New Expert Rules launched by the ICC

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The International Chamber of Commerce (ICC) has launched a new set of ICC Expert Rules (the ICC Expert Rules). The ICC Expert Rules came into force on 1 February 2015 and replace the old ICC Rules for Expertise, which have been in force since 1 January 2003. Colin Johnson, Head of International Arbitration in the Forensic team at Grant Thornton UK LLP and Barry Fletcher of LexisPSL discuss the new rules.

What do the new ICC Expert Rules cover?

The ICC Expert Rules explain and clarify how parties to cross-border disputes can use experts and, a new term for the ICC Expert Rules, ‘neutrals’, to assist with the resolution of their disputes. By neutrals, the ICC means mediators, adjudicators, conciliators or dispute board members.

Unlike the ICC Rules for Expertise 2003, the ICC Expert Rules are actually three discrete sets of rules, each covering a distinct area of the ICC’s dispute resolution services:

- proposal of experts and neutrals
- appointment of experts and neutrals, and
- administration of expert proceedings

Each set of rules contains a useful preamble setting out the services that those rules govern. The ICC International Centre for ADR (the Centre) in Paris (as opposed to the ICC Court of Arbitration) will administer the application of the ICC Expert Rules.

Despite the fact that there are now three sets of rules, the changes, overall, represent an evolution of the existing rules, rather than a revolution.


The Guiding Principles

At the London launch of the rules on 21 January 2015, three principles that guided the drafting committee were expounded. Specifically, the drafting committee:

- avoided making changes to the rules ‘for the sake of it’, instead only where changes were necessary
- avoided making ‘improvements to language’ that might be interpreted as suggesting a substantive change where none was intended
- wanted to make the ICC Expert Rules consistent with the ICC Arbitration Rules 2012

Proposal of experts and neutrals—not only for disputes

The first of the three discrete sets of rules are the ICC Rules for the Proposal of Experts and Neutrals (the Proposal Rules).

The procedure for the ICC to propose experts or neutrals in a particular area is intended to apply not only to disputes but also to other matters where parties simply want an expert to opine or a neutral to act but may not know a suitably qualified person/entity.

In summary, the structure of the Proposal Rules is as follows:

- recourse to the Centre (Proposal Rules, art 1)—sets out how to approach the Centre for a proposal and what the Request for Proposal shall include
- the proposal (Proposal Rules, art 2)—contains the Centre’s role in making a proposal of an expert or neutral, which includes a ‘reasonable efforts’ obligation on the Centre when it comes to a proposal. There is also a requirement, before a proposal is communicated to the requesting party, for the expert or neutral to sign a statement of acceptance, impartiality and independence
- costs (Proposal Rules, art 3)—see also Appendix II
- general provisions (Proposal Rules, art 4)—transitional provisions, liability and interpretation
- statutes of the Standing Committee (Proposal Rules, Appendix I)
- costs (Proposal Rules, Appendix II)

Note: each set of rules also provides that for any matter not covered, the Centre shall act in the spirit of the Rules. This gives the Centre a degree of flexibility in interpreting the Rules overall.

The ICC does not appoint an expert or neutral under these rules—that is for the party to manage (Proposal Rules, Preamble and art 2).

In response to a Request for Proposal (Proposal Rules, art 1) the ICC simply ‘proposes’ a person or persons best matching the attributes desired and not desired by the requesting party, as well as the type of work, the location, language and time frame. The Request for Proposal and the ICC’s proposal are not revealed to anybody other than the requesting party unless they ask otherwise except, as would be expected, as needed in order to find the right expert or neutral.

There is also some difference between practice and theory as contemplated by the Proposal Rules. In principle, the rules call for proposal of a single expert. In practice, the ICC will often identify several who meet the requirements and provide several alternative names rather than only one, but this cannot be assumed. The ICC can under the rules also provide more than one name in the circumstances where it cannot find one person meeting all of the requirements, but can identify that two people together could do that (Proposal Rules, art 2).

One interesting point is that the nominated expert can be a legal, as well as a natural person so firms as a whole can be nominated (Proposal Rules, art 4).
The general filing fee for a proposal is US$ 3,000 (Proposal Rules, Appendix II, art 1). It is also possible for the Centre to request an extra fee not exceeding US$ 3,000 per neutral or expert proposed (Proposal Rules, Appendix II, art 2). However, there is no fee if the request for a proposal for an expert or neutral (eg a mediator) is made from arbitrators in a pending ICC arbitration (Proposal Rules, Appendix II, art 3). This is in line with ICC policy seeking to encourage the use of different ICC services and for increased use of mediation.

Appointment rules

The second of the three discrete sets of rules are the ICC Rules for the Appointment of Experts and Neutrals (the Appointment Rules).

In summary, the structure of Appointment Rules is as follows:

- recourse to the Centre (Appointment Rules, art 1) — sets out how to approach the Centre for an appointment and what the Request for Appointment shall include. Note: slightly different information is required depending on whether you seek the appointment of a neutral or an expert
- written notifications or communications (Appointment Rules, art 2) — sets out how notifications and communications under the rules shall be dealt with, as well as a rule on when a notification or communication is deemed to have been made
- the appointment (Appointment Rules, art 3) — contains the Centre’s role in making an appointment of an expert or neutral, which includes a ‘reasonable efforts’ obligation on the Centre when it comes to an appointment. There is also a requirement, before a proposal is communicated to the requesting party, for the expert or neutral to sign a statement of acceptance, impartiality and independence. There is an express obligation on the expert or neutral to be and remain independent and impartial (unless the parties agree otherwise in writing)
- costs (Appointment Rules, art 4) — see also Appendix II
- general provisions (Appointment Rules, art 5) — transitional provisions, liability and interpretation
- statutes of the Standing Committee (Appointment Rules, Appendix I)
- costs (Appointment Rules, Appendix II)

Unlike the Proposal Rules, the appointment of an expert in accordance with the Appointment Rules will be binding on the parties (Appointment Rules, Preamble). This is because the parties must have agreed to use the Appointment Rules, or the Centre must consider that there is sufficient basis for an appointment (Appointment Rules, Preamble). As for the proposed expert, once again, they can be either a physical person or a legal entity (Appointment Rules, art 5.1).

The request for the appointment of an expert shall, as for a proposal, indicate the required expertise, desired and undesired characteristics (including anything that would disqualify them) of the individual(s) or organisation sought to be appointed. It shall also include information on timing, language and location, as well as enclosing a copy of the agreement under which appointment is requested (Appointment Rules, art 1.2(c)). For a neutral, similar information is required, but rather than field of expertise, it is the description of the dispute and the proceeding the neutral is sought to assist with that shall be included in the request (Appointment Rules, art 1.2(d)).

If the request is not made by all parties it will be forwarded to the other parties for comments (Appointment Rules, art 1.4). Where the Centre cannot locate one expert/neutral meeting all of the required criteria, it may propose an appointment of more than one person/entity acting jointly (Appointment Rules, art 3.2).

Before an appointment, the expert or neutral is required to complete a mandatory statement of acceptance, availability, impartiality and independence in which they have to highlight any facts or circumstances which might call into question the independence or impartiality (Appointment Rules, art 3.4).

Under the Appointment Rules, there is the ability (upon payment of a US$ 3,000 fee) to object in writing to the expert as not fulfilling the required criteria or not being independent or impartial.

The involvement of the ICC generally ends with the appointment. However, an expert can also be replaced by the Centre upon a written objection by any party once the Centre has also considered the observations of the expert or neutral and the other party/parties (Appointment Rules, art 3.5 and Appendix II, art 4).

The cost of an appointment under these rules is US$ 3,000, or half that if the proposal is of an expert previously proposed by the Centre (Appointment Rules, art 4.6). If appointment is of a mediator in the context of an existing ICC arbitration there is no charge (Appointment Rules, Appendix II, art 3).

Administered expert proceedings

The third of the three discrete sets of rules are the ICC Rules for the Administration of Expert Proceedings (the Administration Rules).

In summary, the structure of the Administration Rules is as follows:

- recourse to the Centre (Administration Rules, art 1) — sets out how to make a Request for expert proceedings and what it shall contain
- written notifications or communications (Administration Rules, art 2) — sets out how notifications and communications under the rules shall be dealt with, as well as a rule on when a notification or communication is deemed to have been made
- selection of the expert (Administration Rules, art 3) — details how the Centre selects an expert in the absence of a joint nomination by the parties
- continued impartiality and independence (Administration Rules, art 4) — details the expert’s continued duty of impartiality and independence and also how an expert may be replaced
Do the Expert Rules apply to me?

If the parties have agreed to the proposal of an expert or neutral under the ICC Rules for Expertise 2003 prior to 1 February 2015, they shall be deemed to have agreed to make their request pursuant to the new ICC Expert Rules, unless any of the parties objects, in which case the 2003 rules will apply (Proposal Rules, art 4.2). Identical provision is made in the Appointment Rules (art 5.2) and Administration Rules (art 14.2).

For any proposal, appointment or administration sought on or after 1 February 2015, the ICC Expert Rules 2015 will apply.
How does the Centre select experts?

The ICC confirmed that when it comes to selection of experts, there is no specific central, or closed, list. Rather, they will seek out experts for each individual mandate. However, there is an open database of experts which the ICC keeps based on information that experts provide it with and ICC national committees may also keep a list. Any expert wishing to be considered should therefore contact their national ICC committee to submit their profile/CV and should also submit it to the Centre in Paris.

Any search starts with the standing committee, then goes to national committees and then the open database.

The Standing Committee

There is a standing committee on expertise which can have up to fifteen members but is currently comprised of four lawyers and two experts. Key roles of the committee are to advise the Centre concerning all aspects relating to the Rules and to scrutinise expert reports. The constitution and function of the standing committee is discussed in Appendix I to each set of rules.

The suggested clauses

Within each set of rules there are a number of ‘suggested clauses’ which can be modified and inserted into agreements as needed depending upon exactly what is required. The clauses are ‘suggested’ rather than ‘model’ to reflect the need for the clauses to be tailored to the particular needs of the parties.

There are four suggested clauses for the Administered Rules. Suggested clause D, for example, provides for an obligation to submit a defined dispute to non-binding administered expert proceedings followed by ICC arbitration (if required), and addresses the specific issue of emergency arbitration.

Conclusions

As stated above, the revised ICC Expert Rules represent evolution rather than revolution, but the new rules provide more helpful explanations, useful suggested clauses, they now explicitly apply to neutrals, and they explicitly allow for appointment of legal entities as well as individuals.

Note: this article is prepared to provide an overview of the new Expert Rules of the ICC rather than a fully comprehensive statement of all rules. Any party interested in the area should read the full text of the new Rules. No liability is accepted by Grant Thornton UK LLP as a result of this article.
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Colin specialises in international arbitration where his background as an emerging markets investment manager and a project financier and involvement in projects in over 30 countries is used extensively in evaluation of claims. He specialises in international disputes relating to energy and infrastructure projects.

- He acted as expert on behalf of a national government in relation to its defence of a multi-billion dollar claim by a bankrupt oil and gas company.
- He acted as expert on behalf of the claimants in an ICSID claim against the Government of Tanzania on a power plant claim in excess of US$200 million.
- He acted on behalf of the claimant in relation to a US$400 million solar energy related claim.
- He acted as expert witness on behalf of the Government of Nigeria in its defence of a US$250 million claim, advising particularly in relation to the project financing aspects of the transaction.
- He acted on behalf of the Government of India in its defence of the US$6 billion Dabhol power plant claim.
- Acted as expert witness for a contractor defending a multi-million dollar breach of contract claim in relation to a roads project in Eastern Europe.

Colin also has significant investigation experience including using his various languages such as Spanish and Portuguese.

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