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Using Experts in International Arbitration: Different Circumstances, Different Rules

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International Arbitration Seminar

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New ICC Expert Rules

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Earlier this year, the International Chamber of Commerce (the "ICC") enacted new Expert Rules.

- These rules replace the ICC's 2013 "Rules for Expertise."
- The procedures for appointing experts and presenting expert testimony vary widely.
- In light of arbitration's hybrid nature, it is not uncommon to find a mix of common and civil law practitioners working within the same dispute resolution proceeding, whether as advocates or decisionmakers. In civil law jurisdictions, independent experts are typically appointed by the court, while in common law jurisdictions, experts are typically party-appointed.
- Occasionally, either an international arbitration tribunal will bring on an independent, tribunal-appointed expert to assist it in resolving conflicts between opposing party-appointed experts, or the parties will jointly appoint an independent expert.

New ICC Expert Rules (cont'd)

Earlier this year, the International Chamber of Commerce (the "ICC") enacted new Expert Rules.

- Even beyond appointment, procedures for expert presentation range from traditional direct and cross-examination to expert conferencing or "hot-tubbing" wherein all of the experts involved in a matter meet to discuss issues. In expert conferences, generally, the experts are allowed to ask each other questions, as are the tribunal and opposing counsel.
- So long as experts remain separate from the tribunal (unless explicitly appointed to the panel), and are available for questioning by the parties in some form, the tribunal has broad discretion to determine appropriate procedures for a given dispute.

New ICC Expert Rules (cont'd)

In an effort to maintain this flexibility, in three separate sets of rules, the ICC clarifies its services and rules with respect to:

1. Proposing Experts and Neutrals (Proposal Rules): At the request of a court, a tribunal, a party or the parties jointly, the ICC will make non-binding proposals for experts or neutrals. "Neutrals" may include adjudicators, mediators, neutral evaluators or dispute board members. This service is available even outside of the context of a dispute: "[p]arties might wish to obtain an expert opinion on an issue of importance to them in the ordinary course of business." For assistance in a dispute resolution proceeding, a party can unilaterally request an expert or neutral proposal. The ICC will not inform other parties of unilateral requests unless explicitly asked to do so. Under the Proposal Rules, the ICC's involvement ends with the delivery of the proposal. The ICC does not charge fees for expert or neutral mediator proposals for cases administered by the ICC.
2. Appointing Experts and Neutrals (Appointment Rules): In the context of a dispute resolution process, parties may request that the ICC appoint experts or neutrals. ICC appointments are binding and the ICC's involvement ends upon completion of the appointment process. Experts appointed by the ICC serve as jointly appointed or tribunal-appointed experts. Unless the parties agree otherwise, any appointed expert is to act as an independent expert. The ICC will only appoint an expert under these rules if there is a clear agreement between the parties that allows for such an appointment.

New ICC Expert Rules (cont'd)

In an effort to maintain this flexibility, in three separate sets of rules, the ICC clarifies its services and rules with respect to:

3. Administering Expert Proceedings (Administrative Rules): Parties may enlist the ICC to supervise the entire expert process in a dispute resolution process. The ICC will appoint experts or confirm party-nominated experts, coordinate between the parties and experts, monitor deadlines, oversee costs, and scrutinize the draft expert report (if requested by the parties). Expert findings may be used to inform parties when negotiating settlements or, by agreement of the parties, may treat expert determinations as contractually binding.

The New Rules are Designed to Increase Efficiency

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- The majority of the revisions in the new Expert Rules are aimed at increasing the efficiency of the proposal and appointment processes. For example:
- The ICC maintains a database of experts and neutrals to draw from. Expert topics include accounting, finance, engineering, information technology, construction, energy and law. Parties and arbitrators occasionally find themselves in circumstances where the laws of an unfamiliar jurisdiction apply, thus requiring outside legal expertise.
- Any requests for ICC services under the rules must be accompanied by detailed information, including a description of the expert work needed, whether a report or meetings will be required and the language in which the expert is expected to work.
- Any potential expert or neutral (the ICC may identify a person or an institution) must confirm in advance availability to serve.

The New Rules are Designed to Increase Efficiency

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- Where the ICC is unable to find a single suitable expert, the rules allow the ICC to ask the parties whether they would consider the proposal or appointment of multiple experts who, together, have the necessary qualifications.
- If, after an expert is selected, the parties cannot agree on what the expert is supposed to do, the rules allow the expert to continue working on whatever that expert deems to be included within the scope of the expert's mandate, without prejudice to a tribunal's later determination about the appropriate scope.
- The ICC has not lost sight of cost issues presented by the increasing inclusion of experts in international arbitration. The Administrative Rules specifically caution parties and tribunals to "make every effort to conduct the expert proceedings in an expeditious and cost-effective manner." In its 2012 Techniques for Controlling Time and Costs in Arbitration, the ICC cautioned against ramping up expert-related costs by stating that it helps to "start with the presumption that expert evidence will not be required."

The New Rules are Designed to Increase Efficiency

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- The Appointment Rules and the Administrative Rules include suggested language for inclusion in arbitration clauses for circumstances where parties agree up front to use these ICC services.
- Parties operating under the ICC's 2013 Rules for Expertise for the proposal or appointment of an expert prior to the enactment of these new Expert Rules shall be deemed to have agreed to the operation of the new rules, unless any party objects. If a party objects, the old rules shall apply.
- You can view the ICC's Expert Rules in English, French or Spanish at http://www.iccwbo.org/News/Articles/2015/New-ICC-Expert-Rules-come-into-force/

Unique Aspects of Selecting Expert in International Arbitration

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- International Arbitration employs a wider range of appointment and selection methods (e.g., party-appointed v. arbitrator-appointed experts).
- Beyond typical expertise, like damages experts, international arbitrations often involve unique industry or foreign law expertise.
- Other unique expert selection considerations:
  1. Arbitrations are generally confidential so it can be difficult to track down an expert's previous work for review prior to selection.
  2. Lawyers should consider cultural aspects, like the decision-maker's background, when selecting experts.

Unique Aspects of Presenting Experts in International Arbitration

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- International Arbitration employs a wider range of expert presentation methods (e.g., expert conferencing).
- Experts are generally not allowed to provide live direct testimony at evidentiary hearings. Consider asking the arbitrator to exercise his or her discretion to allow expert presentations before cross-examination.
- Evidentiary rules are relaxed in arbitrations so take advantage of technology or demonstratives in presenting experts.

- Relaxed procedural and evidentiary rules are characteristic of international arbitration. As a result, there is a limited ability for early dismissal of junk claims and junk experts.

- There are no *Frye* or *Daubert* proceedings to eliminate unqualified experts early.

  The *Daubert* standard provides rules of evidence regarding the admissibility of expert witnesses' testimony during U.S. federal legal proceedings. Pursuant to this standard, a party may bring a motion in limine raised before or during trial to exclude the presentation of unqualified evidence to the jury. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). See also, *Frye v. United States*, 293 F. 1013 (1923) (providing standard regarding admissibility of experts used by a number of state courts).

- In extreme examples we've seen experts create valuation methodologies without citing to any academic or professional literature to support them.

- Consider the *Yukos v. Russia* arbitration decisions. The Tribunal in that case was criticized heavily for adopting damages models that contained obvious errors. The expert created three different models (comparable companies, DCF, and comparable transactions). The tribunal rejected two of the models (the comparables), but consider whether those rejected models should ever have been the subject of the final hearing? See *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227.

Questions

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- To learn more about ICC-YAF, please visit: http://www.iccwbo.org/training-and-events/young-arbitrator-forum/

- Additional questions?
  Please email Jean Shim at jshim@mayerbrown.com and your questions will be promptly forwarded to the speakers.