



International Arbitration Alert

22 January 2015

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The New ICC Expert Rules (2015)

I. Introduction

On 14 January 2015, the International Chamber of Commerce International Centre for ADR (ICC) launched its 2015 Expert Rules that set out procedures for the proposal and appointment of experts and neutrals, as well as for the administration of expert proceedings, by the ICC. Below is a short summary of these rules, as well as an outline of some of the more significant differences between these rules and the 2003 ICC Rules for Expertise. In addition, we provide a short commentary on expert rules issued by other institutions and comment on the use of experts in international arbitration generally.

II. Summary of 2015 ICC Expert Rules

The new ICC Expert Rules will come into force on 1 February 2015 and will replace the 2003 ICC Rules for Expertise with three new sets of rules. The new rules clarify the range of expert services offered by the ICC (i.e., proposal, appointment, and administration of expert proceedings) by providing a standalone set of rules for each distinct service:

- ICC Rules for the Proposal of Experts and Neutrals;
- ICC Rules for the Appointment of Experts and Neutrals; and
- ICC Rules for the Administration of Expert Proceedings.

The new rules provide that (unless otherwise agreed) where, prior to the date of entry into force of the new rules, parties had agreed to the proposal or appointment of an expert by the ICC or to refer their dispute to the administration of expertise proceedings pursuant to the 2003 ICC Rules for Expertise, the 2015 Expert Rules will apply. Each set of new rules includes an explanatory preamble that provides examples of circumstances in which parties/tribunals/courts may wish to utilize the services offered. The appointment rules and the administration rules also provide example clauses for inclusion in contracts and detailed guidance for their use.

III. Changes introduced in 2015 ICC Expert Rules

The key changes introduced in the new rules fall into the following broad categories, each of which is considered below: express applicability to neutrals; changes to promote efficiency; and new rules relating to expert or neutral independence and impartiality.



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Neutrals

The proposal rules and the appointment rules now expressly apply to neutrals as well as experts. Situations in which parties may wish to use these services include where they are searching for a mediator, conciliator or dispute board member. It is worth noting that the proposal and appointment of neutrals to act as mediators in on-going ICC arbitration proceedings is offered free of charge by the ICC if the request for the proposal/appointment is made jointly by the parties.

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The new rules include a number of new or amended provisions that appear to be designed to streamline the proposal and appointment processes and encourage the expeditious provision of expert services. These include:

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- Any request for proposal/appointment/administration of expert proceedings must include: a *detailed* description of the work to be carried out by the expert; whether an expert report or site visits will be required; the language in which the expert is to work; and the proposed location of any physical meetings.
- Written notifications or communications from the ICC (appointment rules and administration rules) and the expert (administration rules only) may now be sent by email.
- Before proposal, appointment or confirmation (as applicable), the prospective expert or neutral must sign a statement confirming, among other things, his or her availability to act.
- In addition to considering the expert's availability, in confirming or appointing an expert or neutral, the ICC shall consider the prospective expert's or neutral's ability to conduct the work to be carried out.
- All three sets of rules provide that in circumstances where the ICC is unable to propose/appoint one expert with all the attributes requested by the parties, it may ask the parties whether they wish it to propose/appoint more than one expert (who between them have the requested attributes).
- As regards the administration rules, there is an express requirement that the parties and the expert *"make every effort to conduct the expert proceedings in an expeditious and cost-effective manner."*
- As regards the administration of expert proceedings, in the event of a disagreement between the parties as to the scope of the expert's mandate, the expert may continue with the expert proceedings to the extent that he/she considers that the issues set out in the expert's mission fall within the scope of his/her mandate. The continuation is without prejudice to any determination by an arbitral tribunal or competent court as to the scope of the expert's mandate.

Impartiality and independence

The new rules have also reinforced the duty of impartiality and independence of experts and neutrals. Under all three new sets of rules, the expert or neutral must now not only be "independent," in keeping with the previous rules, but also "impartial." This is clearly set out in the provisions pertaining to the statement the expert or neutral is required to sign before being proposed or appointed by the ICC. Additionally, under the three sets of rules, the request for the proposal or appointment of an expert/neutral or for the administration of expert proceedings must now contain the name and contact details of *"any person or entity relevant for checking potential conflicts of interest of the expert or neutral."* Thus, from the initiation of all types of expert proceedings, the question of independence and impartiality is a key consideration.

The duty of impartiality and independence has also been strengthened in ways specific to each set of rules. In particular, under the ICC Rules for the Appointment of Experts and Neutrals, if a party is not satisfied that the expert or neutral is independent or impartial, it can now file a written objection with the ICC that may lead to the replacement of the expert. The 2003 version of the rules did not contemplate the possibility of a party

objecting to an expert's appointment. Nor did they provide for the replacement of an expert in the context of appointment proceedings; this was only possible when the ICC was administering the expert proceedings.

IV. Other dispute resolution institutions and their rules on experts

The ICC was the first dispute resolution institution to implement a specific set of rules in relation to experts and remains one of the few institutions to have adopted such rules. The majority of other institutions have not published specific rules regarding experts. Some of them, however, offer expert services without having published specific rules to govern such services. Other institutions have included general references to party appointed experts and tribunal appointed experts in their respective arbitration rules. A brief overview of the approaches taken by some of these institutions is set out below:

- The Belgian Centre for Arbitration and Mediation (CEPANI) has adopted specific rules relating to experts (currently being revised) that differ from the ICC Rules in several aspects. In particular, unlike the ICC Expert Rules, the CEPANI rules do not provide for rules pertaining exclusively to the proposal and appointment of experts outside the context of CEPANI administered expert proceedings. Moreover, in contrast to the ICC Rules for the Administration of Expert Proceedings, the CEPANI rules do not provide for a scrutiny process of the expert report.
- The World Intellectual Property Organisation (WIPO) issued an updated version of its Expert Determination Rules last year. Unlike the ICC Expert Rules, there are no specific WIPO Rules that relate solely to the proposal or appointment of experts outside the administration of an expert determination process.
- The Academy of Experts (TAE) and the Institute of Arbitrators & Mediators Australia (IAMA) have also published expert determination rules. Like the WIPO rules, the TAE and IAMA rules do not provide for the proposal or appointment of experts outside the expert determination process.
- The International Centre for Dispute Resolution's (ICDR) International Arbitration Rules allow for an arbitral tribunal to, after consultation with the parties, appoint independent experts to report to it on issues designated by the tribunal and communicated to the parties. The American Arbitration Association's (AAA) Commercial Arbitration Rules allow for the use of expert evidence, but do not contain any specific provisions governing the use of such evidence.
- The London Court of International Arbitration (LCIA) has not published rules relating to experts. However, it acts as an appointing authority and/or administrator in expert proceedings. The LCIA has published draft clauses for these purposes (which include provisions setting out the procedure to be adopted in expert proceedings), which are available on its website.
- Similarly, the Centre for Effective Dispute Resolution (CEDR) does not have specific rules relating to expert services, yet it is able to propose suitable experts from its panel and administer expert determination proceedings.
- As regards the major dispute resolution centres in Asia, neither the Singapore International Arbitration Centre nor the Hong Kong International Arbitration Centre have published rules relating to experts.

V. Use of experts in international arbitration

The proliferation of expert witnesses, while not a new trend in international arbitration, has stimulated increased discussion from practitioners and arbitrators on the value and efficiency of utilizing expert evidence in international arbitrations. Indeed, as recently as 2012, the ICC, in its "Techniques for Controlling Time and Costs in Arbitration," cautioned parties that it "is helpful to start with a presumption that expert evidence will not be required." Despite the ICC's presumption, it is clear that expert evidence has become a staple of international arbitrations. Indeed, a 2012 survey conducted by the School of International Arbitration in London revealed that, on average, expert witnesses are involved in two-thirds of international arbitrations. Interestingly, this survey also revealed that expert witnesses are appointed by parties, rather than the tribunal, in 90% of arbitrations in which expert evidence is utilized.

An emerging trend in international arbitration is the concurrent presentation of expert testimonies, popularly known as "hot-tubbing" or "witness conferencing," whereby experts provide testimony at the same time before the arbitration tribunal. Hot-tubbing is becoming an increasingly common practice in international arbitration

because it encourages an open discussion and allows for the gathering of multiple expert viewpoints at the same time, which can sometimes be useful in complex cases. Additionally, the debate initiated by having experts sit at the same table can help reduce the number of issues on which experts disagree. Although it is an emerging trend in arbitration, it must be noted that some practitioners are reluctant to use hot-tubbing, as they believe that through hot-tubbing more emphasis may be placed on experts' advocacy skills and less on the substance of the technical issues they are being asked to opine on in the dispute.

For the complete set of updated rules, please click [here](#).

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