

Guide to ICC ADR



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Of the various languages in which the ICC ADR Rules and the Guide to ICC ADR may be published, the English and French versions are the only official texts.

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GUIDE TO ICC ADR

PART 1 INTRODUCTION

The International Chamber of Commerce has issued the ICC ADR Rules (the 'Rules') for the use of parties who wish to settle their disputes or differences amicably with the assistance of a third party, the Neutral, within an institutional framework. It is because of the amicable nature of ICC ADR that ICC has chosen to refer to 'ADR' as 'amicable dispute resolution' rather than 'alternative dispute resolution', which has been more commonly used in the past. 'ADR', as used by ICC, therefore does not include arbitration but only proceedings which do not result in a decision or award of the Neutral which can be enforced at law.

The Rules replace the ICC Rules of Optional Conciliation in force as from 1 January 1988. Thus, upon receipt by ICC of any request for conciliation based upon the old conciliation rules, ICC will ask the parties to reformulate their Request in accordance with the new Rules.

Characteristics of ICC ADR

The essential characteristics of ICC ADR are the following:

- 1) ICC ADR proceedings are flexible and party-controlled to the greatest extent possible.
- 2) ADR proceedings under the Rules are intended to be rapid and therefore relatively inexpensive. They permit the parties to seek an amicable solution to their disputes using a minimum of time and resources.
- 3) ICC ADR proceedings allow the parties themselves to choose whichever settlement technique is best suited to help them resolve their particular dispute with the assistance of an experienced Neutral. In the absence of an agreement of the parties upon a settlement technique, mediation will be used. The proceedings can lead to a settlement agreement between the parties which ends

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their dispute and is binding upon them in accordance with the law that applies to that agreement. The outcome of the ICC ADR proceedings can also be, for example, a non-binding opinion or evaluation of the Neutral, if neutral evaluation is the chosen settlement technique.

4) ICC ADR proceedings are confidential. The Rules put in place maximum safeguards to that effect.

ICC ADR thus differs from arbitration and judicial proceedings in that ICC ADR does not lead to a decision or award which can be enforced at law. In reality, however, ICC ADR and arbitration are complementary. If the parties do not succeed in resolving their dispute through ICC ADR, they can refer it to arbitration. Moreover, ICC ADR proceedings can occur during the course of an arbitration.

In addition, the parties are free to agree in writing that they will comply with a recommendation or decision of the Neutral, even though it is itself unenforceable. In that case their agreement is binding upon them in accordance with the law applicable to that agreement.

Finally, it should be noted that the Rules also apply to multiparty disputes.

Overview of the Rules

ICC ADR proceedings, as that term is used in the Rules, refer to the entire ICC ADR process from the filing of the Request for ADR until the ADR's termination. Before ICC ADR proceedings can take place, the parties must agree to submit their dispute to the Rules. Such agreement can occur:

- in a prior agreement of the parties to submit their disputes to the Rules, either in their underlying contract or in a later agreement; or
- through a Request for ADR submitted by one party to ICC and accepted by the other party.

In all cases, a Request for ADR must be submitted to ICC.

The Neutral is selected, either by designation by all of the parties, or by appointment by ICC. In the latter case,

the parties may agree upon any desired qualifications or attributes of the Neutral to be appointed, and ICC will make all reasonable efforts to appoint a Neutral having those characteristics. ICC can also take into consideration the suggestions of any party concerning the qualifications or attributes of the Neutral to be appointed.

The ADR procedure, as that term is used in the Rules, is a part of the proceedings and consists of the operational phase of the ICC ADR during which the Neutral provides his or her assistance. It begins with a discussion among the Neutral and the parties in order to determine the ADR settlement technique to be used and the specific procedure to be followed. The Rules enable the parties to choose the ADR settlement technique which they believe to be the most appropriate for their dispute. In the absence of such a choice, mediation, the most common ADR technique, will be used (see the discussion of Article 5 below).

The Rules provide for the different ways in which the ICC ADR proceedings can terminate (see the discussion of Article 6 below). In particular, any party can terminate the ICC ADR proceedings at any time after the discussion with the Neutral provided for in Article 5(1).

The cost of the ICC ADR is composed of three elements: ICC administrative expenses, which have an established ceiling; the fees of the Neutral, which are fixed on the basis of an hourly rate set by ICC in consultation with the Neutral and the parties; and the reasonable expenses of the Neutral, which are fixed by ICC.

Finally the Rules contain provisions establishing the confidentiality of the ICC ADR proceedings (see the discussion of Article 7 below).

This Guide is intended to be a brief commentary on the Rules, in simple language, for the benefit of users of ICC ADR. An article-by-article analysis of the Rules is provided below as well as a brief explanation of the four alternative clauses suggested by ICC for inclusion by parties in their contracts.

PART 2 ANALYSIS OF THE ICC ADR RULES

Preamble

The preamble concisely summarizes certain aspects of the Rules discussed above. It provides that the Rules are intended for parties seeking an amicable settlement of their 'disputes and differences'. This means that the Rules can be used not only for the settlement of disputes which could be litigated in arbitration or in national courts, but also for simple disagreements concerning, for example, the interpretation of a contractual provision. It should be noted that, throughout the body of the Rules, the term 'disputes' should be understood as including 'differences' as well.

Finally, the preamble makes reference to this Guide, indicating that it does not form a part of the Rules.

Article 1 Scope of the ICC ADR Rules

The Rules apply exclusively to business disputes. This means, for example, that they cannot be used for the resolution of family or labour disputes. They can be used for international as well as domestic business disputes.

In the spirit of ICC ADR, which seeks to maximize party control of the proceedings, Article 1 permits the parties to modify the Rules by common agreement subject to the approval of ICC, whose consent is necessary in order to uphold the integrity of the Rules.

Article 2 Commencement of the ADR Proceedings

An agreement of the parties to submit to the Rules is a prerequisite to the commencement of ICC ADR proceedings. Such an agreement can result from:

- an ICC ADR clause in the underlying contract between the parties;
- in the absence of such a clause, a subsequent agreement of the parties in writing, at any time they

desire, to seek an amicable settlement of their dispute under the Rules; or

- in the absence of any prior agreement, the Request for ADR filed with ICC by a party who wishes to submit the dispute to the Rules, followed by the agreement of the other party to participate in the ICC ADR proceedings.

The ICC ADR proceedings are commenced pursuant to Article 2.A in the first two cases and pursuant to Article 2.B in the third. In all cases, the first step in ICC ADR proceedings is the submission to ICC, either jointly or unilaterally, of a written Request for ADR.

Article 2.A Where there is an agreement to refer to the Rules

Given the amicable nature of ICC ADR, when the parties have agreed to submit their dispute to the Rules, the most appropriate manner to begin the proceedings is for the parties to file a joint Request for ADR. However, when such a joint Request is not made, any party may unilaterally file with ICC a Request for ADR, a copy of which should be addressed to the other party.

When there is an agreement to submit the dispute to the Rules, the parties may not withdraw from the proceedings prior to the first discussion with the Neutral, as provided for in Article 5(1). This provision preserves the parties' intention to agree to ICC ADR, by obligating them to evaluate the potential of the ICC ADR proceedings together with the Neutral.

The written Request for ADR should be filed by mail, fax or e-mail and addressed to:

International Chamber of Commerce
ICC Dispute Resolution Services - ADR
38 cours Albert 1^{er}
75008 Paris - France
Fax: +33 1 49 53 29 29
E-mail: adr@iccwbo.org

The description of the dispute in the Request should be very succinct and limited to matters allowing:

- (i) the Neutral to obtain sufficient information to determine his or her ability to act in the particular

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ICC ADR proceedings and usefully to prepare for the discussion with the parties provided for in Article 5(1);

- (ii) ICC, if it is called upon to appoint the Neutral, to determine the appropriate profile of the Neutral to be appointed; and
- (iii) the other party, when the Request for ADR is filed unilaterally, to understand the nature of the dispute.

The Rules do not prevent a party from requesting or proposing the settlement technique which it believes to be the most appropriate for the resolution of the dispute.

In light of the amicable nature of the proceedings, it is preferable that the parties jointly designate the Neutral; however, if they cannot or do not wish to do so, it remains desirable for them to agree upon the qualifications or attributes of the Neutral to be appointed by ICC. In any event, ICC is available to the parties if they desire it to select the Neutral.

Article 2.A(2) contains provisions that are applicable when the Request is not jointly filed by the parties. In that case, and consistent with the pre-existing agreement of the parties, the party filing its Request with ICC must simultaneously send a copy to the other party. Article 2.A(2) also allows the parties jointly to designate the Neutral or agree upon the desired qualifications or attributes of the Neutral to be appointed by ICC.

Article 2.B When there is no agreement to refer to the Rules

Article 2.B is a modified version of Article 2.A to cover the situation in which there is no prior agreement of the parties to refer to the Rules.

In such cases, a party unilaterally files a Request for ADR pursuant to Article 2.B. ICC sends it to the other party, which party can accept or decline to participate in the ICC ADR proceedings. If it declines to participate, or does not respond to the Request within 15 days, the proceedings shall not be commenced. If it accepts to participate in the ICC ADR proceedings, the

participation of the parties therein is obligatory, as under Article 2.A, and neither party may withdraw from the proceedings prior to the first discussion with the Neutral provided for in Article 5(1).

Article 2.B provides for a mechanism which allows the parties jointly to designate a Neutral or agree upon the qualifications or attributes of the Neutral to be appointed by ICC.

Article 3 **Selection of the Neutral**

The success of ICC ADR proceedings depends in large part upon the abilities of the Neutral.

The parties should seek to ensure that the Neutral:

- has the professional capabilities and experience needed to understand the various aspects of the dispute between the parties;
- has the human qualities needed to create an atmosphere of trust between the parties and encourage constructive discussions.

According to Article 3, the Neutral can be selected in the following ways:

- by joint designation by all of the parties;
- by agreement of the parties on the qualifications or attributes of the Neutral and appointment of the Neutral by ICC;
- by appointment by ICC when there is no joint designation by the parties or agreement of the parties concerning the qualifications or attributes of the Neutral;
- by appointment by ICC when the Neutral designated by the parties does not accept his or her mission.

Neutrals designated by the parties are not approved or appointed by ICC. ICC simply takes note of the parties' choice of the Neutral.

Every prospective Neutral, whether designated by the parties or appointed by ICC, must file a *curriculum vitae* and declaration of independence with ICC, prior to the taking effect of his or her designation or appointment.

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ICC must transmit those documents to the parties in accordance with Article 3(2). It is desirable that parties who jointly designate the Neutral also verify that the Neutral has the necessary qualifications or attributes.

ICC carefully verifies the independence of each Neutral that it appoints. Any such Neutral must remain independent of the parties from the time of the Neutral's appointment until the termination of his or her duties. The parties may designate by common agreement a non-independent Neutral, so long as their choice has been made in full knowledge of the facts and, in particular, in light of the declaration filed by the Neutral before the designation takes effect.

In order to ensure the rapid appointment of the best qualified Neutral, ICC may appoint the Neutral directly or may do so after consulting a National Committee.

In accordance with Article 3(3), any party may object to a Neutral appointed by ICC within 15 days from the date of receipt of the notification of the Neutral's appointment. A party who so objects must state the reason for the objection. If the parties do not have an objection and if they wish to accelerate the process, it is in their interest to notify ICC of the absence of any objection as soon as possible. This will permit the Neutral to commence the procedure rapidly, provided that the deposit referred to in Article 4(2) has been paid.

Article 3(4) allows the parties to designate more than one Neutral and ICC to propose that more than one Neutral be appointed. It may indeed be appropriate, depending upon the situation, to have more than one Neutral in the ICC ADR proceedings. For example, the Neutrals can have different professional backgrounds and thus complement each other, which may lead to a more rapid and effective settlement of the dispute.

Article 4 **Fees and Costs**

The cost of the ICC ADR proceedings comprises (i) ICC administrative expenses and (ii) the remuneration of the Neutral.

ICC administrative expenses comprise the following:

- a non-refundable registration fee accompanying the Request for ADR in the amount of US\$ 1,500 (see Article 4(1) and Appendix, § A);
- administrative expenses capped at a maximum of US\$ 10,000 (see Article 4(2) and Appendix, § B).

The remuneration of the Neutral is calculated as follows:

- fees based upon an hourly rate fixed by ICC in consultation with the Neutral and the parties (see Article 4(2) and Appendix, § C);
- reasonable expenses fixed by ICC (see Article 4(2) and Appendix, § C).

This system permits ICC to control the cost of the ICC ADR proceedings and to ensure compliance with any established deadlines. Moreover, it saves the parties having to discuss fees directly with the Neutral.

It should be noted that, in accordance with Article 4(2), ICC ADR proceedings will not go forward until payment of the deposit has been received.

Article 4(3), which concerns readjustment of the initial deposit, must be read together with the Appendix, § C. Readjustments are typically based on the time spent by the Neutral.

Given the consensual nature of ICC ADR, the parties bear the costs equally, unless they agree otherwise.

Article 5

Conduct of the ADR Procedure

Article 5(1) provides that after the Neutral has been selected and the provisions of Article 4 have been complied with, a first discussion must rapidly take place between the Neutral and the parties in order (i) to seek an agreement on the settlement technique to be used for the resolution of the dispute and (ii) to define the specific procedure to be followed.

While it is usually preferable that the discussion take place via a meeting among the parties and the Neutral, it can also occur via telephone conference, videoconference, or any other suitable means.

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A wide range of ADR settlement techniques can be used pursuant to these Rules. It should be noted, however, that Dispute Review Boards (DRBs) and Dispute Adjudication Boards (DABs) are typically established through extensive contractual provisions which contain the rules to be followed for those proceedings. Thus, in principle, the Rules are not conceived for use in connection with DRBs or DABs. The ADR settlement techniques that can be used under the Rules include the following:

- 1) mediation;
- 2) neutral evaluation;
- 3) mini-trial;
- 4) any other settlement technique; or
- 5) a combination of settlement techniques.

The above list is, by its very nature, neither limiting nor exhaustive. It is important, however, that the parties have the same approach to the settlement technique to be used.

1) Mediation

For purposes of the Rules, mediation is the settlement technique in which the Neutral acts as a facilitator to help the parties try to arrive at a negotiated settlement of their dispute. The Neutral is not requested to provide any opinion as to the merits of the dispute.

To facilitate an amicable settlement, the Neutral generally holds joint meetings with all of the parties present and may also hold separate meetings, often called caucuses, with each of the parties alone. These meetings permit the Neutral to create an atmosphere appropriate for negotiations, obtain useful information, identify the interests of each party and help the parties find common ground for the resolution of their dispute. Any oral statements or written documents provided to the Neutral by one party during a separate meeting or otherwise will not be conveyed to the other party unless the first party has explicitly authorized the Neutral to do so.

2) Neutral evaluation

In accordance with this settlement technique, the parties ask the Neutral to provide a non-binding opinion or evaluation concerning one or more matters, such as:

- . an issue of fact;
- . a technical issue of any kind;
- . an issue of law;
- . an issue concerning the application of the law to the facts;
- . an issue concerning the interpretation of a contractual provision;
- . an issue concerning the modification of a contract.

3) Mini-trial

Mini-trial is the settlement technique in which a panel is constituted comprising the Neutral, as a facilitator, and a manager of each of the parties to the dispute. Each manager should in principle have the authority to bind the party which selected him or her and should not have been directly involved in the dispute. Each party presents its position to the panel in a concise and brief manner, after which, depending upon the situation, the panel seeks a solution acceptable to all of the parties or expresses an opinion on the positions of each side.

4) Any other settlement technique

The parties, in consultation with the Neutral and within the framework of Article 5(1), may agree upon any appropriate ADR settlement technique that would help them resolve their dispute amicably.

5) Combination of settlement techniques

It may be useful to conduct ICC ADR proceedings using a combination of settlement techniques. For example, the Neutral could be asked to give his or her opinion on a specific issue in the course of a mediation.

Regardless of the settlement technique chosen, the Neutral cannot bind the parties. However, the parties may agree contractually to abide by the Neutral's opinion, evaluation or recommendation.

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During the first discussion, the parties should also seek to agree upon the most appropriate procedure to be followed. The specific procedure can include any of the following elements:

- . procedural calendar;
- . exchange of documents;
- . production of memoranda;
- . identification of persons taking part in the proceedings;
- . meetings between the parties and the Neutral;
- . other means to ensure the smooth execution of the procedure.

It should be recalled that the term ‘proceedings’ covers the entire ICC ADR process which includes the specific procedure described above.

Article 5(2) provides that if the parties cannot agree upon an ADR settlement technique, mediation will be used. While Article 5(1) allows the parties themselves to select the most appropriate settlement technique, the mediation fallback provision in Article 5(2) fills the gap when the parties do not agree on another technique.

Article 5(3) provides that the Neutral, in conducting the procedure, must take into account the wishes of the parties – which is of fundamental importance given the consensual nature of ICC ADR – while being guided by principles of fairness and impartiality.

Article 5(4) stipulates that, in the absence of an agreement by the parties, the Neutral chooses the appropriate language(s) and the place of any meetings to be held.

To encourage cooperation and the smooth running of the proceedings, Article 5(5) emphasizes that the parties must exercise good faith in their interactions with the Neutral.

Article 6 **Termination of the ADR Proceedings**

Article 6 lists the events that terminate ICC ADR proceedings which were commenced in accordance with the Rules:

a) The signing by the parties of a settlement agreement which puts an end to their dispute.

Such an agreement is binding upon the parties in accordance with applicable law, which may be chosen by the parties in the agreement.

b) Written notification to the Neutral by one or more of the parties that it does not wish to pursue the ICC ADR proceedings; it should be noted that this notification can be made only after the first discussion among the parties and the Neutral pursuant to Article 5(1).

The obligation to participate in the first discussion stems from the agreement of the parties to submit their dispute to the Rules. Since ICC ADR proceedings are amicable and consensual, each party has the right to terminate them after the first discussion provided for in Article 5(1). The provision making this discussion obligatory is designed to ensure that the ICC ADR will have the maximum chance of success. Indeed, it is difficult for the parties to evaluate the full potentiality of the procedure, without this first discussion with the Neutral.

c) Written notification by the Neutral to the parties that the procedure which was agreed upon during the first discussion or thereafter has been completed.

This provision deals with the case in which the ICC ADR proceedings do not result in the signature of a settlement agreement between the parties. For example, if the parties have simply agreed to obtain an opinion from the Neutral pursuant to a neutral evaluation, the ICC ADR proceedings will end upon the Neutral's presentation of that opinion and the Neutral's written notification thereof.

d) Written notification by the neutral to the parties that, in his or her opinion, the ICC ADR proceedings will not result in an amicable resolution of the dispute between the parties.

This provision allows the Neutral to end the proceedings at any time, if the Neutral considers that it is not possible for the parties to arrive at an amicable

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resolution of their dispute within the ICC ADR proceedings.

e) The expiration of any time period set for the ICC ADR proceedings.

The parties can agree in their underlying contract or in a later agreement that the ICC ADR proceedings will terminate at the end of a fixed period of time. It can be very useful to limit the duration of the proceedings. It permits the parties to know with certainty when the proceedings will end and encourages their rapidity. The parties may of course extend the deadline if they wish to continue the procedure. At the end of the time period, the proceedings come to an end, and the Neutral notifies the parties thereof.

f) Written notification by ICC that payments due by one or more parties pursuant to the Rules have not been made. This provision can be applied when the parties do not comply with their obligations under Article 4 of the Rules. ICC may not terminate the proceedings under this provision until at least 15 days after the due date of the payment in question.

g) Written notification by ICC that, in its opinion, (i) the designation of the Neutral was not possible or (ii) it was not reasonably possible to appoint a Neutral.

This provision can be applied, for example, if one of the parties continually objects to the Neutrals appointed by ICC.

Article 6(2) also assures that ICC, the Neutral and the parties are effectively notified of the termination of the proceedings. It stipulates that the Neutral must inform ICC when the proceedings have ended pursuant to Article 6(1), (a) to (e). The Neutral must also provide ICC with copies of the notifications made by him or her or by one or more of the parties pursuant to Article 6(1), (b) to (e). It should be noted that any settlement agreement between the parties, as referred to in Article 6(1), (a), is never communicated to ICC, in order to preserve its confidentiality.

Article 7

General Provisions

Confidentiality is an important, if not essential, aspect of ICC ADR proceedings and permits the parties to participate therein with complete confidence. Thus, Article 7 sets out the general rule that the ICC ADR proceedings and related materials are confidential.

Article 7(1) provides that ICC ADR proceedings are private and confidential, starting from the filing of the Request for ADR. Only two exceptions are provided. First, the parties may agree that all or part of the proceedings will not be confidential, and, second, a party may disclose any given element of the ICC ADR proceedings if it is required to do so by applicable law. Any settlement agreement between the parties must also remain confidential, subject to the same two exceptions mentioned above. In addition, a party may disclose the settlement agreement if such disclosure is required for its implementation or enforcement.

Article 7(2), in application of the general rule established in Article 7(1), contains a list of what a party may not produce, relative to ICC ADR proceedings, as an element of proof in judicial, arbitral, or similar proceedings. As under Article 7(1), the parties may agree to waive this confidentiality obligation. In addition, a party will not be bound by this obligation insofar as applicable law requires it to produce one or more of the listed elements.

Article 7(3) deals with whether the Neutral may act as a judge, arbitrator, expert or representative of a party in other proceedings related to the dispute submitted to the ICC ADR proceedings. It provides that it is entirely permissible for a Neutral to act in such capacities if all of the parties to the ICC ADR proceedings agree thereto in writing. However, it is not permissible without such an agreement.

Article 7(4) forbids the Neutral to act as a witness in any other proceedings related to the dispute submitted to the ICC ADR proceedings, unless all of the parties agree otherwise or applicable law requires him or her to do so. This article once again is designed to ensure the confidentiality of the ICC ADR proceedings.

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Article 7(5) excludes the liability of ICC, its personnel and the ICC National Committees for any act or omission in connection with the ICC ADR proceedings. This provision is similar to Article 34 of the ICC Rules of Arbitration.

PART 3 ANALYSIS OF THE SUGGESTED ICC ADR CLAUSES

Four alternative ICC ADR clauses which may be inserted by parties in their contracts are annexed to the Rules. They do not constitute model clauses but simply suggestions that can be adapted to the needs of the parties. The parties and their counsel are invited to evaluate their enforceability under the law applicable to the contract. The four clauses are presented in order of increasing obligations on the parties to submit to ICC ADR.

The first clause provides simply for the possibility, without any obligation, for the parties to submit their dispute to the Rules. It is therefore purely optional. It is designed to encourage submission to ICC ADR and to provide a basis for one party to propose ICC ADR to the other.

The second clause obligates the parties to consider submitting their dispute to the Rules. This clause is therefore not purely optional. It requires the parties to discuss the possibility of commencing ICC ADR proceedings. However, the parties retain the right not to do so after their discussion.

The third clause obligates the parties to submit to the Rules any dispute arising in connection with their underlying contract. The clause further provides that after 45 days from the filing of the Request for ADR the parties are no longer obligated to continue the ICC ADR. This time period can be extended by the written agreement of the parties. It is indeed important to provide an automatic expiration mechanism for ADR proceedings in an ADR clause of this type. It allows the parties to know

precisely when they are no longer obligated to continue the proceedings. The parties are of course expected to apply this clause in good faith. The clause does not provide for another dispute resolution mechanism in case the ICC ADR fails to resolve the dispute. In that case, the parties are free to agree to submit their dispute to arbitration, or a party may bring an action before a competent court.

The fourth clause is identical to the third, except that it expressly provides that the dispute will be submitted to ICC arbitration if it has not been resolved within 45 days after the filing of the Request for ADR, unless such time period has been extended. In that case, it is up to the claimant to file a Request for Arbitration with the Secretariat of the ICC International Court of Arbitration in accordance with the ICC Rules of Arbitration.