

# Comparison of ICC Expert Report vs. ICC Arbitration Award

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## Abstract

The aim of the paper is to compare the ICC Expert proceedings and ICC Arbitration within alternative dispute resolution services provided by the International Chamber of Commerce. These two proceedings are widely used contractually in conjunction, however their outcomes and effectiveness pursuant to the legal framework of the Slovak Republic differ. We aim to outline the important factors to consider when choosing these methods of dispute resolution and their particularities. This contribution will contrast the legal nature of ICC Expert Reports and ICC Arbitration Awards and their respective recognition and enforceability in the Slovak Republic.

## Keywords

International Chamber of Commerce; Expert Determination; Arbitration; Alternative Dispute Resolution.

## 1 Introduction

The International Chamber of Commerce (“ICC”) plays a crucial role in business relationships as the largest international non-governmental organization aimed at promoting international trade and commerce.<sup>1</sup> The ICC offers a variety of alternative dispute resolution services through the International Centre for ADR (“Centre”) which is a separate body within the ICC, such as mediation, services related to experts and neutrals, dispute board members and documentary instruments dispute resolution expertise. Expert determination is a process of private dispute resolution, in which parties

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<sup>1</sup> CHOVANCOVÁ, K. *International Commercial Arbitration*. Bratislava: Bratislavská vysoká škola práva, 2009, p. 114.

to a contract agree to refer certain issues or questions to an expert to ascertain.<sup>2</sup> In contrast arbitral proceedings are supervised by the ICC International Court of Arbitration (“the Court”), a separate arbitration body of the ICC. The Court is responsible for ensuring the application of ICC Rules of Arbitration and carries out the administration of the arbitration proceedings.<sup>3</sup> Both expert determination and arbitration arise from the contractual freedom and agreement of the parties. They are forms of alternative dispute resolution which may or may not result in a binding decision; however, the recognition and enforceability of such decisions differ. These two proceedings can overlap, as an expert might be appointed during arbitration. The paper firstly introduces the ICC Expert Rules and the differences between services relating to experts provided by the Centre. It discusses the legal nature of the Expert Report in the Slovak Republic, its recognition and enforcement. The second part summarizes arbitration pursuant to the ICC Rules of Arbitration and introduces legal aspects of the arbitral award. The third section introduces the usage of multi-tiered dispute resolution clauses and their risks in the condition of the Slovak Republic and lastly a comparison of some aspects of the two methods follows.

## 2 ICC Expert Rules

Expert determination might be an effective tool for resolution of a dispute for a significantly lower cost than arbitration or judicial proceedings, if the dispute is settled by a binding determination the parties voluntarily comply with. Expert determination might also be a preliminary or parallel step to pursuing claims in arbitration or judicial proceedings.<sup>4</sup> It can be used

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<sup>2</sup> SANTENS, A.A. Expert Determination Clauses in Contracts Providing for International Arbitration: What Happens when the Expert’s Decision is Not Final and Binding? *Arbitration International*, 2007, Vol. 23, no. 4, p. 687.

<sup>3</sup> Art. 1 Appendix I ICC Rules of Arbitration 2021. *International Chamber of Commerce* [online]. [cit. 25. 3. 2021]. Available at: <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>

<sup>4</sup> ROGERS, J. and M. BUCKLE. Arbitrating M&A disputes. How the arbitration landscape has changed and where technology might take it next. *Norton Rose Fulbright International Arbitration Report* [online]. [cit. 25. 3. 2021]. Available at: [https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/emea\\_15747\\_newsletter\\_international-arbitration-report-\\_issue-13.pdf?la=en&revision=6271a007-2aa1-4f13-a15e-0d3251677fdb](https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/emea_15747_newsletter_international-arbitration-report-_issue-13.pdf?la=en&revision=6271a007-2aa1-4f13-a15e-0d3251677fdb)

in a variety of areas – technical matters in construction or engineering sectors, valuation in mergers & acquisitions, disputes regarding intellectual property or interpretation of a contract. The majority of the requests for the provision of expert services by the ICC in 2019 related to technical, financial or legal expertise and came from the energy and construction sectors.<sup>5</sup>

## 2.1 Types of Expert Proceedings

The Centre offers services related to the experts and neutrals, for the purpose of this paper the focus shall be solely on the expert proceedings (however, most of the elements mentioned apply to neutrals as well). For the further analysis of the nature of expert report, a distinction must be made between the types of expert proceedings the Centre offers. Confidentiality of information and documents is ensured in all types of proceedings, which is an accommodating rule given the commercial nature of disputes and thus the need for protection of know-how or any disclosures made. There are three services provided by the Centre:

1. Proposal of experts; and
2. Appointment of experts; and
3. Administration of expert proceedings.

### 2.1.1 Proposal of Experts

Under the ICC Rules for the Proposal of Experts and Neutrals, the Centre may receive a request for proposal of an expert from any person.<sup>6</sup> The Centre shall process the request if the non-refundable filing fee has been paid. Afterwards the Centre proceeds to propose an expert, it's role under the Expert Rules however ends upon the notification of such proposal.<sup>7</sup> Given the nature of this service, the Centre's responsibilities are limited to the proposal of an expert. The parties requesting an expert are not bound

<sup>5</sup> 2019 ICC Dispute Resolution Statistics. *International Chamber of Commerce* [online]. P. 20 [cit. 28.3.2021]. Available at: <https://iccwbo.org/publication/icc-dispute-resolution-statistics/>

<sup>6</sup> Art. 1 Section 1 ICC Rules for the Proposal of Experts and Neutrals. *International Chamber of Commerce* [online]. [cit. 15.3.2020]. Available at: <https://iccwbo.org/dispute-resolution-services/experts/proposal-experts-neutrals/rules-for-the-proposal-of-experts-and-neutrals/> (“ICC Rules for the Proposal of Experts and Neutrals”).

<sup>7</sup> Art. 2 para. 1. ICC Rules for the Proposal of Experts and Neutrals.

by the proposal, they may decide to not use the proposed expert. The legal nature of expert findings is at the discretion of the parties and the Centre is not entitled to scrutinize the expert findings.

### 2.1.2 Appointment of Experts

The appointment of experts by the Centre is based on a submitted request for the appointment of an expert accompanied by a non-refundable filing fee. The appointment process is subject to the ICC Rules for the Appointment of Experts and Neutrals. The Centre shall only process such request in case it is based on mutual agreement between the parties for the appointment of an expert by the Centre, or where the Centre is otherwise satisfied that there is a sufficient basis for appointing an expert.<sup>8</sup> The agreement to provide the Centre appointing authority in case of a dispute or any situation needing an expert evaluation may be included in a contract between parties. A clause providing for the Centre as appointing authority for experts must be drafted clearly to reflect the agreement between the parties and their will to have an expert appointed for *ad hoc* expert proceedings not administered by the ICC. After the submission of the request for appointment of an expert by one of the parties (or more parties or jointly by all of the parties), the Centre proceeds to appoint an expert. The Centre's role is limited to the appointment of an expert and ends upon notification of such appointment.<sup>9</sup> The only exception to the beforementioned rule is when a party files a written objection asserting that the expert does not have the necessary attributes, is not fulfilling the expert's functions or is not independent or impartial. In such case the Centre may replace the expert after having considered the observations of the expert and the other party or parties.<sup>10</sup> The appointment made by the Centre is binding on the parties. The administration of the expert proceedings and the nature of the expert findings are subject to rules separate from the ICC.

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<sup>8</sup> Art. 1 ICC Rules for the Appointment of Experts and Neutrals. *International Chamber of Commerce* [online]. [cit. 25.3.2021]. Available at: <https://iccwbo.org/dispute-resolution-services/experts/icc-rules-appointment-experts-neutrals/rules-for-the-appointment-of-experts-and-neutrals/> ("ICC Rules for the Appointment of Experts and Neutrals").

<sup>9</sup> Art. 3 ICC Rules for the Appointment of Experts and Neutrals.

<sup>10</sup> Art. 3 para. 5 ICC Rules for the Appointment of Experts and Neutrals.

### 2.1.3 Administration of Expert Proceedings

The administration of expert proceedings is regulated by the ICC Rules for Administration of Expert Proceedings. The request for the administration of expert proceedings may be submitted by one or more parties, accompanied by the non-refundable filing fee.<sup>11</sup> The Centre shall only process such request in case it is based on mutual agreement between the parties for the administration of expert proceedings by the Centre, or where the Centre is otherwise satisfied that there is a sufficient basis for administering the expert proceedings. The date of filing the request is considered to be the date of commencement of the expert proceedings.<sup>12</sup> In the ICC expert proceedings the parties may jointly nominate an expert to be confirmed by the Centre or the Centre shall appoint an expert in the absence of such joint nomination. The expert shall set out the expert's mission in a written document, setting out *inter alia* the procedure to be followed by the expert and a list of the issues on which the expert shall make findings in the expert's report.<sup>13</sup> The expert report is the final document containing the expert's findings on disputed matter. The expert is obliged to submit a draft report to the Centre for scrutiny, however the Centre may not affect the expert's liberty of decision, solely modify the form of the report or draw attention to points of substance.<sup>14</sup> Unless otherwise agreed by all of the parties, the expert's report shall be admissible in any judicial or arbitral proceedings in which all of the parties thereto were parties to the administered expert proceedings in which such report was prepared.<sup>15</sup>

Two eventualities may arise in relation to the expert report:

1. The expert's findings shall be non-binding in the absence of an agreement between the parties to the contrary; or
2. The report shall be contractually binding upon the parties in case all the parties expressly agree in writing.<sup>16</sup>

<sup>11</sup> Art. 1 ICC Rules for the Administration of Expert Proceedings [online]. *International Chamber of Commerce* [cit. 25. 3. 2021]. Available at: <https://iccwbo.org/dispute-resolution-services/experts/administration-experts-proceedings/rules-for-the-administration-of-expert-proceedings/> ("ICC Rules for the Administration of Expert Proceedings").

<sup>12</sup> Art. 1 para. 6 ICC Rules for the Administration of Expert Proceedings.

<sup>13</sup> Art. 6 para. 2 ICC Rules for the Administration of Expert Proceedings.

<sup>14</sup> Art. 9 para. 1 ICC Rules for the Administration of Expert Proceedings.

<sup>15</sup> Art. 8 para. 3 ICC Rules for the Administration of Expert Proceedings.

<sup>16</sup> Art. 8 para. 2 ICC Rules for the Administration of Expert Proceedings.

Even if the expert report is non-binding, the parties may use it in their further recourse to either national courts that have jurisdiction or in case of a valid arbitration agreement or clause in arbitral proceedings. The benefits of expert proceedings administered by the Centre are undoubtedly the institutionalization of the proceeding allowing for scrutiny of the report, adhering to a timeline, confidentiality of information and initiation of steps needed to encourage the expeditious completion by the Centre.<sup>17</sup> The procedure is also highly flexible to the needs of the parties, as the ICC Rules for Administration of Expert Proceedings serve more as a framework than actual procedural rules. The costs for expert determination are significantly lower than the costs of ICC arbitration, though both are set according to the amount in dispute.<sup>18</sup>

## 2.2 ICC Expert Report

Any reference to a binding expert report hereinafter refers to a report which is agreed to be contractually binding upon the parties. The binding expert report constitutes a contractually resolution of a matter between parties. If the findings contained in the binding expert report are not respected by one of the parties, the other party may seek enforcement of the binding expert report in judicial proceedings or arbitration like a breach of contract. The action to follow depends on the agreement between the parties, from which the dispute arose from. The enforceability of the binding expert report is thus limited, and further action is required by the parties, either in court or in arbitration. Though the expert report is binding, it does not constitute *res judicata* and cannot be enforced under Slovak law. There are no direct legal remedies against expert determination (apart from a claim against an expert), and it cannot be appealed.<sup>19</sup> However in proceedings administered by the Centre, experts shall not be liable for any act or omission, except to the extent such limitation of liability is prohibited by applicable law.<sup>20</sup> Depending on the agreed procedural rules for the expert, the determination

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<sup>17</sup> Preamble ICC Rules for the Administration of Expert Proceedings.

<sup>18</sup> Art. 2 ICC Rules for the Administration of Expert Proceedings.

<sup>19</sup> HOMBURGER, B. G. M&A disputes and expert determination: getting to grips with the issues. *Thomson Reuters Practical Law* [online]. 1. 3. 2010, p. 3 [cit. 4. 4. 2021]. Available at: [https://content.next.westlaw.com/4-502-2504?\\_lrTS=20201031133601433&transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://content.next.westlaw.com/4-502-2504?_lrTS=20201031133601433&transitionType=Default&contextData=(sc.Default)&firstPage=true)

<sup>20</sup> Art. 5 para. 3 ICC Rules for the Administration of Expert Proceedings.

does not require the use of adjudicative procedures, instead it relies on the expert's investigation and expertise.<sup>21</sup> The disputed matter frequently involves narrowly-defined and circumscribed factual or technical issues, contrary to arbitration, which seeks to resolve broader legal disputes, where a contract or statutory protection has been breached and what consequences follow.<sup>22</sup> If the parties agree that the expert report shall not be binding, it may serve as a guidance in further recourse. If the parties agreed on arbitration for settlement of their dispute following an expert determination, the expert report may serve as a basis for rendering the final ICC award, however the clauses can be drafted in a way that the arbiter is not obliged to take the expert report into consideration.

### 3 ICC Arbitration

#### 3.1 ICC Arbitration Rules

A party wishing to have recourse to arbitration under the ICC Rules of Arbitration shall submit its request for arbitration to the Secretariat of the International Court of Arbitration of the ICC and pay the filing fees.<sup>23</sup> Pursuant to the Slovak Act No. 244/2002 Coll., on Arbitration, as amended (“Slovak Act on Arbitration”), the disputes that can be a matter of arbitration are set out as all disputes concerning legal relationships eligible for a settlement agreement, including disputes on the existence of a legal relationship or legal title, can be dealt with in arbitration. The following cannot be resolved by arbitration (i) disputes regarding the creation, change or termination of ownership rights and other rights in rem in respect of real property, (ii) disputes regarding personal status, (iii) disputes regarding compulsory enforcement of decisions, (iv) disputes arising in the course of insolvency proceedings and restructuring proceedings and (v) disputes arising from consumer contracts.<sup>24</sup> The arbitration is commenced on the date

<sup>21</sup> BORN, G. B. *International Arbitration: Law and Practice*. Alphen aan den Rijn: Kluwer Law International, 2012, p. 8.

<sup>22</sup> Ibid.

<sup>23</sup> Art. 4 para. 1 ICC Rules of Arbitration 2021. *International Chamber of Commerce* [online]. [cit. 25.3.2021]. Available at: <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> (“ICC Rules of Arbitration 2021”).

<sup>24</sup> § 1 para. 2 Slovak Act on Arbitration.

of receipt of the request for arbitration.<sup>25</sup> The Court shall appoint or confirm arbitrators and the constitution of the arbitral tribunal. The arbitral tribunal draws up terms of reference (similar to expert's mission), containing *inter alia* summary of the parties' respective claims and relief sought by the parties, list of issues to be determined, particulars of the applicable procedural rules and the place of the arbitration. The ICC Rules of Arbitration do not limit the parties' choice of place of arbitration, language of the arbitration nor the governing law, as the choice of these enacts the parties' agreement to arbitrate their dispute. Choosing a neutral place of arbitration, meaning that the parties choose a country that is not a country of origin or domicile of neither party, is a great benefit of arbitration.<sup>26</sup> Even if the parties select a place of arbitration in a country of origin or domicile of one of the parties, this choice should not interfere with and not appear to impair the neutrality of the proceedings or that of the arbitral tribunal.<sup>27</sup> The place of arbitration is a crucial factor for determining whether an arbitration award shall be considered domestic or non-domestic and thus the applicable procedure for recognition and enforcement. The place of arbitration may differ from the place of hearings, meetings or deliberations of the arbitral tribunal.<sup>28</sup>

### 3.2 ICC Award

The final decision of the arbitral tribunal is the award. The award must be submitted to the Court in draft form and the Court may intervene as to the form of the award or draw attention to points of substance, without affecting the arbitral tribunal's liberty of decision.<sup>29</sup> In certain circumstances an interim, partial or additional award may be issued. Every award shall be binding on the parties. The parties by submitting the dispute to arbitration under the ICC Rules of Arbitration, accept to carry out any award without delay and shall be deemed to have waived their right

<sup>25</sup> Art. 4 para. 2 ICC Rules of Arbitration 2021.

<sup>26</sup> SCHERER, M. The Place or 'Seat' of Arbitration (Possibility, and/or Sometimes Necessity of its Transfer?) – Some Remarks on the Award in ICC Arbitration No. 10'623. *ASA Bulletin*, 2003, Vol. 21, no. 1, p. 115.

<sup>27</sup> LALIVE, P. The Transfer of Seat in International Arbitration. In: NAFZIGER, J. A. R. and S. SYMEONIDES (eds.). *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren*. Ardsley, New York: Transnational Publishers, 2002, p. 515.

<sup>28</sup> Art. 18 para. 2 ICC Rules of Arbitration 2021.

<sup>29</sup> Art. 34 ICC Rules of Arbitration 2021.



to any form of recourse insofar as such waiver can validly be made.<sup>30</sup> For a significant period, considering the Court was established in 1923, one of the key benefits of arbitration before the Court was non-publicity. In contrast proceedings before national courts are generally public (as is the case in Slovakia, save for exceptions). Nonetheless, the ICC will publish awards and procedural orders online starting from 2021 to promote greater transparency.<sup>31</sup> The parties will be notified prior to publication and shall have an opportunity to object to publication and request for unnecessary data to be de-identified.<sup>32</sup> The ICC aims to enhance transparency, while not compromising confidentiality of the parties' data. The awards will be published, free of charge through the search engine Jus Mundi.<sup>33</sup> As for confidentiality of the arbitration, the ICC Rules of Arbitration only impose obligations on the Court members, the arbitral tribunal can make orders to ensure confidentiality of the proceedings and protection of trade secrets. However, it can only do so based on a request of one of the parties.<sup>34</sup> The time limit for rendering the award is 6 months from signing of terms of reference (which may be prolonged if necessary).<sup>35</sup> Nevertheless, the average duration of proceedings in 2019 was 26 months.<sup>36</sup> To form ICC arbitration into a faster and more streamlined process in case of smaller disputes, the ICC introduced expedited procedure provisions ("EPP") in 2017, which apply to arbitrations where (i) the amount in dispute does not exceed US \$ 2,000,000,<sup>37</sup> (ii) the arbitration agreement was concluded after

<sup>30</sup> Art. 35 para. 6 ICC Rules of Arbitration 2021.

<sup>31</sup> ICC Data Privacy Notice for ICC Dispute Resolution Proceedings. *International Chamber of Commerce* [online]. [cit. 28.3.2021]. Available at: <https://iccwbo.org/dispute-resolution-services/icc-data-privacy-notice-for-icc-dispute-resolution-proceedings/>

<sup>32</sup> Ibid.

<sup>33</sup> Publication of ICC arbitral awards with Jus Mundi. *International Chamber of Commerce* [online]. [cit. 30.4.2021]. Available at: <https://iccwbo.org/dispute-resolution-services/arbitration/publication-of-icc-arbitral-awards-with-jus-mundi/>

<sup>34</sup> Art. 22 ICC Rules of Arbitration 2021.

<sup>35</sup> Art. 31 para. 2 ICC Rules of Arbitration 2021.

<sup>36</sup> 2019 ICC Dispute Resolution Statistics. *International Chamber of Commerce* [online]. P. 17 [cit. 28.3.2021]. Available at: <https://iccwbo.org/publication/icc-dispute-resolution-statistics/>

<sup>37</sup> Art. 30 para. 2 ICC Rules of Arbitration 2021 and Art. 1 para. 2 Appendix VI ICC Rules of Arbitration 2021. *International Chamber of Commerce* [online]. [cit. 25.4.2021]. Available at: [https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/\('Appendix VI ICC Rules of Arbitration 2021'\)](https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/('Appendix VI ICC Rules of Arbitration 2021')).

1 March 2017;<sup>38</sup> and (iii) the parties have not opted out of the expedited procedure provisions.<sup>39</sup> The parties may also opt in to the EPP regardless of the amount in dispute or date of conclusion of the arbitration agreement.<sup>40</sup> Under the EPP in order to streamline the arbitration there is no requirement for the terms of reference, there is a possibility of deciding without an oral hearing and the appointment of a sole arbitrator is an option, notwithstanding any contrary provision of the arbitration agreement.<sup>41</sup> The time for rendering an award is 6 months from the date of the case management conference (which may also be prolonged if necessary). However, from the 50 awards rendered under the EPP in 2019, 37 were rendered within the 6-month time limit.<sup>42</sup>

### 3.3 ICC Award Recognition and Enforcement

The ICC Award is a final decision on the merits of the case and there is no option to appeal the final award. Judicial review of arbitration awards is in the most developed countries narrowly limited to issues of jurisdiction, due process and public policy.<sup>43</sup> When assessing the recognition and enforcement of the ICC Award, we will focus on the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) as well as the Slovak national legislation. The New York Convention applies to the recognition and enforcement of arbitral awards made in the territory of a state other than the state, where the recognition and enforcement of such awards are sought, as well as to awards not considered as domestic awards in the state where their recognition and enforcement are sought.<sup>44</sup> It is applicable in 168 contracting states, thus making arbitral awards freely recognizable and enforceable (apart from limitations set by Art. V).

<sup>38</sup> Art. 30 para. 3 letter a) ICC Rules of Arbitration 2021.

<sup>39</sup> Art. 30 para. 3 letter b) ICC Rules of Arbitration 2021.

<sup>40</sup> Art. 30 para. 2 letter b) ICC Rules of Arbitration 2021.

<sup>41</sup> Art. 2 and 3 Appendix VI ICC Rules of Arbitration 2021.

<sup>42</sup> 2019 ICC Dispute Resolution Statistics. *International Chamber of Commerce* [online]. P. 16 [cit. 30.4.2021]. Available at: <https://iccwbo.org/publication/icc-dispute-resolution-statistics/>

<sup>43</sup> BORN, G. B. *International Arbitration: Law and Practice*. Alphen aan den Rijn: Kluwer Law International, 2012, p. 16.

<sup>44</sup> Art. 1 para. 1 New York Convention.

Pursuant to the Slovak Act on Arbitration, a foreign arbitral award is an award by which it has been decided in arbitration on the merits and was issued in the territory of a state other than the Slovak Republic.<sup>45</sup> This paragraph stipulates the place of issuance as a conflict criterion. Although the law does not define the term issued in relation to foreign arbitral awards, it is necessary to consider § 34 para. 3 concerning domestic arbitral awards, according to which the place of issue is linked to the place of arbitration, regardless of where the arbitral award was signed, from where it was sent or where it was delivered to the participants in the arbitration proceedings.<sup>46</sup> Therefore, if the place of arbitration is outside the territory of the Slovak Republic, the arbitral award issued in this proceeding will be considered as a foreign arbitral award. As previously stated, the ICC Rules of Arbitration do not limit the parties' choice of the place of arbitration. The New York Convention does not provide a procedural framework for the recognition or enforcement of arbitral awards (except for the formalities of the application set out in Art. 4). In this respect, the regulation is left to national legislation. Pursuant to the Slovak Act on Arbitration, foreign arbitral awards do not need to be recognized by special decisions (save for the below mentioned exceptions). A foreign arbitral award is considered recognized once the court having jurisdiction to enforce takes notice of the award as if it were a domestic arbitral award.<sup>47</sup> Recognition is a preliminary issue in the issuance of an enforcement order and once recognized the award is considered *res judicata* under Slovak law. A foreign award might be recognized by a separate order, based on a request of a party to the arbitration, however this only applies to awards which do not need to be enforced. The third way of recognising a foreign award is when the foreign award is used in a judicial proceeding before the courts of the Slovak Republic. For example, if it was decided by an arbitral award, that party A is not obliged to compensate party B for a claim, and party B petitions the Slovak court (considering it has jurisdiction) regarding the same claim. The court shall recognize the award if none of the obstacles for recognition are present, either at the request

<sup>45</sup> § 46 para. 1 Slovak Act on Arbitration.

<sup>46</sup> GYÁRFÁŠ, J. et al. *Zákon o rozhodovskom konaní. Komentár*. Bratislava: C. H. Beck, 2017, pp. 635–658.

<sup>47</sup> § 49 para. 1 and 2 Slovak Act on Arbitration.

of the party B in case of obstacles stipulated by the New York Convention in Art. V section 1, or ex officio by the court in case of obstacles prescribed in Art. V section 2.<sup>48</sup> The proceeding will be terminated because the foreign award will be recognized as *res judicata*.

The grounds for refusing recognition or enforcement of foreign awards in the Slovak Act on Arbitration correspond to Art. V of the New York Convention and Art. 36 of UNCITRAL Model Law. Recognition of foreign arbitral awards of non-contracting states of the New York Convention will be recognized in the Slovak Republic based on reciprocity.<sup>49</sup> Recognition or enforcement of an arbitral award may be refused only at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: (i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.<sup>50</sup> The parties in the arbitration proceedings cannot, within the framework of their contractual autonomy, agree that the award will be recognized and enforced

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<sup>48</sup> § 49 para. 1 Slovak Act on Arbitration.

<sup>49</sup> LYSINA, P. et al. *Medzinárodné právo súkromné*. Bratislava: C. H. Beck, 2016, p. 491.

<sup>50</sup> Cf. Art. V para. 1 New York Convention.

despite the existence of one of the above-mentioned defects in the Slovak Republic.<sup>51</sup> Notwithstanding parties can choose to deliberately comply with an award which may not be formally recognized and enforced, although this scenario sounds unlikely, but might occur in an instance where the parties wish to maintain commercial relationships for future cooperation.

Otherwise, the recognition and enforcement may only be refused if the court where recognition or enforcement is sought finds that the subject-matter of the dispute is not capable of settlement by arbitration under the Slovak law (arbitrability was previously mentioned above); or the recognition or enforcement of the award would be contrary to the public policy of Slovakia. Contravention of public policy is thus one of the few grounds for refusing the recognition or enforcement of a foreign award.<sup>52</sup> The Slovak Act on Arbitration does not define public policy, however Act No. 97/1963 Coll., on Private International Law and Rules of International Procedure states, that the legal regulation of a foreign state may not be applied if the effects of such an application were contrary to those principles of the social and governmental system of the Slovak Republic and its legal system the compliance with which must be unconditionally insisted upon. The principles may be found in the Slovak constitution, or other legal acts.<sup>53</sup> It is insufficient that the principles are violated, the violation must be of a certain level and intensity and construed narrowly.<sup>54</sup>

## 4 Escalation Clauses

Multi-tiered dispute resolution clauses (or escalation clauses) are a type of clauses by which the parties agree that if a dispute arises between them, they will go through different procedures such as negotiation, mediation or expert determination and then, if necessary, the dispute can

<sup>51</sup> GYÁRFÁŠ, J. et al. *Zákon o rozhodcovskom konaní. Komentár*. Bratislava: C. H. Beck, 2017, pp. 635–658.

<sup>52</sup> Report on the Public Policy Exception in the New York Convention. *IBA Subcommittee on Recognition and Enforcement of Arbitral Award* [online]. [cit. 11.4.2020]. Available at: <https://www.ibanet.org/Document/Default?DocumentUId=C1AB4FF4-DA96-49D0-9AD0-AE20773AE07E>

<sup>53</sup> LYSINA, P. et al. *Medzinárodné právo súkromné*. Bratislava: C. H. Beck, 2016, p. 131.

<sup>54</sup> TOMKO, J. and Z. VALENTOVIC. *Medzinárodné právo súkromné (Všeobecná časť)*. Bratislava: Univerzita Komenského v Bratislave, 1978, p. 99.

escalate to arbitration.<sup>55</sup> Due to the multi-tiered clauses the parties may be obliged to make some effort to settle the dispute amicably, prior to going to arbitration or litigation. If the parties agree to resolve their dispute first in expert proceedings and then escalate the dispute to arbitration, the arbitral tribunal should determine whether the obligation to go through expert determination was satisfied before the submission of request for arbitration. Escalation clauses are frequently used in commercial contracts; however, they may cause issues in practice. An example of a multi-tiered dispute resolution clause combining expert determination and arbitration follows: *“In the event of any dispute arising out of or in connection with [clause X of the present contract], the parties agree to submit the dispute, in the first instance, to administered expert proceedings in accordance with the Rules for the Administration of Expert Proceedings of the International Chamber of Commerce. After the International Centre for ADR’s notification of the termination of the administered expert proceedings, the dispute, if it has not been resolved, shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.”*<sup>56</sup>

If we consider a case, where a dispute between parties is first referred for expert determination under the administration of the ICC, agreed that the findings may be later a matter of arbitration, assuming the parties do not comply with the expert report or no settlement is reached, the dispute escalates to arbitration. Possible issue might be non-compliance with the obligation to settle the dispute amicably in expert proceedings prior to escalation of the dispute. There have been cases in which the courts held that where the parties have agreed upon a procedure of dispute resolution, which has been made a condition precedent for invoking the arbitration clause, then

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<sup>55</sup> PRYLES, M. Multi-Tiered Dispute Resolution Clauses. *Journal of International Arbitration* [online]. 2001, Vol. 18, no. 2, pp. 159–176 [cit. 10. 4. 2021]. Available at: <https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/18.2/336061>

<sup>56</sup> Suggested clauses referring to the ICC Rules for the Administration of Expert Proceedings. *International Chamber of Commerce* [online]. [cit. 10. 4. 2021] Available at: <https://iccwbo.org/dispute-resolution-services/experts/administration-experts-proceedings/suggested-clauses-referring-to-the-icc-rules-for-the-administration-of-expert-proceedings/>

it is required to be followed before filing an application for arbitration.<sup>57</sup> Therefore failure to comply with a mandatory expert determination can be used as a means of challenging the jurisdiction of the tribunal on the basis that compliance is a prerequisite to arbitration. There is no case law available in the Slovak Republic regarding multi-tiered dispute resolution clauses thus their enforceability has not been tested. It can be estimated that the Slovak courts would not see non-compliance with expert determination first as a bar in seeking proceedings due to the prescription of rights. Since the statutory period of limitation begins at the time of *actio nata* – the day that the subjective right could be first exercised in judicial or arbitral proceedings,<sup>58</sup> not filing a request for expert determination and going directly to judicial proceedings or arbitration could be the only way for a party to secure that their claim is not statute barred. Another aspect to consider is the binding effect of the expert report, if agreed, on the arbitral tribunal's decision making.

## 5 ICC Expert Report vs. ICC Arbitral Award

### 5.1 Procedure, Independence, Impartiality and Party Appointment

Expert determination is more favourable in terms of maintaining commercial relationships with the other party, as the procedure is less antagonistic than arbitration.<sup>59</sup> Procedure in expert determination is governed by expert's mission and underlying contract between parties, thus allowing more freedom to adjust procedure according to the needs of parties. ICC Rules of Arbitration provides a more detailed procedural framework, nonetheless, respecting the autonomy of parties the rules may be altered.<sup>60</sup> During both proceedings the parties may interfere with the appointment

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<sup>57</sup> Judgment of the Supreme Court of India of 26 October 2005, *S.B.P. & Co vs. Patel Engineering Ltd. & Anr*, Case No. 4168/2003; Order of Rajasthan High Court of 11 October 2012, *Simpark Infrastructure Pvt. Ltd. vs. Jaipur Municipal Corporation*, Case No. 27/2011.

<sup>58</sup> § 101 Slovak Act No. 40/1964 Coll., Civil Code.

<sup>59</sup> VALASEK, M. and F. WILSON. Distinguishing Expert Determination from Arbitration: The Canadian Approach in a Comparative Perspective. *Arbitration International*, 2013, Vol. 29, no. 1, p. 64.

<sup>60</sup> Art. 19 ICC Rules of Arbitration 2021.

of experts or arbiters and have the ability appoint either experts or arbiters they deem as fitting for their case (i.e., experts/professionals in a given field, or with experience in a certain type of dispute). Interference with the composition of a decision-making body makes these ADR methods more flexible to the needs of the parties. With regards to impartiality and independence of experts, parties are able to agree on waiving these requirements, allowing for more involvement with either party.<sup>61</sup> However, the impartiality and independence of arbiters is considered mandatory under the ICC Rules of Arbitration.<sup>62</sup>

## **5.2 Valid Clause Effect on Judicial Proceedings**

Another aspect to consider is the effect of a valid expert determination or arbitration clause on judicial proceedings in Slovakia. According to Slovak Civil Procedure, the court is only obliged to stop proceedings in case of a valid arbitration agreement (solely based on the objection of the defendant, if the defendant does not object, the court will continue the proceedings regardless of the existence of the arbitration agreement). On the contrary, the binding agreement between parties to refer the dispute to an expert does not have the same effect as an arbitration agreement.

## **5.3 Statutory Period of Limitation**

According to the Slovak Civil Code, if the creditor exercises his right with a court or other competent authority during the limitation period and properly continues in the commenced proceedings, the limitation period shall be tolled from the moment of the exercise during the proceedings.<sup>63</sup> A competent authority other than a court may be an arbitral tribunal, however an expert does not constitute a competent authority for the purposes of suspending the period of limitation. Therefore, choosing expert determination alone may be insufficient for a party to secure their right is not statute-barred. However, by filing a request for arbitration and continuing in the proceedings, the period of limitation is tolled.

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<sup>61</sup> Art. 4 para. 1 ICC Rules of Arbitration 2021.

<sup>62</sup> Art. 11 para. 1 ICC Rules of Arbitration 2021.

<sup>63</sup> § 112 Slovak Act No. 40/1964 Coll., Civil Code.



## 5.4 Liability

Both experts and arbitrators are safeguarded by the respective rules of the ICC and their liability is limited to the extent allowed by applicable law.

## 5.5 Binding Effect and Publicity

While the binding effect of expert reports depends on the will of the parties, the arbitral award's binding nature is compulsory under the ICC Rules of Arbitration. The expert determination is not a public procedure and by extension the final expert report is also not published. As a result, the parties enjoy confidentiality and privacy during expert determination at all stages. Conversely arbitration before the Court has been generally private and the awards were not publicly available. As stated before, the ICC is changing the rules on publishing of awards to facilitate greater transparency in the process of arbitration and the awards can become publicly available, though parties have an option to opt-out or have their data redacted/pseudonymised. Only awards, orders or dissenting and/or concurring opinions may be published, so arbitration proceedings remain predominantly private as opposed to judicial proceedings.

## 5.6 Recognition and Enforceability

Expert determination results in a decision (mostly) on a specific issue of a technical, scientific or related business matter between the parties, the decision may be binding or non-binding on the parties. The binding expert report can be generally enforceable in some jurisdictions, however that is not the case pursuant to the laws of the Slovak Republic. Since enforceability of the expert report is based on national laws that apply to the disputed contract, there is no guarantee of enforcement as there is in case of an award. The party bound by the findings in the expert report can take recourse in judicial or arbitral proceedings and therefore prolong the length of the dispute. In practice, in order to enforce an expert determination in any country, a party must resort to whatever procedure is available to the parties to enforce their respective contractual obligations.<sup>64</sup> The expert report

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<sup>64</sup> VALASEK, M. and F. WILSON. Distinguishing Expert Determination from Arbitration: The Canadian Approach in a Comparative Perspective. *Arbitration International*, 2013, Vol. 29, no. 1, p. 68.

does not receive the advantages under the New York Convention. There is a need for further action if the other party does not comply with the expert report, either in judicial or arbitral proceeding, depending on the jurisdiction of the disputed contract. Whereas the arbitral award is directly recognizable and enforceable domestically in the seat of arbitration or internationally under the New York Convention without any unnecessary burden on the parties. The grounds for challenging the award are limited to jurisdiction, due process and the protection of *ordre public*, thus the award is final, binding and no further remedy is available. The parties should be mindful of enforcement possibilities in the international context.

## 5.7 Res judicata

Though the expert report is binding, it does not constitute *res judicata* and cannot be directly enforced under Slovak law. Nonetheless, when the award is recognized in the Slovak Republic, the award is considered *res judicata* under Slovak law.

## 5.8 Time and Cost

The time for rendering a final award is set at six months from the signature of the terms of reference, but this limit can be extended and as stated, the average duration of the proceeding is 26 months.<sup>65</sup> If the expedited procedure under the EPP applies, the time for rendering an award is 6 months from the date of the case management conference, making arbitration before the ICC significantly faster. As for the overall costs, both methods require the same five thousand USD filing fee, but when comparing a claim in the same amount disputed (e.g., 200 000 USD), expert determination expenses are set significantly lower than the arbitration costs. Expert determination can seem cheaper than arbitration, however the need for subsequent judicial/arbitral proceedings and further costs must be considered. Additionally, when the expedited procedure applies, the costs are reduced quite significantly.

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<sup>65</sup> 2019 ICC Dispute Resolution Statistics. *International Chamber of Commerce* [online]. P. 17 [cit. 28.3.2021]. Available at: <https://iccwbo.org/publication/icc-dispute-resolution-statistics/>

## 6 Conclusion

Alternative dispute resolution mechanisms provided by the ICC are in demand due to their institutionalised nature, procedural economy, resources and professionalism. The involvement of ICC with regard to expert proceedings depends on the service chosen by the parties. Expert determination is used because of the faster, more flexible and cheaper procedure, but the legal consequences of the expert report must be considered on a national level based on applicable law, as there is no international agreement providing for the enforcement of expert reports. Expert determination is a contractual mechanism the final result of which is not protected in the same light as arbitral awards. Arbitration before the Court is more extensive, however arbitral awards benefit from the New York Convention and are more suited for a final, binding and enforceable resolution of the dispute. Parties should consider multi-tiered clauses including expert determination and arbitration as the process of expert determination, if unsuccessful, may prolong the overall time for resolving the dispute with an enforceable award. The applicable law and possible statutory periods of limitation must be contemplated when choosing the right method for dispute resolution.

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