



Experts in International Dispute Resolution: The ICC's Rules for Expertise

ICC Expertise

The ICC's Rules for Expertise came into force on 1 January 2003 ("the Rules"). The Rules recognise that experts with particular knowledge in technical, legal, financial and other fields may well be used in a variety of situations. One of these could of course be to complement an international commercial arbitration. The Rules are, however, complementary to three services provided by the ICC:

1. the proposal of experts;
2. the appointment of experts; and
3. the administration of expertise proceedings.

The ICC is in a unique position as its network of 90 national committees around the world provides the ICC with direct links to government and business worldwide. The ICC therefore has access to a network of experts in a wide range of fields internationally. The ICC's International Centre for Expertise ("the Centre") is assisted by a Standing Committee. The Standing Committee comprises a chairman, two vice-chairmen and eight further members, for a three-year renewable term. These individuals are drawn from around the world, thus adding to the international perspective of the ICC.

The Rules for Expertise are divided into five main sections:

1. Section I: General Provisions
2. Section II: Proposal of Experts
3. Section III: Appointment of Experts
4. Section IV: Administration of Expertise Proceedings
5. Section V: Miscellaneous.

The General Provisions describe the three distinct processes offered by the ICC as follows:

The International Centre for Expertise (the "Centre") is a services centre of the International Chamber of Commerce (ICC). The Centre can perform one or more of the following functions in connection with domestic or international business matters:

- a. Proposal of experts

Upon the request of any physical or legal person(s) or any court or tribunal (a "Person"), the Centre can provide the name of one or more experts in a particular field of activity, pursuant to Section II of these Rules. The Centre's role is limited to proposing the name of one or more experts. The Person requesting a proposal may then contact directly the proposed expert, and, as the case may be, agree with such expert(s) on the scope of the appropriate mission and fees. There is no obligation to make use of the services of an expert proposed by the Centre. The proposal of an expert may be useful in many different contexts. A person may require an expert in connection with its ongoing business activities or in connection with contractual relations. A

party to an arbitration may wish to obtain the name of a potential expert witness. A court or arbitral tribunal which has decided to appoint an expert may seek a proposal from the Centre.

b. Appointment of experts

The Centre will appoint an expert, pursuant to Section III of these Rules, in situations where the parties have agreed to the appointment of an expert and have agreed to use the Centre as the appointing authority or where the Centre is otherwise satisfied that there is a sufficient basis for appointing an expert. In such cases the appointment by the Centre shall be binding on the parties. The Centre's role is limited to appointing the expert in question,

c. Administration of expertise proceedings

When the parties have agreed upon the administration of expertise proceedings by the Centre or when the Centre is otherwise satisfied that there is sufficient basis for administering expertise proceedings, the Centre will administer the proceedings pursuant to Section IV of these Rules.

The final section V Miscellaneous deals simply with waiver, exclusion of liability and the General Rule. If a party proceeds without raising an objection, then Article 15 states that that party has deemed to have waived its right to object. Article 16 provides an exclusion of liability for the expert, the Centre, the ICC, the ICC's employees and the ICC national committees. The General Rule requires the Centre and the experts to act within the spirit of the ICC's Rules.

The three substantive sections of the Rules deal with:

1. Proposal of experts
2. Appointment of experts
3. Administration of expertise proceedings.

Each of the procedures are considered below.

Proposal of experts

Anyone may ask the Centre to propose one or more experts. The proposal must include:

1. The name, address, telephone and fax numbers and email address of each person making the request for a proposal;
2. A statement that the person is seeking a proposal of an expert by the Centre;
3. A description of the field of activity of the expert to be proposed, together with any desired qualifications. This should include but not be limited to education, language skills, professional experience, but should also set out any undesired attributes;
4. A description of any issues that might disqualify a potential expert; and
5. A description of the work to be carried out by the expert and the desired time frame for concluding the work.

The Centre will make a proposal through an ICC national committee or perhaps direct. The Centre then has no further involvement.

The person requesting the proposal must make a non-refundable payment for each expert. Currently that fee is US\$2,500 for each expert.

The Centre, when selecting an expert for proposal, will consider the

information provided in the request and will then try to match a prospective expert's qualifications to the particular circumstances of the case. The Centre will also take into account the expert's availability, normal place of residence and language skills.

A prospective expert is required by the Centre to sign a statement of independence and also to make disclosure in writing of any facts or circumstances that might call into question that expert's independence.

Appointment of experts

The Centre will also appoint experts. This will only be done where the parties have agreed that an appointment of an expert is to be made by the Centre, or where the Centre is otherwise satisfied that there is sufficient basis for appointing an expert.

Any person may therefore make a request, providing that it can be demonstrated that the parties have agreed that there should be a joint appointment. It could therefore, be an agent acting on behalf of the parties, or one of the parties acting for both of them or, alternatively, the tribunal based upon an agreement of the parties. Either party may agree after the arbitration has commenced, or the Rules may provide that the tribunal can appoint an expert.

The request for an appointment requires the same details as for a proposal, but, in addition, a copy of the parties' agreement or other foundation for the basis of the request must also be provided to the Centre. If a request is made by only one of the parties, then the Centre will send a copy of the request to the other party and request observations within a limited time.¹ The Centre will then proceed on the observations, or if no observations are received within the time limit, the Centre will proceed to make an appointment in any event.²

Once again, the appointment is made either through the ICC National Committee or directly. The expert must once again be independent and is required to disclose facts or circumstances that might call into question the expert's independence.

A non-refundable fee is payable to the Centre when making the request.³ A fee is payable for each request.

Administration of expert proceedings

The purpose of the administration of expert proceedings by the Centre is to provide a non-binding written recommendation of an expert. The expert is appointed and is required to determine the issues, in consultation with the parties, and set out the basis of their "mission" to a timetable. The mission of the expert may change as more information becomes available, but the role of the expert is nonetheless to provide a written non-binding recommendation.

A request to the Centre requires the same information as for a proposal.

A non-refundable fee is paid for the request for each expert, and in addition a deposit is required which is likely to cover the administrative expenses of the Centre and the fees and expenses of the expert. The Centre will determine the amount of the deposit, but the parties are able to calculate the likely amount by visiting the ICC's website. The Centre will not proceed until the fee and the deposit has been paid.

On the conclusion of the proceedings or termination of the proceedings, the parties are required to pay any excess. Payment must be made before notification of the expert's final report.

1 Article 5.5
2 Article 5.6
3 Article 8

The Centre's administration of the expert proceedings is set out at Article 9.5, and includes:

- a. co-ordination between the parties and the experts;
- b. initiating the appropriate steps to encourage the expeditious completion of the expert proceedings;
- c. supervising the final aspects of the proceedings;
- d. appointment of an expert using the procedure referred to in Section III or confirmation of an expert agreed to by all parties;
- e. review of the form of the expert's report;
- f. notification of the expert's final report to the parties; and
- g. notification of the termination of the expert proceedings.

The expert's mission

Article 12 of the ICC Rules for Expertise sets out the requirements for the expert's "mission". The expert is effectively identifying the scope of the work to be carried out by them. Article 12.1 is set out in the following terms:

The expert, after having consulted the parties, shall set out the expert's mission in their written document. That document shall not be inconsistent with anything in these Rules and shall be communicated to the parties and to the Centre. Such document shall include:

- a. the names, addresses, telephone and facsimile numbers and e-mail addresses of the parties;
- b. a list of issues to be treated in the expert's report;
- c. the name(s), address(es), telephone and facsimile numbers and e-mail address(es) of the expert or (experts);
- d. The procedure to be followed by the expert and the place where the expertise should be conducted; and
- e. a statement indicating the language in which the proceedings will be conducted.

Modifications to the expert's mission may be made by the expert, in writing, only after full consultation with the party. Any such modifications shall be communicated to the parties and to the Centre.

The expert is, therefore, to identify the issues to be covered in the expert's report. The procedure for investigating those issues, and no doubt any tests or analysis that may be required, are also to be identified. Article 12 recognises that modifications may be required once further information becomes available, but those modifications require the agreement of the parties.

Article 12.2 requires the expert to identify a provisional timetable for the conduct of the expertise proceedings. Modifications to the timetable must be communicated to the parties and to the Centre.

The expert's mission, therefore, requires the expert to take charge of the proceedings, identify the issues, set out a procedure and timetable and then work to it. Modifications to the issues or procedures must be agreed with the parties, while adjustments to the timetable need only be communicated to the parties, but must also be communicated to the Centre.

The expert's findings are to be set out in a written report. The report should be delivered within the timetable, and of course must only deal with the issues

identified in the mission.

The parties must be given the opportunity to be heard and/or make written submissions before the expert produces their final written report.⁴ Article 12.3 states that:

unless otherwise agreed by all of the parties, the findings of the expert shall not be binding upon the parties.

All of the information given to the expert by the Centre or disclosed during the course of the proceedings is to be treated as confidential.⁵ However, the expert's report is to be admissible in any judicial or arbitral proceedings that involve the same parties.⁶

The expertise proceedings are administered by the Centre. As a result, under Article 12.6, once the final draft report is prepared, it is sent to the Centre before it is signed. The Centre will review it and may require modifications to be made. The report is therefore not to be communicated to the parties by the expert. The expert does not have any power to sign the report until the Centre has approved the report.

Once the Centre has approved the report, the expert may sign it and provide sufficient copies to the Centre to allow for one copy for each party and then one for the Centre to retain. The Centre will then serve the report on the parties and notify the parties that the expert proceedings are concluded.

The Centre can waive the requirement of Article 12(6) if requested by the parties and the Centre considers that a waiver is appropriate in that particular case.

There are two important duties placed upon the parties under Article 13.

First, non-participation will not deprive the expert of the power to make findings and render a report. If the report is non-binding, then the non-participation of a party will most likely make the process of little use. However, if the parties have already agreed that the report is to be binding then, depending upon the other dispute resolution procedures in the contract, the expert's findings may be enforceable. This is not an entirely straightforward area. Much will depend upon the dispute resolution procedures in the contract, and the applicable law.

Second, by agreeing to the ICC Rules, the parties have agreed that they will provide documents and adhere to the expert's report. Importantly, they also agree to facilitate the implementation of the expert's mission and to provide free access to the "place" so that the expert can carry out a proper investigation.

Conclusion

The ICC's Rules for Expertise provide for a variety of situations, from a mere proposal to a fully administered expert appraisal. The ICC is the only truly international business-focused organisation in the world that is able to offer and support such a system.

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4 Article 12.3
5 Article 12.5
6 Article 12.4