issues that it considers relevant. Each expert may thus be confronted with what other experts state or asked to engage in a discussion with them. This method is increasingly used to resolve the differences between conflicting expert opinions, but requires the tribunal's active participation and supervision in order to maintain order at the hearing.

#### **L. How should the tribunal use a party-appointed expert's findings when making its decision?**

The tribunal has discretion to decide how much, if any, weight to give to the expert's testimony (Section II(A) above).

### M. May the arbitral tribunal award costs and expenses of party-appointed experts?

Under Article 38(1) of the Rules of Arbitration, costs of the arbitration can include amounts paid to party-appointed experts. Under Article 38(4), the arbitral tribunal has discretion to decide what costs to award and which party or parties shall bear them and in what proportion. As a practical matter, this means that the tribunal can award all, part or none of the experts' fees to the party that advanced those fees.

In international arbitration, the most common approach is to award costs. Some arbitrators award costs in proportion to the outcome of the principal claims. This approach, however, would not preclude capping the recoverability of certain costs, if they are unreasonable. Another approach is for the tribunal to consider costs by categories and to determine the extent to which the party needed to incur these costs in order to establish its case.<sup>3</sup>

## III. Tribunal-appointed experts

### A. Under what circumstances should the arbitral tribunal retain an expert?

The arbitral tribunal has a duty to establish the facts of the case and to apply the law to the facts. It may not delegate these duties to an expert.

Article 25(3) of the Rules of Arbitration gives the arbitral tribunal broad authority to retain one or more experts directly, after consulting the parties.<sup>4</sup> The arbitral tribunal can appoint an expert, even if none of the parties ask the tribunal to do so. If, however, all parties object to the tribunal's appointment of an expert, the tribunal should not make the appointment, as at least one party must be willing to pay an advance on the expert's costs (see Appendix III to the Rules of Arbitration, Art. 1(12)).

In general, the arbitral tribunal may appoint an expert for two reasons:

- > to provide evidence regarding disputed facts that require technical expertise or other specialized knowledge to understand or explain (evidentiary function);
- > to advise the arbitral tribunal regarding and to illustrate and explain issues that are difficult to understand (although not necessarily disputed) and to prepare the tribunal to hear evidence from the parties, including any party-appointed experts (advisory function).

In determining whether to appoint an expert, the tribunal should consider the following factors:

#### (i) Have one or more parties asked or suggested that the tribunal appoint an expert to assist in establishing relevant disputed facts?

If so, is there a reason why the tribunal should not honor this request, such as irrelevance of the subject matter of the expert's proposed testimony to the outcome of the dispute?

#### (ii) Does the arbitral tribunal itself have the expertise to determine the issue?

Regarding the need to avoid a *de facto in camera* expertise proceedings, see Section II(D)(ii) above.

If the arbitral tribunal does not intend to appoint an expert, but prefers to rely on its own specific knowledge of factual matters to be addressed in the award, this should be discussed with the parties. Before rendering its award, the tribunal should also give the parties an opportunity to comment on any findings that are based on its personal knowledge.

#### (iii) Does a party object to a tribunal-appointed expert? If so, does the objection have merit?

A party might object to a tribunal-appointed expert for various reasons, including, for example (i) unfamiliarity with the process, (ii) sensitivity to the cost of retaining experts in general or a specific candidate whom the tribunal proposes, (iii) dissatisfaction with the qualifications of a specific candidate whom the tribunal proposes, and (iv) a preference for party-appointed experts, rather than a tribunal-appointed expert. Although the tribunal may appoint an expert over a party's objections, it is helpful if the tribunal can build consensus among the parties that an expert should be appointed and that a specific candidate or candidates are suitable to all parties.

<sup>3</sup> ICC Commission on Arbitration and ADR Report, Techniques for Controlling Time and Costs in Arbitration, ICC Publication No. 861-2 (2012), p. 15, para. 89. See also ICC Commission on Arbitration and ADR Report, Decisions on Costs in International Arbitration (2015). Both reports are available at [www.iccwbo.org/commission-arbitration-ADR](http://www.iccwbo.org/commission-arbitration-ADR) and <https://library.iccwbo.org/dr-commissionreports.htm>.

<sup>4</sup> Art. 6(1) of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (2020) also provides that the parties should be consulted before the tribunal appoints an expert.

**(iv) Would the expected benefits of appointing an expert reduce the efficiency of the proceedings and increase time and costs in such a way that the adverse effects might outweigh the benefits?**

Not every arbitration needs an expert (Section II(D) above). If the parties already have obtained and submitted expert evidence, it would be unusual (and expensive) for the arbitral tribunal to appoint one or more experts of its own to evaluate the party-appointed experts' work. But if the technical issues involved are sufficiently complex (and the value at stake is sufficiently high), this approach is an option.<sup>5</sup>

**a. At what stage of the arbitral proceedings should the arbitral tribunal appoint an expert?**

The tribunal should appoint an expert as soon as possible after the tribunal has precisely identified the issues calling for expertise. In many cases, identifying the specific issues will require that the parties have submitted at least one, if not two, rounds of detailed pleadings. To further clarify the issues, the tribunal may need to issue directions requiring the parties to provide further particulars concerning certain facts and issues.

**b. What process should the arbitral tribunal use to appoint an expert?**

Once it has determined that an expert is required, the arbitral tribunal searches for prospective experts with the necessary skills.

The tribunal may use its own contacts to identify a suitable expert, and may also seek assistance from a specialized institution, such as the ICC International Centre for ADR.<sup>6</sup> A proposal by the latter may enhance the expert's credibility.

The arbitral tribunal usually will find it helpful to seek the parties' input on whether the proposed expert is suitable. Thus, the tribunal can:

- > invite the parties to agree jointly on an expert; or

- > propose the candidate it considers best suited and give the parties an opportunity to comment, in case they have legitimate objections;
- > present the parties with a list of suitable experts, from which they may delete those to whom they object (eventually, limiting the number of candidates who may be deleted); or
- > present the parties with a list of suitable experts, whom the parties can rank in order of preference, with the candidate scoring the most points selected.

**Initial contacts.** The tribunal's initial contacts with a potential expert should focus on whether the candidate:

- > possesses the required skills,
- > is willing and available to serve without delaying the schedule for the arbitration,
- > is independent and neutral,
- > is willing to accept appropriate compensation for completing the required tasks,
- > is willing to agree to appropriate confidentiality, and
- > does not have a conflict of interest that should preclude the expert from serving.

**Defining the expert's mission.** After obtaining a formal assurance of independence and neutrality from the chosen expert, the arbitral tribunal should require the expert to accept a written retainer agreement (including the expert's terms of reference) that covers the following (see Annex 1 below):

- > the specific tasks that the expert is requested to accomplish;
- > the procedural directions that the expert is expected to follow; and
- > the terms of the expert's financial remuneration and reimbursement of the expert's expenses.

Experts sometimes propose their own format for the retainer agreement and other commercial terms. Depending on the circumstances, these may need to be reviewed and, discarded or amended, as appropriate.

When the expert has executed the retainer agreement, the tribunal formally appoints the expert. This is usually accomplished through a procedural order to which the retainer agreement is attached and which also requires the parties to submit a deposit securing the expert's remuneration.

<sup>5</sup> See ICC Report, *Effective Management of Arbitration: A Guide for In-House Counsel and Other Party Representatives (2014)*, Topic Sheet 9 'Expert Witnesses', 'Cost/Benefit Analysis'. See also N. Blackaby, C. Partasides with A. Redfern & M. Hunter, *Redfern and Hunter on International Arbitration* (5th ed., OUP, 2015), paras 5-23 and 6-136.

<sup>6</sup> Under the Preamble of the ICC Rules for the Proposal of Experts and Neutrals, the ICC International Centre for ADR will propose an expert, if an arbitral tribunal so requests. Such a proposal is free of charge in ICC Arbitrations. See ICC Rules for the Proposal of Experts and Neutrals, Appendix II, Art. 3(1); see also ICC Commission on Arbitration and ADR Report, *Techniques for Controlling Time and Costs in Arbitration*, ICC Publication No. 861-2 (2012) at para. 63., and ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (1 Jan. 2021), para. 277.

Although Article 25(3) of the Rules of Arbitration requires the arbitral tribunal to 'consult' with the parties before appointing an expert, the Rules of Arbitration do not address the parties' role in any detail. Normally, in addition to seeking the parties' comments on whether the tribunal should appoint an expert, the tribunal also will find it helpful, at a minimum, to obtain their comments on the facts to be proved or explained by the expert, how to select the expert, and the terms of the expert's compensation.

*c. How can the arbitral tribunal select the 'right' expert?*

Normally, the expert appointed is an individual person, but the tribunal also may appoint legal entities and 'expert teams' as experts. If so, all persons involved (other than purely clerical staff carrying out secretarial or menial tasks) should be disclosed to the parties and be available for questioning at a hearing.

In all circumstances, the arbitral tribunal should select an expert with care and give attention to the following criteria:

**Personal acceptability and trustworthiness.** The arbitrator(s) and, to the extent possible, the parties should trust the expert's objectiveness and impartiality. For the expert, this requirement amounts to the same standard of objectiveness and impartiality as is expected of arbitrators, including for example:

- > the absence of any appearance of bias caused by the expert's cultural background;
- > the absence of any appearance of bias caused by any personal interest in the outcome of the dispute;
- > the absence of a subject-matter bias – i.e. the expert should not have reached a conclusion before starting to work on the assignment;
- > the absence of a conflict of interest that should preclude the expert from serving.

**Communication skills.** The expert often will not work in his or her usual work environment, communication culture or preferred working language. In international arbitration, this means that the expert should possess the linguistic skills required to carry out the assignment. It also means that the expert should be capable of presenting his or her findings to the arbitral tribunal and the parties in a structured manner and a way that they can understand as laypersons in the specific field of expertise.

**Availability and reliability.** It is important that the expert can adhere to an acceptable time schedule for carrying out the agreed mission. When accepting the assignment, the expert should therefore be able

to forecast whether he or she is available, and should remain available to the extent required for carrying out the mission.

**Professional qualifications and expert skills.** The expert's skill and expertise are the main reasons why the expert is retained, and the arbitral tribunal should give this factor the most weight when selecting an expert. Because the required skills will vary from case to case, the tribunal should define the type of expertise that is required as thoroughly and precisely as possible, taking into account the relevant disputed issues.

If the arbitral tribunal seeks assistance from the ICC International Centre for ADR or another specialized institution, it should inform the institution about the relevant criteria when requesting a proposal.

*d. What terms should the expert's retainer agreement contain?*

The expert will perform services on a contractual basis. The legal framework, including the issue of who is contracting with the expert, depends on the specific legal setting and thus will vary from case to case. Normally, this does not cause problems, so long as the expert's remuneration is secured by an advance payment for fees and expenses.

**Parties to the contract.** Several different approaches exist for identifying who should be the parties to the retainer agreement.

The most common approach is for the arbitral tribunal to contract with an expert in the name and on behalf of all parties to the dispute. The arbitral tribunal's authority to do so comes from Article 25(1) of the Rules of Arbitration, which empowers the tribunal 'to establish the facts of the case by all appropriate means'.

Alternatively, the arbitral tribunal may make the appointment in its own name, relying on its explicit authority to appoint experts. If so, liability for the expert's remuneration should be shifted to the parties by means of an advance on costs paid by the parties (see Appendix III to the Rules of Arbitration, Art. 1(12)), or by incorporating an appropriate provision in the terms of reference.

The parties' arbitration agreement, as well as applicable mandatory law (e.g. *lex arbitri*) also may impact the terms of the agreement with the expert.

**Terms concerning the expert's mission<sup>7</sup> and the tribunal's procedural requirements.** The Rules of Arbitration do not specify formal requirements, such as the need to have the terms signed by the parties or the expert. In practice, the arbitral tribunal often includes the terms of the expert's mission in the procedural order formally appointing the expert.

Even then, however, the arbitral tribunal should make appropriate agreements with the expert because the expert is not a party to the arbitration, and the procedural order will not bind the expert unless the expert agrees to it.

Although the Rules of Arbitration do not expressly require the parties to be involved in drafting the expert's retainer agreement, it is good practice for the arbitral tribunal to draft the expert's retainer agreement and then submit its draft to the parties for comments. These comments should be directed at the scope of the expert's mission, with the goal of securing as much agreement as possible.

In appropriate circumstances, it may be useful to involve the expert in the drafting of his or her mission, as the parties and the tribunal might not have fully grasped the extent of the relevant problem. On the other hand, the expert may not yet have been appointed and the expert's remuneration may not yet be secured by a deposit for fees and expenses. Nor is the expert likely to be in possession of all information needed to provide meaningful suggestions.

Moreover, because the wording of the issues to be addressed by the expert may give rise to debates between the parties, it may be preferable not to involve the expert too much at this stage. Instead, the tribunal should include an umbrella provision in the expert's mission along the following lines:

If the expert, while carrying out the mission, becomes aware that any issue to be addressed in the expert report is not appropriately phrased, or if the expert becomes aware of a relevant issue not mentioned in these terms of reference, then the expert shall advise the arbitral tribunal thereof immediately. The arbitral tribunal shall have the right to modify and/or amend these terms of reference as it deems fit after having heard the parties.

The expert's terms of reference can be attached as an exhibit to the retainer agreement or referenced in the retainer agreement and defined in a separate document. Normally, the arbitral tribunal will want to cover the following: (i) identification of the arbitration; (ii) expert's name and address (if a legal entity is appointed as expert, the responsible individual should be named); (iii) identification of the information (e.g. documents, specimens, etc.) to be communicated to the expert; (iv) general description of the tasks that the expert is expected to perform; (v) description of the expert's right to remuneration and reimbursement of expenses (including fees for the expert's employees, allowances for appropriate travel and accommodation, etc.) and any advance payments; (vi) duty to maintain confidentiality; (vii) obligation to be truthful and impartial; (viii) duty to disclose the expert's contacts with the parties<sup>8</sup> or potential sources of conflicts of interest before and during the arbitration; (ix) basic rules for communications among the expert, the parties and the tribunal so as to protect the transparency of the expert's performance; (x) basic rules for monitoring costs and readjusting the advance on the expert's costs; (xi) provisional timetable; (xii) scope of the expert's liability and grounds for termination; (xiii) affirmation of the parties' right to comment on the expert's report and to question the expert at the hearing; and (xiv) the arbitral tribunal's power to adjust the expert's terms of reference as necessary.<sup>9</sup>

**Defining the expert's mission.** The arbitral tribunal should clearly describe the scope and substance of the questions to be answered by the expert, and clearly distinguish between the disputed and the undisputed facts of the matter.

**Procedures regarding remuneration.** For obvious practical reasons, the arbitral tribunal should not permit the expert to begin work without obtaining agreement on the expert's remuneration and reimbursement of the expert's expenses and the parties' payment of an advance on costs and expenses. This is explicitly addressed in Articles 37(2) and (6) of the Rules of Arbitration and Article 1(12) of Appendix III.

<sup>7</sup> See Annex II and Section III(D)(ii) of the updated report 'Issues for Experts Acting Under the ICC Expert Rules on the ICC Rules of Arbitration' (2021), published in this issue of the Bulletin and also available at [www.iccwbo.org/commission-arbitration-ADR](http://www.iccwbo.org/commission-arbitration-ADR) and <https://library.iccwbo.org/dr-commissionreports.htm>. Rules of Arbitration' (2021) available at [www.iccwbo.org/commission-arbitration-ADR](http://www.iccwbo.org/commission-arbitration-ADR) and <https://library.iccwbo.org/dr-commissionreports.htm>.

<sup>8</sup> Unlike party-appointed expert witnesses, tribunal-appointed experts normally should not have any private contact with any of the parties. Contacts with a party outside the arbitral tribunal's control are inappropriate. Consequently, all contacts with a party or counsel are subject to full disclosure.

<sup>9</sup> A checklist for experts' terms of reference is attached as Annex I.

The arbitral tribunal should fix the advance on the expert's costs and expenses at an amount that will in all likelihood cover the total anticipated amount of the expert's costs and expenses. Thus, the tribunal should ask the expert to report as soon as the expert believes that the advance is likely to be insufficient.

The Rules of Arbitration do not specify how the parties are to bear the advance on costs, and the tribunal has discretion in this regard. If one party refuses to pay its share, the arbitral tribunal may request the other party to pay that share, if appropriate under the circumstances. If a party does not pay the advance on costs, the expert's work thus will not proceed, and the arbitral tribunal may take adverse inferences against the party who refused to pay (on the final allocation of expert costs, see Section III(B)(iii) below).

Likewise, the Rules of Arbitration do not address the question as to who shall administer the advance payment of the expert's costs. Although it is possible to request that the advance payment be made to the expert, who will then render account to the arbitral tribunal and the parties, this approach is not recommended. A better practice is for the arbitral tribunal to require that payment be made into a special account that it administers (normally through the chairman, in the case of a panel) or to order payment into an ICC account administered by the Secretariat of the ICC International Court of Arbitration under the arbitral tribunal's direction. The arbitral tribunal shall be responsible for ensuring the payment by the parties of such fees and expenses (see Appendix III to the Rules of Arbitration, Art. 1(12)).

***e. What should be the arbitral tribunal's role in directing the expert's work?***

The arbitral tribunal will order the expert to commence carrying out the expert's mission.

For practical reasons, the expert will have a high degree of independence when carrying out the mission. But because the arbitral tribunal is responsible for establishing the truth, ensuring efficient proceedings, and rendering an enforceable award, the tribunal retains supervisory responsibility over the expert's conduct and performance.

The arbitral tribunal should adopt appropriate measures to ensure that the expert receives from the parties the support needed to carry out the mission. If necessary or if the expert requests, the arbitral tribunal should require the parties to support the expert, for example, by responding to the expert's questions, by granting access to sites and physical evidence and by accompanying the expert during site visits and attending meetings if the expert requests.

In most cases, this sort of assistance from the tribunal will be needed only if one party does not voluntarily cooperate with the expert.

The arbitral tribunal should also adopt appropriate measures to ensure that the expert observes the parties' right to be heard and respects the terms of reference defining the scope of the expert's mission. Thus, for example, the arbitral tribunal should include the following measures to ensure transparency in the flow of information:

- > Generally, the expert should not communicate with a party without the other party being included (i.e. no private meetings, no letters unless copied to all, no telephone conferences unless all parties may listen).
- > If the expert absolutely must communicate with one party, the arbitral tribunal should make sure (to the extent possible) that the other party is informed of this communication and its purpose and contents as soon as possible.
- > Both parties must have a chance to be present if the expert questions one party or visits a site. The other party must be informed if the expert requests documents from one party. Documents obtained from one party must be made available to the other party. If the expert works on a site owned by a party, the arbitral tribunal should ensure that the other party is duly informed and also obtains access to the site.
- > According to the second sentence of Article 25(3) of the Rules of Arbitration, the arbitral tribunal, upon its own initiative or a party's request, must give the parties the opportunity to question any tribunal-appointed expert at a hearing.

Where the information to be provided to the expert involves trade secrets or other non-public business information, the arbitral tribunal should provide appropriate directions that address the parties' legitimate interests in protecting confidential business information (Section II(G)(ii)(d) above).

When fulfilling its responsibilities, the arbitral tribunal may need to communicate with the expert, and the expert may need to communicate with the arbitral tribunal whenever a difficulty arises. These communications are often informal and may be essential to the efficient completion of the expert's mission. The parties may be concerned about such communications taking place without the parties being fully informed. Opinions are divided as to whether private communications between the arbitral tribunal

and the expert should be allowed and, if so, to what extent. Thus, the arbitral tribunal should exercise great caution in this regard.<sup>10</sup>

## **B. What guidance should the arbitral tribunal provide regarding the expert's report?**

It is common practice in international arbitration for a tribunal-appointed expert to provide the arbitral tribunal and the parties with one or more written reports.

The Rules of Arbitration do not contain any requirements regarding the form or content of the expert's report. Thus, unless the applicable law or the expert's terms of reference provide otherwise, issues relating to the form of the report are up to the expert.

That said, the arbitral tribunal may wish to include, in the expert's terms of reference or separately, guidance on how the report is to be presented and structured on the issues to be covered. The report should meet at least the following basic requirements:

- > The report should answer the questions contained in the expert's mission in a comprehensive manner.
- > The report should allow the arbitral tribunal to form its own opinion on the issues that were submitted to the expert.
- > The report should be self-contained in the sense that the arbitral tribunal and the parties may understand how and why the expert arrived at each specific conclusion.

It also is entirely appropriate for the tribunal to provide guidance to the expert on communications with parties during preparatory work, as well as concerning site visits, reporting duties, time scheduling and other issues that have nothing to do with the expert's findings.

### **(i) What should the arbitral tribunal do with the expert's report?**

Once the expert submits his written report to the arbitral tribunal (in a sufficient number of copies), the tribunal should communicate it to the parties with further procedural directions. Normally, the parties will

be given the opportunity to comment in writing before the oral hearing, at which they will have the right to examine the expert.

The tribunal may instruct the expert first to submit a draft report, so as to ascertain that the report has the required quality and form. Experience shows that this method of quality control is useful.

If the parties agree or the arbitral tribunal directs, the expert may be invited to present a summary of the draft report at a meeting, at which the parties will be invited to comment on the preliminary findings. The expert can then take into account these comments when finalizing the report. This approach has the advantage of allowing corrections and amendments to be made, but may occasionally result in protracted discussions and unjustified attacks on the expert's credibility.

### **(ii) What directions, if any, should the arbitral tribunal issue on the questioning of experts during the hearing?**

#### ***a. Procedural aspects***

From a common law perspective, the expert's written report is to be regarded as direct testimony, and the expert's oral evidence is limited to responses to questions from the arbitral tribunal and the parties and their representatives. From a civil law perspective, the report is also considered as evidence, although with special probative value as it is evidence from a knowledgeable neutral third party acting under the arbitral tribunal's control. Regardless of the expert's conclusions, the authority to establish the facts rests with the arbitral tribunal, which retains the right not to follow the expert's findings.

The Rules of Arbitration (and, in most cases, the applicable law) do not require a specific form of questioning. Unless the parties have agreed that the questioning shall be conducted in a particular manner, or the terms of reference so require, the arbitral tribunal will usually discuss and determine at a preparatory conference how experts are to be questioned.

The method chosen will depend on each individual case. The emerging trend is for the parties to drive the expert's examination, as one would expect under the common law approach. Another approach is for the arbitral tribunal to take an active role in the questioning, leaving the parties with the right to submit additional relevant questions.

<sup>10</sup> If the IBA Rules on the Taking of Evidence in International Commercial Arbitration (2020) apply, the arbitral tribunal should comply with Article 6(5), which states: 'The Parties may examine any information, Documents, goods, samples, property, machinery, systems, processes or site for inspection that the Tribunal-Appointed Expert has examined and any correspondence between the Arbitral Tribunal and the Tribunal-Appointed Expert.'

*b. Disagreements that may occur at the hearing*

The following matters relating to experts may be a cause of disagreement during the hearing:

**Whether and which additional questions should be put to the expert.** After consulting the parties, the arbitral tribunal has discretion regarding whether the expert must supplement the expert report (either because it did not answer all questions that the arbitral tribunal defined or because further questions have arisen). If the parties agree that no additional questions should be put to the expert, this is not an issue. The arbitral tribunal also must decide whether an expert must answer questions to which the other party objects.

**Whether another expert should be appointed.** In rare cases, the arbitral tribunal, the parties, or both may have the impression that the expert has not done a good job or is incompetent. In this case, the tribunal must decide, after hearing from the parties, whether another expert should be appointed. The tribunal may appoint a second expert only if at least one party agrees and is willing to make the advance payment.

**The expert's conclusions.** The arbitral tribunal must assess the expert's conclusions and decide the case after hearing from the parties. This does not apply, however, in the rare cases where the parties stipulate regarding certain facts or conclusions after receiving and jointly disagreeing with the expert's report.

**(iii) What directions or decisions may the arbitral tribunal issue regarding the costs and expenses of tribunal-appointed experts?**

The same principles applicable to party-appointed experts govern the allocation of the fees and expenses of a tribunal-appointed expert (Section II(M)). The only difference is that in most cases these expenses are paid out of a deposit to which one or all parties have contributed as directed by the arbitral tribunal. The parties' respective contributions to the deposit should be in the final award allocating costs.

**(iv) May the arbitral tribunal use an expert as advisor in private meetings and, if so, how?**

Parties and counsel may be instinctively opposed to an expert acting as advisor to the arbitrators in private meetings, and this practice is rare.

In certain complex and technically difficult cases, however, an expert capable of explaining certain technical terms or other experts' reports may be useful in helping the arbitrators to understand the facts correctly and assure the quality of the reasoning underlying the award.

If the arbitral tribunal wishes to use an expert as an internal advisor, it is good practice for the tribunal to raise the issue beforehand with the parties and to obtain their explicit agreement in advance.

When the tribunal wishes to use an expert as an advisor, the tribunal, the expert and the parties should all understand the following:

- > the expert shall only function as an advisor, and shall not be responsible for finding any new facts or evaluating facts;
- > the expert's task will be limited to explaining information on technical issues submitted by the parties (including any party-appointed experts); and
- > the expert will not become a decision-maker and will not exceed the role described above.

The above should be recorded in writing. Unless such an agreement is reached, arbitral tribunals usually will abstain from adopting this approach.

## Annex I - Checklist for experts' terms of reference

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An expert's terms of reference normally will cover the following topics:

- (i) Identification of the arbitration proceedings
- (ii) Name and address of the expert (in case of a legal entity appointed as expert, the responsible individual also should be named)
- (iii) Identification of information (documents, specimens, etc.) to be communicated to the expert
- (iv) Definition of the expert's tasks
- (v) Definition of the expert's rights:
  - Remuneration and reimbursement of expenses (including fees for the expert's employees and charges for travel and accommodation, if appropriate)
  - Advance payments
- (vi) The expert's secondary obligations:
  - Duty to maintain confidentiality
  - Obligation to be truthful and impartial
  - Duty to disclose the expert's contacts with the parties and potential conflicts of interests prior to and during arbitral proceedings
- (vii) General rules for the conduct of the expertise:
  - Basic rules for communications between the expert, the parties and the tribunal to ensure the expertise proceedings are fully transparent
  - Basic rules for monitoring costs and readjusting the advance on expert's costs
  - Provisional timetable
- (viii) Items that might be included:
  - Power of the arbitral tribunal to adjust the expert's terms of reference if so required by the expert's findings (normally exercised after consulting the parties)
  - Scope of the expert's liability
  - Grounds for dismissal
  - Affirmation of the parties' right to comment on the expert's report and to question the expert at an oral hearing upon request.

## Annex II - Checklist for expert reports

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### A. Structure

An expert report that follows a structure similar to the following will usually be helpful to the arbitral tribunal:

- (i) A summary identifying the party or parties, the expert (including professional biography) and the arbitration procedure.
- (ii) A summary of the expert's mission
- (iii) A summary of the methodology and the standards that the expert used; and, if applicable, the professional or ethical rules by which the expert abides.
- (iv) A summary of the information on which the expert relies, including comprehensive references to literature and other sources used. Sometimes, it is appropriate to include this in an attachment.
- (v) The expert's factual findings and reasoned opinion and conclusion regarding the issues that were submitted for the expert to evaluate. In many cases, it will be appropriate to set forth separately the parties' respective positions, the experts' factual findings and the conclusions separately, on an issue-by-issue basis. Alternatively, it is possible to summarize the parties' respective positions and the factual findings in one section and the reasoned conclusions in another section. If known to the expert, he or she may also specifically refer to reports by other experts on relevant issues. Regardless of the structure, the expert report should be easily and fully understandable to any non-experts who are expected to read it. In other words, if only other experts are likely to understand the report, its value to the arbitral tribunal is reduced.
- (vi) A statement that the report and its findings set forth in the report are true and that the opinions expressed are correct to the expert's best knowledge.
- (vii) Date and signature

### B. Methodology and standards

The expert should use the methodology and standards that are generally accepted in the expert's field of expertise. If the expert deviates from these for justified reasons, the expert should clearly state why and how. The basic rule is that the expert's report should withstand the test of peer review. The expert should assume that the report will be subjected to some sort of peer review because this is highly probable.