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# Issues for Experts Acting Under the ICC Expert Rules or the ICC Rules of Arbitration

## 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 2010 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 provide general guidance regarding issues that should be considered by individuals who have been retained to serve as an expert in proceedings under the ICC Expert Rules (the 'Expert Rules'),<sup>1</sup> the ICC Rules of Arbitration (the 'Rules of Arbitration'),<sup>2</sup> or who are contemplating such an engagement. It also provides information that may be useful for other expert services to which these rules do not apply.

Experts may be natural or legal persons.<sup>3</sup> The Expert Rules do not distinguish between the two. Nonetheless, legal persons acting as experts should bear in mind that the obligations set forth below apply both to them and to any employees, assistants and subcontractors who may be involved in the execution of their assignment. Although the Expert Rules are silent on the topic, an expert's services are of a highly personal nature. Accordingly, the expert's tasks should not be subcontracted unless all parties retaining the expert explicitly consent.

Experts provide a valuable service in helping to avoid or resolve disputes, and can serve several different roles under the Expert Rules and the Rules of Arbitration.

#### Expertise:

- > *Consulting expert services.* At the request of a party, an expert can analyze facts and assist in finding solutions to specific problems before or during a dispute.

- > *Independent impartial expert services and non-binding evaluation.* Either in connection with a pending arbitration or as the parties otherwise agree, the parties can engage an expert to establish the 'true' facts, to evaluate these facts, or to provide a nonbinding, impartial evaluation of a disputed issue within the expert's expertise.
- > *Independent binding adjudication<sup>4</sup> / determination by an impartial expert.* Either in connection with a pending arbitration or as the parties otherwise agree, the parties can engage an expert to provide a binding determination regarding the solution of a disputed issue within the expert's expertise. The extent to which the expert determination is contractually binding or otherwise will depend on the applicable rules, such as the ICC Dispute Board Rules<sup>5</sup> and the applicable law.<sup>6</sup>

#### Arbitration:

- > *Expert witness.* In arbitrations, where the expert's expertise helps the arbitral tribunal to understand the issues and resolve the dispute, one or more parties or the arbitral tribunal may engage an expert to evaluate certain facts relevant to disputed issues and to provide an expert opinion regarding the results of that evaluation.

1 The ICC Expert Rules consist of three sets of Rules: (I) Proposal of Experts and Neutrals; (II) Appointment of Experts and Neutrals, and (III) Administration of Expert Proceedings. In this report references to these Rules use I, II, or III to designate the relevant subset of rules.

2 ICC Rules of Arbitration in force as from 1 January 2021.

3 E.g. see Expert Rules I, Preamble.

4 'Adjudication' is a term coined in the United Kingdom for a swift and informal agreed process by which the expert determines rights and obligations of the parties involved. Other national laws provide for procedures with a similar result, but the terms used and certain legal requirements may vary. 'Adjudication' must not be confused with 'arbitration'.

5 Under Art. 5(2) of the ICC Dispute Board Rules, a Decision of a Dispute Board binds the parties upon receipt.

6 Many (if not most) countries allow parties to authorize an expert to determine their contractual rights and duties. On rare occasions, such determinations may be easier to enforce than a contract. Some countries require the expert to observe certain minimum 'procedural standards'. As addressed below, this will vary, depending on the applicable law.

- > *Expert consultant.* In arbitrations, one or more parties may engage an expert to assist counsel in efficiently presenting the case.
- > *Expert as arbitrator.* An expert also can be appointed to serve as an arbitrator in an arbitration. In this situation, the expert is not a witness, but a decision maker, who ensures that the arbitration is conducted consistently with the Rules, decides disputed factual issues, and applies the law to the facts to resolve the parties' dispute. Experts who are acting as arbitrators should conduct themselves in the same manner as arbitrators who are not experts, and further discussion of arbitrator behavior is beyond the scope of this text.

## II. What are the differences between serving as an expert under institutional rules and being engaged directly by one party or all parties?

### A. What determines my rights and duties?

#### (i) Direct appointment by one party or all parties

The agreement under which you promise to provide your services defines your rights and duties. Typically, this will be an agreement between you and the party or parties who engage you to provide services.

Your agreement will be governed by the law to which you and the parties agree or, in the absence of an agreement regarding the applicable law, determined by the competent authority, which can be either an arbitral tribunal or a national court. The applicable law may be relevant to define your duties –for example, through such concepts as implied duties (obligations that you may have, even if they are not expressly stated in your engagement) and the consequences of any failure in the performance of these duties, such as late or defective performance, and excuses for such failures. Ultimately, the choice of law depends on the circumstances of your case, and is not addressed here. But in your agreement with the parties, you should take care to agree explicitly on all relevant rights and duties with the appropriate level of detail and on the applicable law.

In general, the terms to which the parties agree are binding and enforceable.

#### (ii) Appointment under institutional rules

If the parties have agreed to proceed under the Expert Rules or the Rules of Arbitration, you will be expected to provide your services in a manner consistent with these rules, and the rules are part of your engagement. For example, as provided in the agreed set of rules, the institution or the arbitral tribunal will make certain determinations (e.g. the scope of your assignment, the form of your expert report, when your report is due, your compensation). Thus, before you accept an appointment, you should ask whether the parties have agreed to a particular set of rules and read those rules carefully. You cannot unilaterally change the rules to which the parties have agreed, and if the rules or the timeline under which you are expected to provide your services are unacceptable, you should not accept the engagement unless all parties agree to suitable modifications.

### B. To which ethical standards am I subject?

#### (i) Professional standards

If you are a member of a professional society or subject to licensure requirements or other professional or legal standards, the rules that normally apply to your professional activities probably also apply to you when you serve as an expert. Thus, if your agreement with the parties would require services or behavior that conflict with the mandatory rules to which your profession is subject, you should consider declining or terminating your engagement. In case of doubt, you should consider obtaining advice from the professional body to which you belong, but be careful not to violate any obligation to maintain confidentiality.

Of course, you should also conduct yourself in a manner that is consistent with the trust that the parties placed in you when they retained you. You should act honestly and in a manner that will withstand peer review. If you are retained as 'neutral' expert, you shall also act impartially without any bias for a party or a position.

#### (ii) Standards under institutional rules

Institutional rules to which the parties agree may include ethical standards; e.g. with regard to the expert's independence and impartiality. When you accept your engagement, you agree to comply with these standards (Section II(A)(ii) above).

**a) Independence.** Article 2(3) of the Expert Rules I ('Proposal of experts and neutrals') requires that experts *who are being proposed by the ICC International Centre for ADR* ('Centre')<sup>7</sup> must disclose any circumstances that could compromise their independence in the eyes of the party or parties requesting the proposal. Under Articles 3(3) and 3(4) of the Expert Rules II ('Appointment of Experts and Neutrals'), *any expert appointed by the Centre* must provide a written declaration confirming impartiality and independence and disclosing relevant facts. The expert must be and remain impartial and independent of the parties throughout the engagement.

Under Article 3(3) of the Expert Rules III ('Administration of expert proceedings'), the expert must provide identical declarations, *in proceedings administered by the Centre*. According to Articles 4(1) and 4(2) of the Expert Rules III, unless the parties agree otherwise, the expert must remain independent and impartial throughout the proceedings, and is under a duty to disclose in writing to the Centre the subsequent occurrence of any facts or circumstances that could put this into doubt.

Normally, a common sense approach will allow you easily to decide whether to decline an engagement for lack of independence.

'Independent' means that you may not reasonably be perceived as having any financial or personal interest whatsoever in the outcome of your assignment. Whether you are independent depends on an evaluation of your relationships and business and financial interests. Thus, only general guidance can be provided in this regard. You are responsible for determining whether these relationships and interests can be seen as compromising your independence. Although directed at arbitrators and not binding upon ICC, the IBA Guidelines on Conflicts of Interest in International Arbitration<sup>8</sup> might help you to evaluate difficult questions.

When acting under the Expert Rules, you should assume that the standards applicable to your impartiality and independence are the same as those applied to arbitrators under the ICC Rules of Arbitration. For example, factors that could compromise your independence or require disclosure include:

- > A close personal relationship with one of the parties (e.g. being married to the CEO of a party or a company belonging to the same organization or group as a party, or current or former status as an employee or consultant of that party). Depending on their character and duration, even certain past relationships of this kind may continue to be relevant.
- > A material financial interest (e.g. owning a stake in one of the parties, or past or present contractual relationships with a party or a member of the group of companies to which a party belongs).
- > Prior and non-trivial services to a party or prior services related to the disputed subject matter.

A similarly close relationship with a third party that has an interest in the outcome of the dispute may also need to be taken into account.

**b) Disclosure is essential in case of doubt.**

Nonetheless, a vast 'grey area' exists, where reasonable people might disagree as to whether the expert has a conflict that would compromise the expert's independence or impartiality. Thus, if you have questions about whether a particular interest or relationship creates a conflict, you should disclose it (Section II(B)(ii)(a) ('Independence') above). Once these relationships and interests are fully disclosed, the issue is resolved if the concerned parties do not object or explicitly waive the requirement.

Moreover, by providing full disclosure, you reinforce the perception of your honesty and credibility. By contrast, undisclosed relevant facts that come to light later on may substantially affect your credibility, reputation and the authoritative character of your work product, even if the parties would not have objected upon early disclosure. More important, failure to disclose may violate your duties to the parties under applicable law.

**c) Impartiality.** 'Impartiality' is synonymous with 'neutrality', and the essence of both terms is broadly the same. If the parties have entrusted you with the mission of being an impartial expert evaluator or adjudicator, you also are responsible for the process and should strive to meet the justified expectations of all parties regarding how a party standing in their shoes would expect to be treated. You should be impartial and disinterested in the outcome of the proceeding or the conclusions to be drawn from your work product (i.e. your 'deliverable'). You should proceed in a fair and just manner, and treat the parties equally. You also should proceed in a transparent manner. This means that you should spell out what you expect of the parties, and ensure that the parties are privy to any

7 See Expert Rules I, Preamble and Art. 2; Expert Rules II, Preamble and Art. 3; Expert Rules III, Preamble and Art. 3 (discussing the Centre and procedures for securing a proposal or appointment for experts from the Centre).

8 [https://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx).

flow of information, unless exceptional circumstances require otherwise (Sections III(C) and IV(D) below). Moreover, the expert who is perceived to be impartial and disinterested will tend to be more persuasive.

Thus, the question is whether you would be able to reserve judgment and reach a conclusion based on the same professional standards and criteria that your peer experts would apply to the same facts or whether external factors (e.g. a dislike for a party or its counsel) might cause you to reach a different conclusion than your peers would under the same circumstances.

Finally, you may not be impartial if you already have formed such a strong opinion regarding a certain matter that you are unlikely to be able to take an objective look at the situation based on the facts of the specific case. If, however, a substantial number or most of your peers would share your professional opinion, your previous opinion need not automatically mean that you are not impartial. If you have questions about how a previous opinion might impact your impartiality, you should consider disclosing the issue to the party or parties who are requesting your services.

The Expert Rules I and II are silent regarding the disclosure of issues that arise only after the expert's initial disclosures as the Centre's role ends with the proposal or the appointment of the expert. Nonetheless, in light of Article 4 of the Expert Rules III ('Continued Impartiality and Independence of the Expert; Replacement of the Expert'), an expert should also disclose any such issues without delay.

**d) Availability.** When accepting a proposal or appointment (Section II(B)(ii)(a) ('Independence') above), the expert must confirm his or her availability to perform and complete the assignment. Swift completion of the expert's assignment is usually essential for the parties. Thus, before accepting, the prospective expert must confirm that required expert activities can be started promptly after the proposal or appointment and that they will be carried through to their end within the expected period of time or a reasonable period of time based on the information that the Centre makes available. If this information is insufficient, the expert should request more information from the Centre. The expert should confirm his or her availability by reference to prior or expected commitments using his or her experience with regard to the scope and duration of comparable assignments. If the prospective expert concludes, in light of other commitments, that the time required to complete the assignment would exceed that of any comparable expert without such assignments to complete the

same assignment, the prospective expert should either decline the assignment or consult the Centre for further guidance.

### C. How do the different types of assignment affect my role?

#### (i) Considerations for expert witnesses in arbitration and expert evaluators or adjudicators in expertise proceedings

Unless the parties agree or the tribunal directs otherwise, any statement of fact that you make in writing or orally during an arbitration hearing or in the report that you issue in connection with an arbitration or expertise proceedings must be true to the best of your knowledge, and any opinion that you give must be correct to the best of your professional ability. You may assume certain facts or proceed on the basis of hypothetical facts if the parties or the arbitral tribunal instruct you to do so and you make this explicit. But unless the parties expressly agree, you may not tacitly assume or invent facts or omit relevant facts that are known to you. A witness who knowingly provides untrue evidence may be subject to civil and criminal liability under applicable law. Likewise, you should not provide opinions or evaluations that you or any equally qualified peer expert would know are not sustainable in the light of the recognized state of the art in your field.

#### (ii) Considerations for experts who are only proposed or appointed by the Centre to one party or to parties with convergent interests.<sup>9</sup>

If the work is assigned to you by only one party or by parties who have identical interests and you are not appointed under the Expert Rules, the above principles may not fully apply.

**a) If you are retained to provide a work product for one or more parties for their internal use only,** your duties are governed by your agreement with the parties and by the professional standards to which you are subject (Section II(B)(i) above). If you are a proposed expert under the Expert Rules I, Article 2(3) requires you to provide an initial statement of availability, impartiality, independence and disclosures.

**b) If you are retained to provide services related to a nascent dispute or as expert evidence in litigation or arbitration,** you should distinguish between the following situations: either you act exclusively as expert consultant assisting counsel or you are retained as

<sup>9</sup> Expert Rules I ('Proposal of experts and neutrals') and Expert Rules II ('Appointment of Experts and Neutrals').

expert witness. In some instances, you may first be retained as a consultant and later designated as an expert witness.

- > If you will be acting exclusively as an expert consultant, the principles set forth in Section II(C)(ii)(a) apply. Laws or procedural rules governing the behavior of advisors may also apply.
- > If you will be acting as expert witness, the standards and rules set forth in Section IV apply. Additionally, you will have to provide the party or parties requesting the proposal with an initial statement of independence and disclosures (Section II(B)(ii) above).

**c) If possible, you should try to clarify your role before you accept the engagement or as soon as possible thereafter.** If there is any possibility that you will be asked to serve as an expert witness, you may want to behave differently from how you would if you are only to be a consultant. The counsel with whom you are working should be able to guide you regarding specific legal and ethical requirements. If the party provides guidance or instructions that you believe to be illegal or inconsistent with your professional duties, consider declining the engagement or terminating it early.

#### D. How does my role affect my initial contacts with a party?

##### (i) Questions to ask

Your services may be required for different roles, each of which require specific behavior and may be subject to different legal and ethical standards. Thus, before you begin discussions about the substance of the assignment, you should obtain basic information, including:

- > Who is contacting you and in what capacity?
- > Who are the other parties/stakeholders?
- > For what purpose are your expert services required?
- > What is the expertise that the parties require?
- > Are there any agreements or applicable rules that define terms and conditions of an eventual assignment?
- > What is the time frame for completing the assignment?
- > How will you be paid?

If you cover these points, you should be able to determine whether you have the needed expertise, have a conflict of interest, need to disclose certain facts, are available, and are willing to accept the assignment.

##### (ii) What to avoid?

- > Avoid acting in a way that would be inappropriate once you accept the assignment.
- > Avoid providing opinions, judgments or partisan statements that might be relevant in the expertise proceedings or arbitration.
- > Avoid accepting the assignment before you have determined that there is no conflict of interest and no other impediment to your acting as expert.

If one party contacts you regarding a proposed impartial engagement as expert (e.g. expert evaluator, adjudicator or arbitrator), you should avoid any further contacts with fewer than all parties beyond the initial exchange of basic information. For example, it is generally inappropriate to accept and study documents or other information, especially if the other party is unaware. If a meeting or preliminary study of documents and other information is appropriate, you should get all parties involved and afford them the opportunity to participate in any preliminary meetings or conference calls.

### III. Experts operating under the ICC Expert Rules

#### A. What can be my role under the ICC Expert Rules?

##### (i) Proposed or appointed expert, without administration<sup>10</sup>

Upon request by one or more parties, the Centre will propose or appoint an expert. An arbitral tribunal may request a proposal.

If an expert is *proposed* by the Centre, the party or parties who have requested the proposal will have to decide whether to appoint the expert and negotiate the terms of his engagement. The Expert Rules normally will not apply to the expert's engagement. Rather, the scope and nature of the expert's activities are governed by the terms and conditions of the agreement made between the expert and the party or parties (see Section II(A) above).

The Centre *appoints* the expert on the parties' behalf and based on the parties' agreement. In most instances, however, the parties' agreement will need to be supplemented by an agreement with the expert to define the scope and nature of the expert's activities and remuneration (see Section II(A) above). After

<sup>10</sup> Expert Rules I ('Proposal of experts and neutrals') and Expert Rules II ('Appointment of Experts and Neutrals').

the expert is appointed, the Centre has no further involvement, and the Expert Rules will apply only to the extent the parties have agreed. Thus, unless specifically agreed, the Expert Rules will not apply to the expert's engagement. Rather, the scope and nature of the expert's activities are governed by the terms and conditions of the agreement made between the expert and the party or parties (see Sections II(A) and II(B)(ii) above).

### (ii) Administered expertise proceedings<sup>11</sup>

In administered expertise proceedings, the Expert Rules govern the expert's activities, including issues related to remuneration. The Centre also retains certain responsibility to ensure that the proceedings comply with the Rules and has certain powers to assure quality. This avoids the need to negotiate many details of the expert's engagement.

When the parties have agreed to administered expert proceedings, the parties can select an expert directly or agree upon an expert proposed by the Centre, or, if they cannot agree, the Centre will appoint the expert on the parties' behalf and based on their agreement. The Expert Rules continue to govern the expert's engagement as described above under Section II(A)(ii).

### (iii) Nature of the expert's work product

Your role also depends on the type of work product that is requested from you.

**a) Non-binding expert findings.** If you are retained by one party as consultant or expert witness or appointed as an expert by an arbitral tribunal, your expert findings will be authoritative but will not directly or conclusively establish rights and duties of any concerned party.

**b) Binding expert findings.** If the parties agree, your findings will conclusively affect or create the parties' rights and duties. This does not mean that you act as an arbitrator who renders an arbitral award. Rather, it means that the parties have agreed that you will determine certain of their rights and duties in a given situation for a specific purpose and that your determination becomes part of the parties' agreement. For example, the parties may agree that you will establish certain facts or technical issues concerning which the parties may not further argue (Expert Rules III, Article 6(2)). Because your authority flows from the parties' agreement, you should at all times bear in mind what the parties have agreed and act accordingly. If the parties' agreement appears to be unclear or incomplete, you should seek clarification from the parties.

The law applicable to your agreement with the parties, as well as the professional standards to which you are subject, may contain rules that affect your power to make binding findings or impose certain formal or other requirements related to your service as an expert. If you have questions or doubts, you should also seek clarification from the parties. Although it is unrealistic to try to address all possible scenarios, if you have a question, it is better to seek clarification early in the engagement, before a problem arises concerning how you should proceed.

## B. What factors should I consider before accepting an appointment?

Before accepting an appointment, you should strive to obtain all of the information that you need to make an informed decision concerning whether to accept. If you accept an engagement and then it turns out that you lack the required expertise or cannot otherwise perform (e.g. because of a conflict of interest), you will hurt the parties and your professional reputation, and potentially could be dragged into legal proceedings.

If the parties do not provide all of the information you need to evaluate a potential engagement, do not be afraid to ask.

### (i) Do I have the experience to serve?

First, you should obtain the information that you need to understand the nature and scope of the issues for which your subject matter expertise is requested, so that you can decide whether your expertise is the same as the type of expertise required. In making this determination, you should keep in mind that your first contact may not be with a person skilled in your field of expertise, and thus the description of the problem may be inaccurate. Further, if your first contact is with only one of several parties with whom you are expected to work, the party's description of the problem may not fully match the description that the other side would provide.

Second, you should also ask questions regarding the purpose of the expertise proceedings. This will allow you to evaluate whether you have the necessary 'procedural' skills. For example, if the parties seek a binding expert opinion or adjudication, you will need dispute resolution skills that enable you successfully to manage proceedings where the parties are in a contentious dispute. In such cases, your communication and persuasion skills are important, given that you normally lack the power to compel the parties to comply with your requests.

<sup>11</sup> Expert Rules III ('Administration of expert proceedings').

Finally, you should ask whether there are language requirements that could diminish your ability to carry out the assignment efficiently. For example, if all relevant project documents are in Chinese, or if the parties speak only French, and you are fluent in English only, it may be difficult or impossible for you to serve as an expert.

Once you have this information, you should personally and honestly assess whether you are the expert the parties are looking for. If you conclude that substantial effort and time would be needed to familiarize yourself with the issues at hand, if you detect a serious communication issue, or if you believe that you will have to subcontract another expert, you should either decline the engagement or raise the issue with the party or parties before accepting.

#### **(ii) Am I impartial and independent of the parties?**

Independence and impartiality can be tricky issues, especially where you are one of very few experts in your field. Independence and impartiality may have different meanings depending on the applicable law and the type of proceedings (Sections II(A) and II(B) above).

#### **(iii) What obligation do I have to disclose potential conflicts of interest to the parties?**

Potential conflicts should be disclosed (Section II(B) above).

#### **(iv) Do I have the time to serve?<sup>12</sup>**

Always ask about the parties' time schedule and when the parties need to receive your work product. In nearly all cases, time is of the essence to the parties. The parties may have decided to use your services as an alternative to arbitral or court proceedings because they want and need a swift result. Sometimes the parties' agreement may fix a rigid time schedule within which your work product is required.

You should also ask for the information needed to determine what needs to be done (site visits, experiments, etc.), so that you can realistically estimate the time you will need to accomplish your mission, taking into account the inevitable 'surprises' along the way.

If your forecast and the parties' time schedule do not match and it is unlikely that you or anybody else will be able to meet the parties' requirements, you should raise the issue with the parties, in case they may be willing to modify their agreement.

If your other professional or personal commitments make it impossible for you to adhere to the proposed time schedule, you should raise this issue with the parties before accepting and ask whether they are willing to retain your services with an adjusted time schedule. If they are not, you should decline the engagement.

#### **(v) How will I be compensated and how will my expenses be paid?**

**Non-administered expertise proceedings.** You are entitled to be paid for your services, but you will need to reach agreement with the parties regarding who will compensate you, in what amount, and how. Unless you want to risk being surprised later, you should not accept a mandate as expert without making satisfactory arrangements regarding payment.

Your fee can be based on your normal hourly or daily rates. Or you could agree to a lump sum fee. You should agree on how out-of-pocket expenses are going to be repaid, as well as other payment terms, such as due dates, invoicing procedures, currency of payment, etc. Your fees should not depend in any way on the outcome of the expertise proceedings, as this would seriously compromise your impartiality.

Because it may be particularly cumbersome to enforce claims for fees in an international environment, you should consider requiring a deposit or advance payment to cover the fees and expenses for the services that you will render, along with permission from the parties to pay your fees out of the deposit. You should also consider requiring the deposit to be 'refreshed' if and when it is exhausted.

**Administered expertise proceedings.** In ICC administered expert proceedings, these issues are governed by the Expert Rules III, Article 12 and their Appendix II 'Costs', Article 3. Under these rules, you will be paid for the time that you reasonably spend at a daily rate that the Centre fixes after consultation with you and the parties and taking into account the complexity and other relevant circumstances of the case. The Centre will also fix your reasonable expenses.

Your fees and expenses will be paid out of a deposit fixed at the beginning and adjusted as required. Thus, you should provide the Centre with reliable information concerning the time you anticipate to complete your mission, the complexity of the case, and your usual daily fee. You should also estimate your out-of-pocket expenses. Fees are usually paid at the end of the proceedings, although advances on fees may be granted upon request and the completion of concrete milestones in the proceedings.

<sup>12</sup> See also Section II(B)(ii)(d)('Availability') above.

You should address these financial issues with the Centre as soon as you have the basic information about the engagement. If your expectations about fees are unlikely to be met, you should consider declining the engagement. If unforeseen circumstances will cause you to perform more work than you originally anticipated, you should provide the Centre with the updated information as soon as possible.

### C. How may I communicate with the parties?

#### (i) Expertise under agreement with one party

If only one party has retained you to provide services, you and the party may communicate as either of you deems fit. If the party retaining your services plans to use your work product as expert evidence in court or arbitration proceedings, your communications with the party may be subject to certain legal rules and requirements that can vary depending on the circumstances. Thus, you should ask the party that retained you about any requirements concerning communication, especially anything that might limit the usefulness of your work product. Keep in mind that your communications with the party may be subject to full disclosure in the court or arbitration proceedings.

#### (ii) Expertise under agreement with all parties

If all parties retain your expert services to resolve a dispute between them, you should avoid communications with only one party unless all other parties are privy to those communications. The parties expect to be treated fairly and transparently. If they suspect that something might be taking place behind their backs, your credibility and thus the persuasiveness of your work product will be reduced. Moreover, if you engage in communications with a party, the other parties may have a basis to challenge your independence or impartiality.

Before working on the assignment, you should define in writing the communication protocol that you and the parties will follow. An open discussion with the parties about these issues is useful because it allows you to obtain a feeling for whether the parties' approach is cooperative or more adversarial.

**a) Written materials.** Try to get agreement that the parties will jointly provide you with all materials, objects and other information that you will need in electronic or tangible format. Alternatively, you should require that each party simultaneously provide the other parties with a true and complete copy of anything that a party sends to you. You should keep a list itemizing what you have received and provide the parties with a copy of the list before you prepare and submit your work product.

The parties have a responsibility to comply with the communication procedures that you and they agree, but if you suspect that the other side has not received certain information, you should raise your concern with the parties.

**b) Meetings.** Unless all parties agree, you should not meet with only one party unless all other parties are present or have a reasonable opportunity to be present. The same applies to site visits. Thus, any meeting or site visit should be scheduled with the parties and announced far enough in advance so that the date can be adjusted if a party or parties are unavailable.

It may be useful to provide the parties with a written summary of any meeting or site visit within a reasonably short period thereafter, including the date, place, participants and results of the meeting or site visit. If the parties have agreed on facts that were previously disputed, it is important to record this agreement in writing.

**c) Telephone or video communications.** In general, you should participate in a telephone or video conference with a party only if the other parties are privy. Experience shows, however, that a party may call you or you may need to call a party about a non-substantive issue (e.g. payment). In this instance, try to avoid discussing issues of substance. Generally, you should create a note that summarizes the conversation, and make it available to all parties.

### D. How do I define my mission as an expert?

The quality of the questions often determines the quality of the answers. Your active participation in defining your mission may increase the efficiency of the proceedings, as well as the quality of your work product. Although the nature of your mission is ultimately up to the parties, your expertise may help you to guide the parties to define your mission in a way that will help to promote efficiency, reduce costs and result in a work product that is more likely to assist the parties to resolve their dispute. Thus, you should avoid skipping the sometimes cumbersome exercise of working with the parties until you are satisfied that the mission enables you to perform your duties in a manner consistent with the state of the art in your field of expertise.

If shortcomings in the agreed mission become apparent only later, carefully raise the issue with the parties and seek agreement on the desirable modifications as early as possible.

### (i) Expertise under agreement with one party

The party will define your mission. If you become aware of any deficiencies or possible improvements, you may raise the point with the party.

### (ii) Expertise under agreement with all parties

Here, the challenge is to work with the parties so that they are able to agree on your mission. Parties in a dispute may tend to phrase the questions posed to you differently and in a way that each believes is likely to lead to the desired answer. Thus, even if the parties broadly agree on your mission, they still may disagree on many specific points. Accordingly, the wording of your mission should be discussed and, to the extent possible, agreed during a meeting or a telephone conference.

In administered proceedings under the Expert Rules III, Article 6(2) requires you to define your mission in writing after consulting all parties. You also may modify your mission after consulting all parties. Although you cannot deviate completely from what the parties have asked you to do when they commenced the expertise proceedings, you have the flexibility to define your mission even where the parties disagree over how you should proceed. Further, Article 7 of the Expert Rules III requires that a Procedural Timetable for the conduct and completion of the assignment be established.

If you are unable to reach agreement with the parties, you can use one of the following approaches to resolve such a disagreement:

- > Define your mission broadly, with words to which all parties are willing to agree.
- > Define your mission by including each party's questions where they disagree and a question requiring you to decide, if necessary, which question is appropriate.
- > Define your mission by rephrasing the questions over which the parties disagree.

You should use your judgment to decide which of these approaches is preferable in the specific circumstances. You also should make a reasonable effort to keep the mission from being flawed with imprecise or irrelevant questions.

## E. What sort of work product is expected from me?

As a general rule, your work product should satisfy any formal requirements established in your mission and cover all points defined therein. Unless the parties agree, you should not exceed your defined mission or deviate from it.

Normally you will be expected to present a report, setting out your analysis and findings, as described in further detail below. Sometimes, you may be required to report on findings of fact, such as the observations you made during a test run, at an inspection, or in reviewing accounting records. Occasionally, other services may be required of an expert, such as ongoing advice on certain issues or the drafting of texts.

If a party wants your report to deal with an issue where the parties have diverging interests, you should make sure that your report addresses only what the parties agreed, and avoid exceeding your mission based upon a unilateral and contested request. You should resolve any dispute over whether to include this type of divergent request early in your engagement, rather than surprise one party with your work product by addressing an issue that fewer than all parties have asked you to consider.

### (i) Non-administered expertise proceedings

In non-administered expertise proceedings under the Expert Rules I and II, the party or parties retaining your services will define the form of your work product. This should be clearly stated in your written agreement with the parties. As the expert, you may need to elicit from the party or parties what they have in mind and then take the lead by proposing the form of your work product and level of detail required.

### (ii) Administered expertise proceedings

In administered expert proceedings, Article 8(1) of the Expert Rules III requires a written report for the Centre's scrutiny (Expert Rules III, Article 9) in draft form. The Centre has the right to require formal adjustments to your report. This helps to ensure good quality and may be helpful to you because you can draw on the Centre's experience.

The Expert Rules do not include specific requirements regarding the content or quality of the report, as this depends on the nature of the expertise and how the report will be used. Thus, it may be useful to discuss with the parties specific requirements as to form and substance and to record those stated in your expert

mission (Section III(D) above). The parties can provide you with any applicable legal requirements regarding form.

### (iii) General guidelines for a persuasive work product

**a) Methodology and standards.** You should use the methodology and standards that are generally accepted in your field of expertise. If you deviate from these for justified reasons, you should clearly state why and how you did so. The basic rule is that your report should stand the test of peer review, and you should assume that your report will be subjected to some sort of peer review because it possibly will be.

**b) Structure.** In most instances, the report follows a structure similar to the following:

- > A summary identifying the party or parties and yourself.
- > A statement of your mission.
- > A summary of the methodology and the standards you have used and, if applicable, the professional or ethical rules by which you abide.
- > A summary of the information on which you rely, including comprehensive references to literature and other sources that you used. Sometimes, it is appropriate to include this in an attachment.
- > Your factual findings and your reasoned opinion and conclusion regarding the issues that were submitted to you. In many cases, it will be appropriate to set forth separately the parties' respective positions, your factual findings, and the conclusions on an issue-by-issue basis. But it is also possible to summarize the parties' respective positions and factual findings in one section and the reasoned conclusions in another section. If known to you, you may also specifically refer to reports of other experts on the relevant issues in this context. Regardless of which structure you choose, your report should be easily and fully understandable to the non-experts who are expected to read it. In other words, if only experts are able to understand your report, the report's value to the parties will be reduced.

**c) If only one party assigned the work to you, the same principles apply.** If the party requires your report for a nascent dispute or as expert evidence in litigation or arbitration (rather than only for the party's internal use), you should proceed as an independent impartial expert and provide your work product accordingly. You may seek instructions from the party

regarding any specific legal requirements. If the party provides guidance or instructions that you believe are problematic, illegal or inconsistent with your professional duties, you should consider terminating your engagement.

## IV. Expert witnesses operating under the ICC Rules of Arbitration

### A. What is my role in arbitration proceedings?

As described above in the introduction, you may be asked to serve in one of several distinct roles in an arbitration: (1) party-appointed expert witness, (2) tribunal-appointed expert witness, or (3) non-testifying expert consultant.

Experts are sometimes initially retained as consultants<sup>13</sup> and later designated as testifying expert witnesses. Considerations for party-appointed and tribunal-appointed expert witnesses are discussed below.

### B. What factors should I consider before accepting an appointment as an expert witness in arbitration?

Under the Rules of Arbitration, an expert witness can be retained by one or more parties or by the arbitral tribunal. Under Article 25(2) of the Rules of Arbitration, party-appointed experts are engaged to offer testimony on behalf of one or more parties. 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.

Regardless of who retains you, before accepting an engagement as an expert in an arbitration, you should strive to obtain all of the information that you need to make an informed decision concerning whether to accept, including the following:

#### (i) Do I have the experience to serve?

As described in Section III(B)(i) above, you should evaluate whether you have the substantive expertise, procedural skills and language ability necessary to fulfill your engagement.

<sup>13</sup> The role of expert consultants is discussed in Section II(C)(ii)(b) above.

**(ii) Am I impartial and independent of the parties?<sup>14</sup>**

The Rules of Arbitration do not expressly require expert witnesses to be independent or impartial. Nonetheless, you may be subject to independence and impartiality requirements under applicable law or professional standards to which you are subject (Section II(B)(i) above).

In addition, if your appointment as an expert witness comes through a proposal from the Centre, you must satisfy the requirements for independence and impartiality under the Expert Rules (Section II(B)(ii) above).

In this context, if the arbitral tribunal requested that the Centre propose an expert, Article 2(3) of the Expert Rules I requires you to be independent of the parties also and not only the arbitral tribunal. If the Centre appoints you, Article 3(2) of the Expert Rules II will apply (Section II(A)(ii) above).

As a practical matter, if you are a tribunal-appointed expert, your terms of engagement, the rules to which the parties have agreed,<sup>15</sup> or the applicable arbitration law will likely require you to be and remain impartial and independent of the parties.

If you are a party-appointed expert, the party or parties who engage you will likely require you to disclose potential conflicts of interest or other information related to your independence or impartiality. If all parties retain you to serve as a party-appointed expert, the parties will likely require you to be and remain independent of and impartial towards all parties.

If fewer than all parties retain you, these parties will likely want to make sure, at a minimum, that you do not have a conflict of interest with any opposing party. Moreover, regardless of legal requirements and professional standards, if your relationships or interests would cause the arbitral tribunal to view you as biased towards a particular party or outcome, your testimony is unlikely to be persuasive to the arbitral tribunal. Thus, even where fewer than all parties retain you, you may be required to be and remain independent of all parties and to demonstrate a lack of predetermined bias towards a particular outcome.

If you have any questions or concerns about whether you are sufficiently independent or impartial, you should raise these concerns with the persons who propose to engage you before you accept the engagement. If you accepted the engagement before your concern arose, you should work to address the concern as quickly as possible with the persons who engaged you. If you have any doubt about whether you should disclose a particular relationship or interest, you should disclose it.

**(iii) Do I have the time to serve?**

ICC Arbitrations have a procedural timetable that will vary depending on the circumstances of each case. Therefore, it is essential that you can complete your assignment within the period of time allotted by the procedural timetable. Thus, before accepting an engagement, you need to ask sufficient questions to the party that is engaging you to understand (a) when you will be expected to complete your work product, (b) how long it likely will take you to complete your work product, and (c) the dates of any hearings at which you would be expected to testify. If you cannot meet any of these deadlines, you should not accept the engagement.

**(iv) How will I be compensated and how will my expenses be paid?**

Whether you are a party-appointed or tribunal-appointed expert, your fees and expenses are the subject of negotiation and agreement between you and the persons who engage you. Your fee can be based on your normal hourly or daily rates, or you could agree to a lump-sum fee. You should agree on how out-of-pocket expenses are going to be repaid, as well as other payment terms, such as due dates, invoicing procedures, currency of payment, etc. You should reduce your agreement regarding payment of fees and expenses to writing before your engagement begins. You should also assume that your agreement regarding payment of fees and expenses will be disclosed to the opposite side.

Regarding deposits or advances on fees and expenses, see Section III(B)(v) 'Non-administered expertise proceedings' above. If you are appointed by the arbitral tribunal, and the tribunal manages a deposit, most of the considerations in Section III(B)(v) 'Administered expertise proceedings' above will apply.

<sup>14</sup> The concepts of 'independence' and 'impartiality' are discussed above in Section III(B)(ii) 'Am I impartial and independent of the parties?'.

<sup>15</sup> E.g. Arts. 5.2.c) and 6.2 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (2020) detail various requirements concerning the expert's independence and impartiality ([https://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx).)

## C. What duties do I owe to the parties to the arbitration and to the arbitral tribunal?

### (i) Overview

Your duties as an expert in arbitration proceedings arise from several sources. First, your duties are determined by the terms of your engagement. Second, your role is governed by the applicable procedural rules and the applicable arbitration law. Third, the arbitral tribunal may issue instructions that pertain to you. Regardless of the differences in agreements, procedures and law that may exist from case to case, your role in the arbitration will always be to assist in establishing the truth. Moreover, an expert witness who is perceived to be independent and disinterested in a particular outcome will tend to be more persuasive.

- > If you are a *tribunal-appointed expert* and operate under terms of engagement that the tribunal has established, you will normally be considered as a 'fact finding aide' to the tribunal. This role should be distinguished from that of a 'witness of fact'.
- > If you are an *expert appointed by all parties*, you will operate under the terms of your engagement, which will usually require a neutral approach as described in Sections II(C)(i), III(C)(ii) and III(D)(iii) above. Unless the parties have agreed that you should act as a tribunal-appointed expert, the considerations in (c) below apply.
- > If you are a *party-appointed expert*, you may sometimes perceive tension between your relationship with the party that retained you and your role in the proceedings. Ultimately, you should remember that a party-appointed expert is an expert witness. Under applicable law, you must testify truthfully and cannot make up things that did not happen. Likewise, you must not try to create a false impression by omitting known, relevant information.

### (ii) Duties to all parties

You should testify truthfully in any report or witness statement that you provide, as well as at the hearing. At the hearing, you should answer questions from the opposing party courteously and without evasion. If you fail to testify truthfully, you may be subject to penalties under applicable law for providing false testimony

### (iii) Duties to the arbitral tribunal

The arbitral tribunal is responsible for determining how the arbitration will proceed, subject to the applicable rules and any agreements of the parties. Among other

things, this means that regardless of whether you are a party-appointed or tribunal-appointed expert, the tribunal will determine whether expert testimony will be allowed, the form of your work product, when your work product is due, whether you will be accepted as an expert, how long you will be permitted to testify, the limits of cross-examination, and so forth. You will need to comply with the requirements set by the tribunal.

In addition, if you are a tribunal-appointed expert, the tribunal is acting as your principal. You will need to comply with your terms of reference agreed between the tribunal and you (Section III(D) above). If you have suggestions, questions or concerns about how your terms of reference should be defined, you should raise them with the arbitral tribunal, which will determine the proper course of action, usually after consulting the parties.

You must testify truthfully in response to any questions from the arbitral tribunal.

### (iv) Duties to the party or parties who appointed me.

You should discharge the terms of your engagement, including the preparation of your work product, on time and in a manner consistent with the professional standards to which you are subject and applicable rules of law.<sup>16</sup> You should strive to create a work product that would withstand scrutiny from your peers in your field of expertise.

## D. How may I communicate with the parties and the arbitral tribunal?

You should distinguish between two issues: (a) whether and how you may communicate with the parties or the arbitral tribunal and (b) whether the substance of your communications with the parties or tribunal is appropriate under the circumstances.

### (i) Party-appointed expert

#### a) Communications with the parties who retained you.

If you are retained by one or more parties but fewer than all parties, you may communicate with the parties who retained you as you deem appropriate, unless the arbitral tribunal's order or applicable rules restrict those communications. You should be aware, however, that in some cases all parties or, in case of disagreement, upon a party's request, the arbitral tribunal may require you to disclose to the other parties any written communications between you and the parties who retained you or their counsel and that the other parties may be permitted to question you at the

<sup>16</sup> Regarding your terms of reference, see Section III(D) above.

hearing about any of those communications (Section III(C)(i) above). Whether and to what extent such disclosure can be required depends on the tribunal's directions or other rules applicable to the specific case. Given that these directions may not be known to you from the beginning, you should assume that your communications might not be privileged and that their disclosure might be required later.

If you are retained by all parties, you should be careful to ensure that you do not communicate with one party in the absence of the other parties (Section III(C)(ii) above).

**b) Communications with the opposing party.** In general, as a party-appointed expert, you should not communicate with the opposing party or its counsel unless counsel to the party that engaged you is present or if specifically instructed to do so by the party that appointed you or by the arbitral tribunal.

**c) Communications with other expert witnesses.** In general, as a party-appointed expert, you should not communicate with other expert witnesses unless counsel to the parties are present or if specifically instructed to do so by agreement with the parties or the arbitral tribunal.

**d) Communications with the arbitral tribunal.** In general, as a party-appointed expert, you should not need to communicate with the arbitral tribunal, except when testifying at the hearing. If you have a question regarding a procedural matter, you should raise this question through the counsel to the party that engaged you.

**e) Substance of the communications.** As a party-appointed expert, the substance of your communications with that party is usually not governed by specific rules. Nonetheless, your communications should be consistent with the professional standards to which you are subject, applicable rules of law, and your role in helping to find the truth in the arbitration. Put another way, no party or its counsel should ask you to do something that is illegal, unethical or dishonest. If this sort of conflict arises, you should raise the issue with the party that appointed you, and if you are unable to resolve the issue, you should decline or terminate your engagement.

#### **(ii) Tribunal-appointed expert**

**a) Communications with the tribunal.** If you are retained by the arbitral tribunal, the tribunal should define in your terms of engagement or otherwise any communication protocols that the tribunal would like you to follow. Thus, for example, the tribunal ordinarily should provide directions to you regarding (i) whether

you should communicate only with all members of the tribunal simultaneously (e.g. in writing or through a conference call); and (ii) whether and when the parties' counsel should be present when you communicate with the tribunal and whether and when counsel should receive copies of your written communications to the tribunal. If you have any questions or concerns about what the tribunal requires, you should seek clarification from the tribunal.

**b) Communications with the parties.** The arbitral tribunal will control your communications with the parties and provide you with guidance regarding how and to what extent you may communicate with the parties or their counsel outside the tribunal's presence. In general, where the tribunal directs you to interview a party, to visit a party's facility, or otherwise to communicate with a party, you should make sure that the other parties or their counsel have the opportunity to attend and observe. Unless for some reason the tribunal directs otherwise, written communications to one party should be copied to all other parties. Again, if you have any questions or concerns, you should ask the tribunal to clarify.

**c) Substance of the communications.** As a tribunal-appointed expert, the substance of your communications with any party is governed by the requirements of independence and impartiality. Ideally, all parties and the arbitral tribunal should be privy to any such communication. Communications with only one party should take place only when absolutely necessary, and should be limited to minor logistical or similar issues (e.g. instructions on how to get to the plant or other site), as opposed to contentious or substantive issues. The arbitral tribunal may issue directions or guidelines in this regard (Section III(C)(ii) above).

### **E. What powers do I have to obtain information (including access to a site) from the parties and the arbitral tribunal?**

#### **(i) Party-appointed expert**

If you are a party-appointed expert, you may ask the parties that engaged you to provide the documents or other things (including access to a site) within those parties' possession, custody or control that you need to complete your work product. If the required documents or things are within the opposing party's possession, custody or control, you should ask counsel with whom you are working to request the needed documents or things on your behalf. If the opposing party is unwilling to cooperate, counsel can ask the arbitral tribunal to direct the opposing party to provide you with the required information and documents.

Nothing guarantees, however, that the arbitral tribunal will issue the requested directions. Thus, you may need to complete your work product without the opposite side's full cooperation and without obtaining all information that you might want from the opposite side.

#### (ii) Tribunal-appointed expert

You should tell the arbitral tribunal what sort of information and documents you need. If the information and documents are within a party's possession, custody or control, the arbitral tribunal can direct the party to provide you with the required information and documents.

#### F. What sort of report or other work product will I be expected to produce?

Party-appointed experts and tribunal-appointed experts almost will always be expected to prepare some sort of written work product, which usually will take one of two forms:

- > a narrative report of your analysis and conclusions, or
- > a witness statement setting out your analysis and conclusions in the form of an affidavit or declaration. The persons who engaged you can provide guidance regarding the type of work product, its format, and the level of detail required.

Tribunal-appointed experts will operate according to a procedural order or 'terms of reference' that generally require the submission of a written report (Section III(E) (iii) above).

Your report or other work product should be prepared using the same methods that experts in your field of expertise would use in the same or similar circumstances. If you fail to apply recognized methodologies or if peers in your field of expertise would be unable to repeat your analysis or are likely to disagree, your work product may be subject to criticism that will significantly reduce or even eliminate its usefulness to the parties and the arbitral tribunal.

#### G. What can I expect after submitting my work product but before a hearing?

Regardless of whether you are a party-appointed expert or a tribunal-appointed expert, your work product will be communicated to all parties, who will normally be afforded an opportunity to comment on or rebut your report before the hearing. If you are a party-appointed expert, the party that appointed you may instruct you to review and analyze any reports from the opposite side's experts and to supplement your own work product, as appropriate.

If the opposing parties have each appointed an expert witness, the various experts often disagree on crucial issues. Where, for example, the experts differ in the structure of their work product, their basic underlying data or their methodology, the experts' disagreement may create a substantial hurdle for the arbitral tribunal to overcome, given that the arbitrators usually do not have the same technical expertise as the experts.

To avoid the difficulty that 'dueling experts' sometimes create, some arbitral tribunals may choose to appoint their own expert in place of, or in addition to, party-appointed experts.

Another approach is to require all experts to meet in private to attempt to narrow the areas of disagreement. The tribunal may require the experts to jointly prepare a statement concerning the points on which they agree and disagree and a joint explanation of the points of disagreement. Where the differences cannot be bridged, the arbitral tribunal may require the experts to explain in writing to the tribunal and the parties the reasons for the differences and whether the experts' differing approaches can both withstand peer review.

In these circumstances, the experts should remember their independence and duties to all parties and the tribunal (Sections II(B) and IV(C) above) and cooperate accordingly.

If you were appointed by the arbitral tribunal and there are no party-appointed experts, the tribunal may instruct you to supplement or clarify your report in light of the parties' comments or questions.

## H. What can I expect at the hearing?

The Rules of Arbitration give the arbitral tribunal broad discretion regarding how to conduct the hearing, but the tribunal will work to provide each party with a full and fair opportunity to present its case. 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.

Historically, hearings have usually been held in a large conference room at an ‘impartial venue’ where seating arrangements tend to mimic (to a greater or lesser extent) those in a court of law. More recently, especially in reaction to the COVID-19 crisis in 2020, arbitral tribunals have ordered hearings to take place ‘virtually’ by videoconference. Regardless of whether the hearing takes place in conference room or by videoconference, if you will need technical equipment to present your expert opinion or to answer questions, you should make sure that the required arrangements are made and document your request for the equipment.

Likewise, regardless of how the hearing is conducted, the arbitral tribunal likely will issue directions regarding the physical setting from which you will testify. For example, if the hearing is in a conference room, you may be asked to testify from the conference table or from a separate ‘witness chair’. If the hearing is conducted by videoconference, you may be asked, for example, to sit in a certain location and not to use a virtual background. Before you start testifying, the arbitral tribunal will likely ask you to affirm that your testimony is true and correct. In appropriate circumstances, you may also be required to testify under oath.

Then, some combination of the parties’ counsel and the tribunal will ask you questions about your background as an expert, your assignment in this case, what you did, your analysis and your conclusions. You may also be asked, for example, about the details of your report, articles and books that you have written, documents produced as evidence in the case, and other matters relevant to the disputed issues in the case. The arbitral tribunal will instruct counsel to stop if the tribunal finds that a particular question or line of questioning is irrelevant or otherwise improper. If you find a question to be improper, you may say so, and the arbitral tribunal will ultimately decide whether you should answer the question.

The order of questioning is up to the arbitral tribunal. If you are party-appointed expert, for example, the arbitral tribunal may direct that counsel for the party that retained you will go first, followed by the opposing party’s counsel, and then the tribunal. Alternatively, the arbitral tribunal may permit the opposing party’s counsel to go first, followed by the counsel for the party that retained you, and then the tribunal.

If you are a tribunal-appointed expert, the arbitral tribunal will permit each party’s counsel to question you, after which the tribunal may also have questions. Alternatively, the tribunal may switch this order.

Regardless of your role and who asks the questions, you must answer all questions truthfully.

Some arbitral tribunals may direct or authorize you to put questions to other experts or witnesses in relation to the subject matter of your assignment. Actual practice in this regard varies depending on the arbitrators and the dispute.

Finally, if there are several party-appointed experts, the tribunal may direct that a so-called ‘witness conference’ be conducted in which you will be heard together with the other experts and knowledgeable fact witnesses, if any. During a witness conference, several experts or witnesses will be present in the hearing room and the arbitral tribunal will direct them to address certain issues which it deems relevant. You may be confronted with what the other experts state or directed to engage in a discussion with them. This method is increasingly used to resolve differences between conflicting expert opinions.