


EFFECTIVE MANAGEMENT OF ARBITRATION

A Guide for In-House
Counsel and Other Party
Representatives



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EFFECTIVE MANAGEMENT OF ARBITRATION

A Guide for In-House Counsel and Other Party Representatives

The purpose of this guide is to provide in-house counsel and other party representatives, such as managers and government officials, with a practical toolkit for making decisions on how to conduct an arbitration in a time- and cost-effective manner, having regard to the complexity and value of the dispute. The guide can also assist outside counsel in working with party representatives to that effect.

Reflecting the ICC's continuing efforts to provide arbitration users with means to ensure that arbitral proceedings are conducted effectively, the guide focuses on time and cost issues in the management of arbitration. While strategic considerations are of great importance in any arbitration and will have a significant impact on its management, they tend to be case-specific and are beyond the scope of this guide.

While the guide was conceived with the ICC Rules of Arbitration in mind, most of its contents, as well as the dynamic generated by it, can be used in any arbitration. The guide can be useful for both large and small cases.

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INTRODUCTION

Arbitration is a dispute resolution mechanism that provides diverse users worldwide with a neutral forum, a uniform system of enforcement and the procedural flexibility that allows parties to tailor-make a procedure to suit their needs in each case. With a joint commitment to efficient management by parties, outside counsel and arbitral tribunals, it can achieve a time- and cost-effective resolution of a dispute. Without that commitment, the opposite can be true: the very flexibility of arbitration can lead to increased time and cost.

As arbitration has become more complex and the scrutiny of dispute resolution mechanisms has intensified, users have expressed the concern that arbitration is often too long and too expensive. One user has queried why a bridge can be built in one or two years but an arbitration to determine responsibility for delays and defects can take as long as three to four years. In light of the concerns of users, the ICC decided to address time- and cost-efficiency in arbitration head-on.

As a first step, in 2007, the ICC Commission on Arbitration (as it was then known) published its report on controlling time and costs in arbitration. Prior research covering a wide range of ICC cases had showed that on average:

- 82% of the costs of an arbitration were party costs, including lawyers' fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration;
- 16% of the costs covered arbitrators' fees and expenses; and
- 2% of the costs covered ICC administrative expenses.

It followed that, to minimize costs, special emphasis needed to be placed on reducing the costs connected with the parties' presentation of their cases. The report developed a series of suggested concrete measures for each phase of the arbitration that can be used to reduce time and cost.

EFFECTIVE MANAGEMENT OF ARBITRATION INTRODUCTION

Then, in 2009, the Commission began its revision of the ICC Rules of Arbitration. The revised Rules came into force on 1 January 2012.* One of the guiding principles for the revision was to improve the time- and cost-efficiency of arbitration. Among the provisions directed to that end is the requirement of an early case management conference during which the parties and the tribunal can establish an appropriate, time- and cost-effective procedure for the arbitration. The suggestions in the 2007 report, many of which are now included as an appendix to the Rules, may be used for that purpose.

The present guide is a continuation of that effort and is designed to help party representatives implement the new provisions and make appropriate decisions for effective case management. The guide will also assist outside counsel in working with party representatives to ensure well-planned and well-managed proceedings.

As noted above, arbitration rules permit flexibility and do not specify precisely how an arbitration is to be conducted. For example, there is nothing in the ICC Rules of Arbitration about the number of rounds of briefs, document production, the examination of witnesses, oral argument, post-hearing memoranda or bifurcation. The open-ended nature of the Rules enables the parties and the arbitral tribunal to tailor-make an effective procedure that suits the needs and particularities of each case. However, when studying the matter, the Commission came to the conclusion that too often the parties and tribunals do not tailor-make the procedure at an early stage, but rather apply boilerplate solutions or simply decide procedural matters piecemeal as the case progresses. This was found to increase time and cost in many arbitrations. Under the new case management provisions in Articles 22–24 of the Rules, which are specifically designed to address that problem, the process of tailor-making the procedure has now become a formal requirement.

* Those Rules have since been further revised to include, among other things, an expedited procedure for lower-value cases. Effective as of 1 March 2017, the newly revised Rules can be downloaded from the ICC website (www.iccwbo.org). In this guide, references to the Rules have been updated, where necessary.

Tailor-making the procedure so that the arbitration will be faster and cheaper is not inherently difficult to accomplish. The parties can agree upon faster and cheaper procedures and, failing their agreement, the arbitral tribunal has the power to determine such procedures after consultation with the parties. This will normally be done at the first case management conference. What is more challenging is determining the appropriate level of process and resources to match the value and complexity of the case. It is faster and cheaper to have one round of briefs rather than three, or to hold a three-day rather than a three-week hearing, but an extended opportunity to be heard will necessarily be given up. It is less expensive and less burdensome to present a witness by videoconference, but perhaps also less persuasive. The goal of each party is to present its case in a manner that is most likely to persuade the arbitral tribunal to find in its favour. The time and cost that a party should be willing to devote to that end will vary according to the importance, complexity and value of the dispute. For each phase of the arbitration, cost/risk/benefit decisions have to be made.

Appropriate time and cost decisions can be made when party representatives have a collaborative relationship with outside counsel and actively participate in the making of those decisions. Each party best knows its own internal processes, the value of the underlying transaction and what is ultimately at stake. It is the party's case, the party's risk and the party's money, so the party itself is in the best position to decide what level of risk to accept and what strategic decisions to make. Outside counsel can assist in reaching such decisions on the basis of an informed evaluation of the pros and cons of the available alternatives. In addition, arbitral tribunals play an important role by bringing their experience to bear in devising cost-effective procedures and encouraging all of the parties to assist in conducting the arbitration in an expeditious and cost-effective manner, as contemplated by Article 22(1) of the Rules.

CASE MANAGEMENT CONSIDERATIONS

As a general matter, party representatives should consider the following when managing an arbitration:

Early case assessment. Much time and cost can be saved by not litigating matters with low chances of success, or that are not worth the cost/time/distraction to its personnel. This should be analysed before an arbitration has begun; however, case assessment should also continue during the arbitration.

Maintaining realistic schedules. Setting up of a realistic schedule for the entire arbitration as early as possible and sticking to that schedule, unless there are serious reasons for not doing so, are essential to controlled and predictable proceedings. Parties will be able more accurately to foresee the date of the award and make appropriate financial plans. The arbitral tribunal also has an important role in establishing and maintaining a realistic schedule.

Establishing a tailor-made and cost-effective procedure. Using this guide, party representatives along with outside counsel can determine optimum procedures from the party's perspective. The question then is how to implement those procedures. First, one party may consult with the other party with a view to reaching agreement on the applicable procedures. Any such agreement must be applied pursuant to Article 19 of the Rules. If the parties cannot agree on one or more of the procedures, each can present its position to the arbitral tribunal prior to or during the case management conference. The arbitral tribunal will decide after hearing the parties.

Awareness of settlement procedures. Settlement procedures such as mediation, neutral evaluation and direct settlement discussions can occur at any time before or during an arbitration. As an arbitration progresses, views on the case and parties' needs may change, affecting the desirability and nature of a potential settlement. New facts may come to light, a partial award may be rendered, management changes may occur, and new perspectives in relations between the parties may emerge. The parties should continually reassess their case and determine whether, at any given point in time, there is an opportunity for a meaningful settlement.

STRUCTURE OF THE GUIDE

This guide is composed of three main parts, each of which is designed to assist in making effective time and cost decisions for an arbitration: first, a discussion of settlement considerations; second, a discussion of the case management conference; and third, a series of eleven topic sheets.

Each topic sheet deals independently with a specific step in the arbitration process where cost/risk/benefit decisions need to be made. The topic sheets are not intended to cover every aspect of an arbitration; rather, they are designed to provide a methodology for decision-making. They may also serve as a tool to assist in making appropriate decisions on each topic. The following topics are covered:

- Request for arbitration
- Answer and counterclaims
- Multiparty arbitration
- Early determination of issues
- Rounds of written submissions
- Document production
- Need for fact witnesses
- Fact witness statements
- Expert witnesses
- Hearing on the merits
- Post-hearing briefs

Each topic sheet is designed to serve as an executive summary and follows a standard format consisting of a series of separate sections. The first section presents the topic and identifies the issue(s); the second section sets out the options available to the parties for that topic; the third section discusses the pros and cons of the different options; the fourth section analyses the different choices from a cost/risk/benefit perspective; and the fifth section lists useful questions that will help to focus on the key decisions that need to be made. The list of questions could, for example, serve as a basis for discussion between party representatives and outside counsel regarding the choices that need to be made for that particular phase of the arbitration. Where useful, a final section contains other general points to consider.

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The topic sheets are not prescriptive and do not provide any definitive answers but rather contain suggestions that can be used to stimulate discussion and decision-making. It is the hope of the Commission that these topic sheets will help in taking the appropriate cost/risk/benefit decisions that need to be made in order to conduct an expeditious and cost-effective arbitration, having regard to the complexity and value of the dispute.

SETTLEMENT CONSIDERATIONS

A negotiated settlement of the dispute can save a great deal of time and cost, and parties would be well advised to maintain focus on the availability of settlement opportunities before and throughout an arbitration. The case management techniques listed in Appendix IV (h) to the ICC Rules of Arbitration indicate that the arbitral tribunal may inform the parties that they are free to settle all or part of the dispute at any time and, where agreed with the parties, may take steps to facilitate a settlement, subject to enforceability considerations under applicable law.

WHETHER OR NOT TO SETTLE

This is a complex question that will depend on each individual case. It is necessary to weigh the chances of success in an arbitration against a series of factors including the costs, burden and distraction caused by the proceedings and the time required to obtain the result. The choice may be affected by matters of principle or the need to eliminate financial or other uncertainties. Additional considerations include:

Preservation of relationships. Parties to an arbitration may have an ongoing relationship which they wish to preserve. Settlement may support that relationship better than litigating the dispute.

Difficulties of enforcement. If a claimant anticipates difficulties in enforcing an arbitral award against a particular respondent, it should factor that difficulty into its assessment of the strength of its case. When enforcement is uncertain, a settlement for a lower amount may be appropriate.

Reasons not to settle. Various factors may militate against settlement. For example, a claimant may wish to obtain a precedent or guidance from a tribunal for use in future cases or may consider that a given settlement offer does not match the chances of success in an arbitration. A respondent may prefer not to settle in order to discourage other potential claimants from seeking a settlement or because it is concerned that a settlement may be interpreted as an admission of liability.

EFFECTIVE MANAGEMENT OF ARBITRATION SETTLEMENT CONSIDERATIONS

Importance of confidentiality. A settlement may be preferable to an arbitration that is not confidential. ICC arbitration proceedings will not be confidential unless the parties have so agreed, the tribunal has so ordered or applicable law so requires.

METHODS OF SETTLEMENT

If the parties have decided to explore settlement, various methods are available to them. They may seek a settlement on their own, with the assistance of counsel or with the assistance of a mediator pursuant to the ICC Mediation Rules. Recourse to the Mediation Rules may be based on an agreement between the parties or a unilateral request by one party subsequently accepted by the other. While providing for mediation, the ICC Mediation Rules also allow the parties to choose any other settlement method that may be better suited to their dispute. Settlement methods that can be used under the ICC Mediation Rules include:

Mediation. The neutral acts as a facilitator to help the parties arrive at a negotiated settlement of their dispute. The neutral is not requested to provide any opinion on the merits of the dispute.

Neutral evaluation. The neutral provides a non-binding opinion or evaluation on any of a wide variety of matters including issues of fact or law, technical questions or the interpretation of a contract.

Mini-trial. A panel consisting of the neutral and an authorized executive of each party hears presentations by the parties, after which either the panel or the neutral can mediate the dispute or express an opinion on the merits.

A combination of methods, such as mediation with a neutral evaluation on a particular issue.

The report of an expert, selected pursuant to the ICC Rules for the Administration of Expert Proceedings to make findings on a disputed matter, may help to facilitate settlement. However, unlike a neutral evaluation and unless the parties agree otherwise, the expert's report will be admissible in judicial or arbitral proceedings if no settlement is reached.

CASE MANAGEMENT TECHNIQUES

The parties and their counsel should keep in mind that even where settlement is not feasible before or at the outset of an arbitration, the arbitration can be managed in such a way as to facilitate settlement throughout the proceedings. Appendix IV to the ICC Rules of Arbitration highlights several case management techniques that can be used to that end:

Bifurcation. In appropriate cases, a partial award on jurisdiction or liability may facilitate settlement. For example, if the arbitral tribunal decides that it has jurisdiction, the parties will know that the arbitration will go forward. This could prompt them to discuss settlement. Similarly, if the tribunal finds a party to be liable, the parties may prefer to settle the issue of damages rather than incur the time and expense of completing the arbitration.

Early consideration of controlling issues. In some cases there are issues of law, fact or a mixture of fact and law, which necessarily affect the determination of the claims in the arbitration, yet can be resolved independently at relatively little expense. Examples include the determination of the applicable law, statute of limitations, the interpretation of a particular contractual provision, the determination of a key fact or technical issue or the measure of damages. The parties may find it easier to arrive at a settlement after such issues have been resolved by the tribunal.

Engagement of the arbitral tribunal. Where the parties agree and the applicable law permits, the arbitral tribunal can actively facilitate settlement either by encouraging the parties to pursue one of the settlement methods described above, or through discussions with the parties.

CREATIVITY AND OPEN-MINDEDNESS

Arbitrations often take on a life of their own once the parties have developed their positions and incurred costs. Parties and their counsel should keep in mind that a settlement can occur at any time during an arbitration and that the ICC Rules of Arbitration encourage the parties to explore this possibility. When exercising their will and their creativity in seeking a settlement, parties often arrive at solutions that are unavailable through arbitration.

CASE MANAGEMENT CONFERENCE

The case management conference provides the mechanism for determining the manner in which the arbitration will be conducted. If it is not possible to determine the entire procedure at the first case management conference, the remaining issues may be decided at a subsequent conference. The decisions made at the case management conference can be modified during the course of the arbitration by agreement of all of the parties or, failing such agreement, by a decision of the arbitral tribunal.

Article 24(1) of the ICC Rules of Arbitration requires the arbitral tribunal to convene an early case management conference to consult the parties on the conduct of the arbitration. Thereafter, pursuant to Article 22(2) of the Rules, the arbitral tribunal may adopt procedural measures for the conduct of the arbitration, provided that they are not contrary to any agreement of the parties. Article 22(1) requires the arbitral tribunal and the parties to make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

Issues to be decided include: the number of rounds of briefs; the extent of document production, if any; the early determination of issues; fact and expert witnesses; and the conduct of the hearing, if any. The topic sheets contained in this guide are designed to assist the parties, along with their counsel and the arbitral tribunal, in making appropriate choices for the conduct of the arbitration.

In practice, after receiving the case file, the arbitral tribunal may invite the parties to make case management proposals. If it does not do so, the parties can seek to agree between themselves upon the conduct of the proceedings. If they arrive at an agreement, it must be followed, subject to any proposals of the arbitral tribunal that are accepted by all of the parties. If the parties do not reach an agreement, the arbitral tribunal, after listening to the parties, will adopt procedural measures that it deems to be appropriate for the case at hand.

EFFECTIVE MANAGEMENT OF ARBITRATION CASE MANAGEMENT CONFERENCE

While Article 22(1) of the Rules refers to expeditious and cost-effective proceedings, it also makes clear that speed and low cost are not ends in themselves. The complexity and value of the dispute must be taken into account. A cost-effective and expeditious arbitration will be one in which the time and cost devoted to resolving the dispute is appropriate in light of what is at stake. In each case, it is necessary to make a cost/benefit analysis in order to see whether a particular procedural measure is cost-justified.

The objectives of the parties will play a crucial role in making such choices. Some examples of how parties' goals may translate into case management strategy are set forth below:

- When an important matter of principle is at stake, it may be worth the time and expense needed for a thorough examination of the facts and a full articulation of all legal arguments. A party with this objective may be willing to incur the expense of more extensive document production, multiple rounds of written submissions, a larger number of fact and expert witnesses, and the like.
- When neither an important principle nor great sums are at stake, parties may wish the arbitration to be as inexpensive and rapid as possible. Here, in contrast, parties may seek to limit document production, limit the number of witnesses, shorten hearings or minimize submissions.
- When parties wish to settle the case, for example in order to maintain their relationship or mitigate the risk of loss, they may use the case management conference to seek bifurcation of the proceedings or an early determination of controlling issues, the resolution of which might facilitate settlement. The parties may also agree to undertake settlement procedures either before or during the remaining phases of the arbitration.

TOPIC SHEETS

- 1.** Request for Arbitration
- 2.** Answer and Counterclaims
- 3.** Multiparty Arbitration
- 4.** Early Determination of Issues
- 5.** Rounds of Written Submissions
- 6.** Document Production
- 7.** Need for Fact Witnesses
- 8.** Fact Witness Statements
- 9.** Expert Witnesses (pre-hearing issues)
- 10.** Hearing on the Merits (including witness issues)
- 11.** Post-Hearing Briefs

1. REQUEST FOR ARBITRATION

PRESENTATION

An ICC arbitration is commenced by the filing of a Request for Arbitration with the Secretariat of the ICC International Court of Arbitration (Article 4 of the ICC Rules of Arbitration). In all cases, the Request must contain the information required by Article 4(3) of the Rules. That provision is intended to elicit sufficient information to enable the respondent to respond to the claimant's claims, as required by Article 5(1) of the Rules, and for the International Court of Arbitration to fulfil its functions under the Rules with respect to the constitution of the arbitral tribunal and the setting in motion of the arbitration.

Issue: Should the Request contain only the minimum requirements of the Rules or provide a more elaborate statement of the case?

OPTIONS

A. File a short Request that satisfies the Rules without providing any more content or evidence than is strictly required by the Rules.

B. File a comprehensive Request that constitutes a full statement of the case, including exhibits.

The above options represent two ends of a spectrum. However, there is also the option of filing a Request that provides a level of content and evidence anywhere between those two ends.

PROS AND CONS

A shorter and less comprehensive Request can be prepared more economically and more quickly than a more comprehensive document.

On the other hand, a more comprehensive Request may avoid the need for multiple rounds of subsequent submissions and thereby help to expedite the arbitration. In addition, providing more information may increase the impact of the Request on the respondent. Additional detail may also enable the parties and the

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1. REQUEST FOR ARBITRATION

arbitral tribunal to focus on the key issues in the case as early as possible and thereby facilitate the drawing up of the Terms of Reference and the conduct of the case management conference.

COST/BENEFIT ANALYSIS

In all circumstances, the claimant should seriously consider conducting an early assessment of the nature, strengths and weaknesses of its case before filing a Request. This will allow it to determine, in the first instance, whether the claims are sufficiently strong to warrant bringing the arbitration or whether it would be better to seek a settlement of the dispute. If it decides to proceed with the arbitration, the early case assessment will help to ensure that the Request does not contain errors and that the claimant's claims are correctly described and set forth in the most effective manner. While this assessment requires some time and expenditure, it typically results in a saving of both over the arbitration as a whole.

If the claimant decides to proceed with the arbitration, it must determine whether to file a shorter or longer Request. The decision on how comprehensive the Request should be will be heavily influenced by the circumstances of the case and strategic considerations. Some time and cost may be saved by drafting a shorter Request although this may be a temporary saving if the claimant is ultimately required to supplement such a Request with additional detailed information. When the Request and the Answer respectively constitute a full statement of the case and a full statement of defence, time and cost can be saved by avoiding one or more further rounds of submissions. However, in complex cases this may not be possible, and the Request and Answer may be ultimately superseded by subsequent written submissions.

If a primary purpose for filing a Request is to elicit settlement discussions, consideration should be given to whether this is best accomplished with a shorter or a longer Request. A shorter Request may be preferable if the respondent is unlikely to discuss settlement unless an arbitration has been commenced and the substantive aspects of the claim would be best dealt with in the

settlement discussions. A longer Request may be preferable if the goal is to show the respondent in writing the strengths of the claimant's case before commencing settlement discussions.

QUESTIONS TO ASK

1. What is the desired result of filing the Request (e.g. triggering settlement discussions or having the dispute resolved by arbitration)?
2. Are there any valid reasons for not conducting an early case assessment?
3. Are there any real cost savings in filing a shorter Request? Would they be outweighed by the benefits of filing a longer Request for any of the reasons described above?
4. Are there any other strategic or legal considerations that may affect the timing of the filing of the Request and consequently whether it should be shorter or longer?

OTHER POINTS TO CONSIDER

In certain cases, questions of timing may militate in favour of a shorter Request. For example, a Request may need to be filed quickly to avoid being barred by a statute of limitations. A Request may also have to be filed within ten days of receipt by the Secretariat of an application for emergency measures pursuant to Article 1 of the Emergency Arbitrator Rules (Appendix V to the Rules).

Pursuant to Article 23(4) of the Rules, after the Terms of Reference have been established, no new claims may be made without the authorization of the arbitral tribunal. It is therefore prudent for the claimant to make all of its claims prior to the signing of the Terms of Reference.

Article 5(6) of the Rules provides that the claimant shall submit a reply to any counterclaim raised by the respondent pursuant to Article 5(5) of the Rules. The topic sheet relating to the Answer and counterclaims offers guidance on this matter.

2. ANSWER AND COUNTERCLAIMS

PRESENTATION

The respondent is required to file an Answer to the Request for Arbitration with the Secretariat (Article 5 of the ICC Rules of Arbitration). In all cases, the Answer must contain the information required by Article 5(1) of the Rules. The Answer may contain a counterclaim pursuant to Article 5(5) of the Rules.

Issue: How detailed or extensive should the Answer and any counterclaim be, above and beyond what is required by the Rules?

OPTIONS

A. File a short Answer that satisfies the Rules without providing any more content or evidence than is strictly required by the Rules.

B. File a comprehensive Answer that constitutes a full statement of defence, including evidentiary exhibits.

The above options represent two ends of a spectrum. However, there is also the option of filing an Answer that provides a level of content and evidence anywhere between those two ends.

In deciding on the appropriate length of the Answer, the respondent should consider whether or not to match the length and level of detail chosen by the claimant. Specifically, the respondent may choose between the following options:

- a) File an Answer that reflects the approach taken by the claimant (e.g. a shorter or a longer document).
- b) File an Answer in a form that is different from the form of the Request filed by the claimant.

C. Assert a counterclaim, irrespective of the length and content of the Answer. The raising of a counterclaim is subject to considerations similar to those described in the topic sheet on the Request for Arbitration.

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2. ANSWER AND COUNTERCLAIMS

PROS AND CONS

The pros and cons of filing a shorter or a longer Answer may vary depending on the form of the Request filed by the claimant. If the claimant has filed a shorter Request and the respondent reciprocates with an equally short Answer, the arbitration should be able to proceed more expeditiously to the Terms of Reference and the case management conference, in part because the respondent is less likely to need an extension of time for filing the Answer pursuant to Article 5(2) of the Rules. On the other hand, if the claimant files a longer and more detailed Request, then the respondent may be required to seek an extension of time in order to respond with a detailed Answer.

A shorter and less comprehensive Answer can be prepared more economically and more quickly than a more comprehensive document.

If the claimant has filed a comprehensive Request and the respondent decides to file a comprehensive Answer, this may avoid the need for multiple rounds of subsequent submissions and thereby expedite the arbitration.

In addition, providing more information may increase the impact of the Answer. Additional detail may also increase the ability of the parties and the arbitral tribunal to focus on the key issues in the case as early as possible and thereby facilitate the drawing up of the Terms of Reference and the conduct of the case management conference.

COST/BENEFIT ANALYSIS

To the extent possible in the time available, the respondent should conduct an early assessment of the nature, strengths and weaknesses of its case before filing an Answer. This will allow it to determine, in the first instance, whether the case should be defended or whether settlement should be pursued. If the respondent decides to defend the arbitration, and possibly assert counterclaims, the early case assessment will help to ensure that the Answer does not contain errors and that the respondent's defence and/or counterclaims are correctly described and set forth in the most effective manner. While this assessment

requires some time and expenditure, it typically results in a saving of both over the arbitration as a whole.

An additional consideration for the respondent is the limited amount of time available under the Rules for making an early case assessment and filing its Answer. If the respondent has prior knowledge of the dispute, then it may be able to undertake an early case assessment before receiving the Request for Arbitration. If, on the other hand, the receipt of the Request for Arbitration is the respondent's first real opportunity to assess the claimant's claims, the time available to it under the Rules for this purpose will be limited.

Depending on the circumstances described above, the respondent must decide whether to file a shorter or a longer Answer. The decision on how comprehensive the Answer should be will be heavily influenced by the circumstances of the case, strategic considerations and the limited time available for submitting the Answer under the Rules. Some time and cost may be saved by drafting a shorter Answer although this may be a temporary saving if the respondent is ultimately required to supplement such an Answer with additional detailed information.

If the claimant has filed a full statement of the case in its Request and if in the time available it is possible to file a full statement of defence in the Answer, time and cost can be saved by avoiding one or more rounds of further submissions. However, this may not be possible in complex cases.

Consideration should be given to whether filing a shorter or a longer Answer might facilitate settlement discussions. A shorter Answer may be preferable if the substantive aspects of the settlement would best be dealt with in negotiations and there is a reasonable prospect of a settlement. A longer Answer may be preferable if the goal is to show the claimant in writing the strengths of the respondent's defence and any counterclaims for purposes of settlement discussions.

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2. ANSWER AND COUNTERCLAIMS

QUESTIONS TO ASK

1. Are there any real cost savings or any other advantages in filing a shorter Answer? Would they be outweighed by the benefits of filing a longer Answer for any of the reasons described above?
2. Is there sufficient time to conduct an early assessment of the defence and file the Answer within the 30 days specified in the Rules, or is it necessary to request an extension of time for filing the Answer pursuant to Article 5(2)?
3. Are there any serious counterclaims that can and should be raised in the arbitration? Should they comply with only the minimum requirements set out in the Rules or be more detailed and accompanied by evidentiary exhibits?

OTHER POINTS TO CONSIDER

Pursuant to Article 23(4) of the Rules, after the Terms of Reference have been established, no new claims may be made, without the authorization of the arbitral tribunal. It is therefore prudent for any counterclaims to be made by the respondent prior to the signing of the Terms of Reference.

If the respondent wishes to join an additional party pursuant to Article 7(1) of the Rules, it must be careful to do so within the time limits specified in that Article.

If there are serious objections to jurisdiction, the respondent may consider keeping the Answer short with respect to the merits.

3. MULTIPARTY ARBITRATION

PRESENTATION

Under the ICC Rules of Arbitration, an arbitration having more than two parties may occur when all of the parties have so agreed. Multiparty arbitrations may result from various procedural choices:

- A claimant may commence an arbitration pursuant to Article 4 of the Rules against two or more respondents.
- Two or more claimants may commence an arbitration pursuant to Article 4 of the Rules against one or more respondents.
- Before the confirmation or appointment of any arbitrator, any party may join another party to the arbitration pursuant to Article 7 of the Rules.
- Upon any party's request, two or more pending arbitrations may be consolidated into a single arbitration by the Court, subject to the requirements of Article 10 of the Rules.

Issue: When is it beneficial to choose a multiparty arbitration?

OPTIONS

- A. A single arbitration that includes all relevant parties when they have all so agreed.
- B. Two or more separate arbitrations.

PROS AND CONS

A single multiparty arbitration, when possible, results in more comprehensive proceedings and avoids duplication. It also avoids the risk of conflicting decisions in separate arbitrations.

On the other hand, a single multiparty arbitration may result in more complex proceedings, which could increase the length and cost of the arbitration. For example, a party with a small role in the dispute may not wish to participate in a multiparty arbitration and could

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3. MULTIPARTY ARBITRATION

refuse to do so in the absence of a binding arbitration agreement. Further, in an arbitration where there is to be a three-member arbitral tribunal, choosing to have more than two parties in the arbitration may deprive the parties of their ability to choose a co-arbitrator, because the ICC International Court of Arbitration may decide to appoint the entire tribunal pursuant to Article 12(8) of the Rules.

COST/BENEFIT ANALYSIS

Consideration should be given to whether a single multiparty arbitration, as opposed to two or more separate arbitrations, would save time and money. While a single arbitration will usually be more cost-efficient, there could be situations in which separate arbitrations may still be the more efficient option for one or more parties.

If a single multiparty arbitration is the more time- and cost-efficient option, the parties should consider whether the time and cost benefits outweigh any of the potential disadvantages, such as the risk of losing the opportunity to choose a co-arbitrator because the International Court of Arbitration may find it necessary to appoint the arbitral tribunal pursuant to Article 12(8) of the Rules.

Another important factor to consider in deciding whether a single multiparty arbitration would be beneficial is the contractual role of each party and the specific interests flowing from that role. Arbitration of your dispute with one party may weaken your position with respect to another party. Where, for example, parties share potential liability with respect to their contractual counterparty, it may be tactically imprudent for them to have their internal disputes heard in the arbitration with the contractual counterparty, since their allegations against each other may support the counterparty's case against them.

4. EARLY DETERMINATION OF ISSUES

PRESENTATION

Issue: In what circumstances would it be beneficial to break out certain issues for early determination by the arbitral tribunal in a partial award?

Various kinds of issues lend themselves to such treatment:

First, there may be threshold issues that could be dispositive of the entire arbitration. Such issues might include:

- whether the tribunal has jurisdiction over the dispute;
- whether the dispute is barred by an applicable statute of limitations;
- whether there is liability;
- whether the dispute is arbitrable;
- whether the parties have capacity to sue or be sued.

For example, were a tribunal to decide that it lacks jurisdiction over the entire dispute, that would result in a final award dismissing all claims made in the arbitration. If the tribunal decides that it has jurisdiction, that decision would result in a partial award and the arbitration would continue, unless the tribunal's decision leads to a settlement. The same pattern would apply, *mutatis mutandis*, to the other examples given above.

Second, there may be discrete issues which could be usefully broken out and decided in a partial award, even though their resolution would not be dispositive of the entire arbitration. The early resolution of a particular issue may narrow or simplify the issues to be decided in the remainder of the arbitration or may facilitate settlement. Such issues may include:

- a decision on the meaning of a contractual provision;
- a decision on the applicable law;
- a decision on certain key facts in dispute;

EFFECTIVE MANAGEMENT OF ARBITRATION

4. EARLY DETERMINATION OF ISSUES

- a decision on an issue that may significantly affect a party's exposure to one or more claims, such as determination of the types of recoverable damages.

For example, a decision on applicable law may save the parties from having to incur time and cost pleading their case on the basis of alternative applicable laws. The same analysis applies to the other examples above.

OPTIONS

- A. Do not break out any issues for early determination.
- B. Break out one or more issues for early determination by means of an award.

PROS AND CONS

The early determination of one or more issues in a partial award may resolve the entire dispute, simplify the remainder of the arbitration or facilitate settlement. However, if the award does not achieve one of those objectives, the early determination procedure may result in added time and cost. In addition, breaking out a discrete issue rather than having it decided along with the other issues may affect the way the tribunal decides one or more of the issues.

COST/BENEFIT ANALYSIS

Breaking out issues that could be dispositive of the entire arbitration

A cost/benefit analysis of this question is complicated by the fact that the decision has to be made in the face of important unknowns. When deciding whether or not to break out an issue, the parties cannot know what the arbitral tribunal's decision will be. For example, in a case involving issues of liability and damages, if the issue of liability is broken out and the tribunal decides that there is no liability, a great deal of time and cost will be saved since there will be no need to exchange briefs and hold hearings on damages. On the other hand, if the tribunal finds that there is liability, unless such finding encourages the parties to settle the case, there will have to be a damages phase, and the breaking out of the issue of liability may then actually add to the overall time and cost of the proceedings.

Given these unknowns, the cost/benefit analysis must turn on an appreciation of probabilities and an estimate of potential cost. In deciding whether to break out an issue, it may be useful to estimate likely outcomes as well as time and cost in answer to certain specific questions:

- What is the likelihood that the tribunal's decision will be dispositive of the entire arbitration?
- If the tribunal's decision will not be dispositive of the entire arbitration, what is the likelihood that the tribunal's early determination of the issue may result in a settlement of the case?
- What is the added time and cost likely to result from early determination of the issue in comparison with the likely overall cost, i.e. how much more time and cost would there be if the arbitration were conducted in two parts rather than one?

The answers to these questions can help in deciding whether or not to break out an issue for early determination. The following factors would tend to favour the breaking out of an issue for early determination:

- the likelihood of a dispositive determination is high;
- the likelihood of a settlement, even if there is no dispositive determination, is high;
- the remaining phases are likely to be long and expensive;
- the additional cost caused by early determination is low.

A decision on whether to break out an issue can be made by weighing these factors in relation to each other.

Breaking out issues in a partial award not dispositive of the entire arbitration

A similar type of cost/benefit analysis would apply here, although the relevant questions are slightly different:

- What is the likelihood that the tribunal's early determination of a particular issue will significantly narrow or simplify the other issues to be decided in the remainder of the arbitration?

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4. EARLY DETERMINATION OF ISSUES

- What is the likelihood that early determination of a particular issue may result in a settlement of the case?
- What is the additional time and cost likely to result from early determination of a particular issue?

Once again, weighing the answers to those questions against each other can help in deciding whether it is beneficial to break out a particular issue for early determination.

QUESTIONS TO ASK

1. Does the case contain any threshold or discrete issues that could be determined in a separate award?
2. Would the early determination of those issues by the arbitral tribunal be beneficial, in light of the cost/benefit analysis discussed above?
3. Would early determination (a) potentially resolve the entire dispute, (b) facilitate settlement or (c) simplify the rest of the arbitration?

OTHER POINTS TO CONSIDER

Article 38(5) of the Rules permits the arbitral tribunal, when allocating the costs of the arbitration, to take into account the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner. The arbitral tribunal might allocate some amount of costs against a party that loses in the early determination of a potentially dispositive issue if that party is considered to have acted in bad faith or otherwise not to have acted in an expeditious and cost-effective manner.

There may be logistical reasons for breaking out one or more issues for early determination, such as the availability of witnesses, hearing facilities, counsel or arbitrators. In addition, it may allow a complex case to be conducted in a more orderly manner.

There may be compelling reasons for deciding certain issues early in an arbitration, e.g. whether claims made under different arbitration agreements may be heard together in a single arbitration. The breaking out of an issue for decision in a partial award could be agreed upon by the parties or determined by the arbitral tribunal in the absence of an agreement by the parties.

5. ROUNDS OF WRITTEN SUBMISSIONS

PRESENTATION

An ICC arbitration is commenced by the filing of a Request for Arbitration (Article 4 of the ICC Rules of Arbitration). Thereafter, the respondent files an Answer (Article 5). If the Answer contains a counterclaim, the claimant files a reply (Article 5). The Terms of Reference for the arbitration are then established (Article 23).

Issue: How many subsequent rounds of written submissions are appropriate in a particular arbitration?

OPTIONS

- A. No further written submissions are necessary, since the Request and the Answer sufficiently state the case.
- B. One subsequent round of written submissions.
- C. Two or more subsequent rounds of written submissions.
- D. Post-hearing briefs (assuming there is a hearing).

PROS AND CONS

Additional rounds of written submissions enable the parties to articulate their positions more extensively and respond to the developing arguments on each side.

However, additional rounds of briefs may lead to unnecessary repetition, excessive detail or dilatory tactics.

COST/BENEFIT ANALYSIS

Each round of written submissions increases the length and cost of the arbitration. It is therefore essential to determine whether, in a particular case, the benefits of an additional round are worth the extra time and cost.

Additional submissions may be particularly useful in certain cases, e.g. where there are complicated issues of fact or law or issues of strategic importance for a party. In such cases, it is very common to have two rounds of pre-hearing written submissions after the initial submissions.

QUESTIONS TO ASK

1. Does the case justify the extra time and cost caused by additional written submissions?

And, in particular,

2. Are additional rounds of submissions genuinely useful or necessary for a party to make its case to the arbitral tribunal, and if so, why?

3. What is the estimated cost of such additional rounds?

4. Is the benefit worth the cost, and if so, why?

OTHER POINTS TO CONSIDER

Consider limiting the number of pages of written submissions.

Consider limiting the scope of such submissions, e.g. to issues raised by the other side in its immediately preceding submission.

Consider having the arbitral tribunal indicate issues on which it wishes the parties to focus in any further round of submissions.

Consider whether any subsequent rounds of submissions should be simultaneous or sequential. For example, it may be efficient for post-hearing briefs to be filed simultaneously.

Consider whether post-hearing briefs are genuinely useful or necessary, or whether one round of pre-hearing briefs and one round of post-hearing briefs are sufficient.

The foregoing suggestions could be put into effect either through an agreement between the parties or in an order from the arbitral tribunal upon a party's request.

6. DOCUMENT PRODUCTION

PRESENTATION

Document production can involve substantial time and cost. Obviously, every party may unilaterally submit documents to support its case. Document production refers to the extent to which one party may demand that another party produce documents.

The ICC Rules of Arbitration contain no specific provisions governing document production. Article 19 of the Rules allows the parties to agree upon the procedures to be applied and empowers the tribunal to decide in the absence of an agreement of the parties. Article 22(4) requires the arbitral tribunal to ensure that each party has a reasonable opportunity to present its case. Article 25(1) provides that the arbitral tribunal shall establish the facts of the case by all appropriate means and Article 25(5) allows it to summon any party to provide additional evidence.

In short, the Rules leave the question of whether and how much document production will occur to the parties and the arbitrators, provided that the parties are treated fairly and impartially and that each party has a reasonable opportunity to present its case. When document production is to occur, the manner in which the process is executed and the degree of production can have a significant impact on time and cost.

In-house counsel or other party representatives, working with outside counsel, should consider whether and to what extent document production is genuinely useful and cost-beneficial. When document production is to occur, time and cost can be significantly reduced by establishing an efficient document production procedure.

Issue: Is document production desirable and, if so, how much document production should there be?

OPTIONS

Options range from no document production at all to full document production.

EFFECTIVE MANAGEMENT OF ARBITRATION

6. DOCUMENT PRODUCTION

A. No document production.

- The parties may decide to seek no documents from each other and to rely solely on the documents each of them possesses.
- The parties are always free to submit their own documents.
- The parties are also free to request the arbitral tribunal to order the production of specific documents.

B. Production limited to specific documents or narrow categories of documents, which are relevant and material to deciding an issue in the arbitration.

Consider using:

- the IBA Rules on the Taking of Evidence in International Arbitration (“IBA Rules”) as a standard;
- the suggestions in the report of the ICC Commission on Arbitration and ADR entitled “Controlling Time and Costs in Arbitration”;
- the report of the ICC Commission on Arbitration and ADR entitled “Managing E-Document Production”.

C. Broad document production as used in some common law jurisdictions.

- The parties may agree upon broad requests for documents.
- In rare cases, the parties may agree to common law style “discovery” including depositions and/or interrogatories.

When document production is to occur, the parties may agree upon the ground rules for requesting documents from and producing documents to each other.

If the parties cannot agree on whether to have document production or on the extent of document production or the ground rules for such production, the tribunal will decide.

PROS AND CONS

Document production can be very expensive and time-consuming and the broader the document production the more expensive and time-consuming it

tends to be. It requires time and expenditure from the party that searches for and produces documents as well as from the party that must study and analyse the documents that are produced.

On the other hand, if one of the parties has sole possession of documents needed by the other party, document production may be essential. Moreover, document production can provide the parties and the tribunal with a more complete understanding of the case. Given that parties are unlikely to submit documents spontaneously when they are detrimental to their own case, document production puts them under an obligation to do so.

COST/BENEFIT ANALYSIS

In view of the time and cost required for document production, a cost/benefit analysis is necessary in order to decide whether to seek document production at all and, if so, to determine the desired extent of such production. The parties should explore whether they can effectively meet their burden of proof with the documents that are already in their possession and whether the other side is likely to have documents that are genuinely useful for the first party to make its case.

Each party should then estimate the extra time and cost caused by document production and weigh this against the likelihood that document production will genuinely assist it in making its case. For example, if document production is estimated to cost USD 500,000 and it is considered that there is at best a 10% chance that it will yield valuable results, the question arises as to whether that 10% chance is worth the expense of USD 500,000. This is a decision that can best be made jointly by the party, typically represented by in-house counsel, and outside counsel. Many factors may come into play, such as the amount in dispute, whether there are policy issues, whether there is concern about precedent and whether the benefit of obtaining documents from the other side may be outweighed by the detriment of being required to produce documents oneself.

EFFECTIVE MANAGEMENT OF ARBITRATION

6. DOCUMENT PRODUCTION

QUESTIONS TO ASK

1. Are any requests for document production genuinely useful or necessary for a party to make its case or can the party rely effectively on the documents in its possession?
2. What extent of document production is genuinely useful and necessary?
3. When should document production occur?
4. What is the estimated cost of searching for and producing documents, as well as the cost of reviewing and analysing documents that have been produced?
5. Is the benefit of document production worth the cost, and if so, why?

OTHER POINTS TO CONSIDER

Consider whether it is appropriate to deal with document production in the arbitration clause, for example by agreeing that there will be no document production (e.g. in contracts where it is relatively certain that document production will not assist in resolving potential disputes); by agreeing to limited document production in accordance with the IBA Rules; or by agreeing to broad document production or “discovery”.

Consider whether document production should occur once or more than once. Consider whether it should occur prior to or after written submissions.

Consider whether it is appropriate to limit documents transmitted to the arbitral tribunal to a manageable quantity.

Take into account any costs of translation when estimating the cost of document production.

Consider the ground rules to be adopted for implementing document production, including the use of a Redfern Schedule and the setting of the shortest reasonable time frames for production.

Special considerations may be needed if the parties agree upon or the tribunal orders the production of electronic documents. In such cases, the report of the ICC Commission on Arbitration and ADR entitled “Managing E-Document Production” can be used to assist in choosing the most efficient methods of e-document production.

7. NEED FOR FACT WITNESSES

PRESENTATION

Article 25(1) of the ICC Rules of Arbitration requires the arbitral tribunal to establish the facts of the case by all appropriate means. This can include the hearing of fact witnesses. Article 25(3) of the Rules specifically allows the arbitral tribunal to decide to hear witnesses. However, Article 25(6) allows the arbitral tribunal to decide the case solely on documents, unless a party requests a hearing. This would permit an arbitration with no hearing and no fact witnesses.

Issue: Is there a genuine need for fact witnesses?

OPTIONS

A. No fact witnesses at all.

B. One or more fact witnesses.

- Identify the issues on which fact witness testimony is necessary.
- Identify the appropriate fact witnesses for the issues.

PROS AND CONS

Fact witnesses can be essential to proving a case. However, they significantly increase the length and cost of an arbitration, since there will typically be one or more written witness statements for each witness and the oral testimony of each witness may be required at a hearing.

COST/BENEFIT ANALYSIS

Fact witnesses may be genuinely necessary in order to prove disputed facts or to present a broader picture of the circumstances surrounding the dispute. In determining whether fact witnesses are needed, the following issues can be considered:

- Are there any disputed facts? It may appear from the pleadings that there are disputed facts, but it may turn out after discussion between the parties that those facts are not really disputed. In addition, a party may agree not to contest certain disputed facts in order to save time and cost when the dispute over those facts is not sufficiently important.
- If there are disputed facts, are they relevant and material for deciding an issue in the dispute? There is no need to incur the extra time and cost involved in having a fact witness testify on disputed facts that will not affect the determination of an issue in the dispute.
- If there are disputed facts that are relevant and material, can they be proved by documents alone or do they genuinely need to be proved through fact witnesses?
- Is it useful to call fact witnesses to make a general presentation on the circumstances of the dispute?

When a party has decided to use fact witnesses, time and cost can be reduced by avoiding having many witnesses testify as to the same facts and by carefully focusing the scope of the testimony of each witness.

QUESTIONS TO ASK

1. Is there a genuine need for fact witnesses at all?
2. If so, who should they be? What should be the scope of their testimony? How many fact witnesses are genuinely necessary to establish a particular fact or present the circumstances of the case?

OTHER POINTS TO CONSIDER

Consider using videoconferencing for oral witness testimony to save time and cost.

Consider what is the most effective way of examining the fact witnesses at a hearing: e.g. direct examination and cross-examination; opening presentation by the witness followed by cross-examination; use of the witness's written statement as a substitute for direct examination and proceeding straightaway with cross-examination; questioning of fact witnesses by the tribunal only or by the tribunal followed by questions from counsel.

Determine whether it is preferable for a given witness to testify in the language of the arbitration or in his or her native language. When a witness is testifying in a language other than the language of the arbitration, appropriate translation will often need to be arranged, which will increase time and cost.

8. FACT WITNESS STATEMENTS

PRESENTATION

Issues arising when a party has decided to present fact witness evidence: Should witness statements be submitted? What should their scope be? When should they be submitted?

OPTIONS

Form

- A. No written witness statements.
- B. Brief summary of the scope of witness evidence (witness summary).
- C. Full witness statements.

Scope of full witness statements

- A. Lengthy and comprehensive statement.
- B. Short statement limited to key factual issues in dispute.

Number and timing

- A. One or more rounds of witness statements.
- B. Witness statements submitted with written submissions.
- C. Witness statements submitted following the exchange of written submissions.
- D. Witness statements submitted simultaneously or sequentially.

PROS AND CONS

Form

Written witness statements increase the length and cost of the pre-hearing phase, but can reduce the length and cost of the hearing by replacing direct examination and allowing for a more focused cross-examination. The absence of witness statements, or the submission of witness summaries only, will reduce pre-hearing costs but can increase the length and cost of the hearing.

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8. FACT WITNESS STATEMENTS

Scope

Comprehensive witness statements can be a valuable part of case presentation, allowing witnesses to tell the story of the dispute and place documentary evidence in its context. However, lengthy witness statements will increase time and cost as well as the scope of cross-examination.

Number and timing

More than one round of witness statements provides witnesses with the opportunity to rebut the evidence of other witnesses, but will increase time and cost prior to the hearing.

Submitting witness statements with the written submissions provides direct proof of the facts at the time they are alleged. It also allows the parties to identify and progressively narrow down the factual issues, which may make for shorter, more targeted submissions later.

Submitting witness statements only after the exchange of written submissions may allow the parties to narrow down the factual issues in dispute before preparing and submitting witness statements, which may consequently be more focused on the disputed issues.

COST/BENEFIT ANALYSIS

While witness statements can provide valuable evidence in support of a party's position, they can add significantly to time and cost. The importance of the evidence to be presented must therefore be weighed against the time and expense required to present it. For example, if alternative sources of evidence are available (e.g. contemporaneous documentary evidence), there may be no cost justification for providing a witness statement on those facts. Similarly, if a witness is submitting a statement on a given fact, the submission of another witness statement evidencing the same fact may not be cost-justified, particularly if the fact is of little importance.

Full witness statements require more work and are therefore more expensive to prepare than witness summaries. However, they may subsequently save time and cost during a hearing by obviating the need for lengthy direct examination of the witness at the hearing.

The case management techniques set out in Appendix IV to the Rules include limiting the length and scope of written witness evidence so as to avoid repetition and focus on key issues. In line with Appendix IV, parties may wish to consider how to structure their fact witness evidence as efficiently as possible.

QUESTIONS TO ASK

1. In light of the other sources of evidence available, is the preparation of a given witness statement justified in terms of time and cost?
2. Is a witness statement required to prove a disputed question of fact or provide necessary background information? Is more than one witness statement necessary to accomplish this? Is there a good reason not to limit the witness statement to the key factual issues in dispute?
3. Should the witness evidence be presented in the form of full witness statements or witness summaries?
4. Is it necessary to have more than one round of witness statements?
5. Should the witness statements be filed concurrently with, or only after, the parties' written submissions?

9. EXPERT WITNESSES (PRE-HEARING ISSUES)

PRESENTATION

Article 25(3) of the ICC Rules of Arbitration contemplates the possibility of experts appointed by the parties, while Article 25(4) provides that, after consulting the parties, the arbitral tribunal may appoint one or more experts, define their terms of reference, and receive their reports.

Issues: Is there a genuine need to appoint experts? Should they be appointed by the parties, the tribunal, or both? How should they be selected? How should the written expert reports be produced?

OPTIONS

Whether and how to appoint experts

- A. No experts at all.
- B. Party-appointed expert(s) only.
- C. Tribunal-appointed expert(s) only.
- D. Both party-appointed and tribunal-appointed experts.

How to select party-appointed experts

- A. Selection of an expert by the parties or their counsel.
- B. Selection of an expert proposed by the ICC International Centre for ADR at a party's request.

How to select tribunal-appointed experts

- A. Selection by the tribunal alone after obtaining the parties' comments on the expert to be appointed, including with respect to the expert's independence and impartiality. This option includes the tribunal's selection of an expert proposed by the ICC International Centre for ADR at the tribunal's request.
- B. Selection by the tribunal of an expert agreed by the parties or from a list of experts jointly submitted by the parties.

Production of written reports

A. Separate reports by each party-appointed expert.

- These reports can be produced with the parties' briefs or after the parties have produced their fact witness statements.
- These reports can be produced either simultaneously or sequentially.

B. Instead of, or subsequent to, the production of separate reports, the party-appointed experts meet to determine points of agreement and disagreement and produce reports laying out their respective positions on the points of disagreement.

C. Preparation by the tribunal of terms of reference for tribunal-appointed experts after submitting a draft to the parties for comment. Thereafter, the expert produces a written report based upon the terms of reference.

PROS AND CONS

Certain technical issues may need to be presented through expert opinions. In some cases, expert opinions can be decisive for a case. However, expert witnesses significantly increase the length and cost of an arbitration.

If there are to be experts, the pros and cons of party-appointed experts and/or tribunal-appointed experts must be considered. In particular cases, a tribunal-appointed expert may be the most persuasive expert for arbitrators from certain legal cultures, but reliance on a tribunal-appointed expert deprives the parties of some degree of control. Whether a tribunal-appointed expert should be requested is an important matter of strategy to be considered on a case-by-case basis.

Recourse to a tribunal-appointed expert alone, with no party-appointed experts, will no doubt be the least expensive option. However, there may be cases where a tribunal-appointed expert's views cannot be adequately questioned or tested by the parties without the assistance of party-appointed experts. Recourse to both will increase time and cost.

COST/BENEFIT ANALYSIS

Whether and how to appoint experts

Whether or not to appoint experts can be a complex question requiring consideration of a number of factors, including the nature of the issues, the legal and cultural background of the tribunal, the availability of experts, case strategy and the impact on time and cost. A key consideration will be whether the cost and time associated with expert witnesses is justified by a genuine need in the case at hand.

How to select party-appointed experts

A. Selection of an expert by the parties or their counsel

In order to present evidence on issues requiring expertise, the parties or their counsel may select an outside expert to produce an expert report. Alternatively, evidence on such issues can be presented by the parties' in-house technical experts. The in-house experts may be very knowledgeable in their field and have hands-on knowledge of the specific technical matters at issue. Yet, there is a risk that the tribunal could perceive them as being partial. Outside experts are more expensive and more time-consuming but, depending on their qualifications and professional demeanour, could be viewed as more impartial.

B. Selection of an expert proposed by the ICC International Centre for ADR at a party's request.

The ICC International Centre for ADR offers parties and tribunals a service of finding experts from a wide range of sectors and countries. This may speed up the process of identifying experts and minimize the cost. In addition, the fact that a party-appointed expert has been identified by the ICC International Centre for ADR can reflect well upon the expert's qualifications, independence and impartiality.

How to select tribunal-appointed experts

A. Selection by the tribunal alone after obtaining the parties' comments on the expert to be appointed, including with respect to the expert's independence and impartiality. This option includes the selection by the tribunal of an expert proposed by the ICC International Centre for ADR at the tribunal's request.

EFFECTIVE MANAGEMENT OF ARBITRATION

9. EXPERT WITNESSES

The selection of an expert by the arbitral tribunal alone may be more expeditious and may avoid disputes between the parties over the suitability of their respective proposals. Moreover, the appointment of one expert will reduce time and cost. However, this method excludes the parties from the selection process and creates a risk that the chosen expert may fall short of the parties' expectations. From the parties' perspective, a further disadvantage is that the content of the expert's opinion may remain unknown to them until produced before the arbitral tribunal.

B. Selection by the tribunal of an expert agreed by the parties or from a list of experts jointly submitted by the parties.

This is a more time-consuming process than the appointment of an expert by the tribunal alone, but has the advantage of restricting selection to an expert acceptable to the parties and the tribunal. Moreover, the appointment of a single expert will reduce time and cost. However, a potential disadvantage from the parties' perspective will again be that the content of the expert's opinion remains unknown to the parties until produced before the arbitral tribunal.

Production of written reports

A. Separate reports by each party-appointed expert.

- These reports can be produced with the parties' briefs or after the parties have produced their fact witness statements.

The submission of expert evidence with a party's briefs has the advantage of enabling a more comprehensive understanding of that party's case. It may help to focus the content of any subsequent briefs on the actual rather than the assumed areas in which expert evidence may be submitted. The disadvantage is that the expert evidence may not take account of any evidence introduced by the other party in subsequent witness statements, expert reports or subsequent briefs and may either be incomplete or create a need for supplemental expert evidence.

- These reports can be produced either simultaneously or sequentially.

In cases where the points of disagreement are sufficiently clear, simultaneous filings will generally be faster than sequential filings because there will be fewer rounds. However, when the points of disagreement are not sufficiently clear, simultaneous filings may result in expert reports that do not correspond or respond to each other, which could actually increase time and cost.

The ultimate choice will also depend upon tactical or strategic considerations that go beyond issues of time and cost.

B. Instead of, or subsequent to, the production of separate reports, the party-appointed experts meet to determine points of agreement and disagreement and produce reports laying out their respective positions on the points of disagreement.

The production of written expert reports can be time-consuming and expensive. Reducing the scope of those reports will reduce time and cost. If the party-appointed experts are given the opportunity to meet and clearly identify the points over which they disagree, their reports can be shortened and focus on the points of disagreement.

C. Preparation by the tribunal of terms of reference for tribunal-appointed experts after submitting a draft to the parties for comment. Thereafter, the expert produces a written report based on the terms of reference.

It is important to ensure that the tribunal-appointed expert focuses and provides an opinion on the specific issues in dispute within the relevant area of expertise. The terms of reference are designed to serve this purpose. By being allowed to comment on and provide input into the terms of reference, the parties will have a degree of control over the process.

EFFECTIVE MANAGEMENT OF ARBITRATION
9. EXPERT WITNESSES

QUESTIONS TO ASK

1. Is there a genuine need to appoint experts or can the case be effectively made without expert evidence?
2. Should there be party-appointed experts, tribunal-appointed experts or both?
3. What is the appropriate method for selecting party-appointed experts or tribunal-appointed experts, as the case may be?
4. If there are to be party-appointed experts, how many experts are genuinely necessary?
5. When and in what form should expert reports be produced?
6. Should reports be submitted simultaneously or sequentially?
7. Should party-appointed experts be required to meet in order to determine points of agreement and disagreement?
8. If such a meeting is held, should counsel be present at the meeting?

OTHER POINTS TO CONSIDER

Consider avoiding more than one party-appointed expert per topic on each side.

Consider whether it is genuinely necessary to have an expert witness on issues of law. A great deal of time and cost can be saved if legal issues are argued by outside counsel in their briefs and at the hearing.

10. HEARING ON THE MERITS (INCLUDING WITNESS ISSUES)

PRESENTATION

Pursuant to Article 25(2) of the ICC Rules of Arbitration, a hearing must be held if requested by any party. In addition, pursuant to Articles 25(2) and 25(3), the arbitral tribunal may hear the parties, witnesses, experts or any other person, if it so decides of its own motion.

Hearings are expensive to hold and the longer they are, the more costly they become.

Issues: Is it genuinely necessary to hold a hearing at all? If so, is there a need for more than one hearing? What is the appropriate length for the hearing and how should it be organized?

OPTIONS

A. Hold no hearing and have the case decided solely on the documents submitted by the parties.

B. Hold one or more hearings, as appropriate.

When a hearing is to be held, a certain number of choices need to be made, including:

- appropriate location;
- dates;
- attendees;
- appropriate duration;
- allocation of time between the parties;
- whether there are to be opening and/or closing statements and their duration;
- whether there should be direct examination, cross-examination and/or witness conferencing for fact and expert witnesses;
- whether the hearing should be transcribed and if so, whether daily transcripts and/or live transcripts (i.e. real-time transcripts available electronically to participants during the hearing) should be made;

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10. HEARING ON THE MERITS

- when interpreting is needed, whether it should be consecutive or simultaneous;
- whether to use videoconferencing for all or part of the hearing.

PROS AND CONS

Oral hearings are often considered as a key opportunity for the parties to present their case and for the arbitrators to understand it and assess the evidence.

On the other hand, oral hearings are typically one of the most expensive and time-consuming phases of the arbitral process. Costs are generated by a number of factors, including the extensive preparation that is usually necessary and the number of people attending the hearing. In addition, the arbitration is often delayed by the difficulty of finding a mutually convenient time in the calendars of all relevant participants.

Cost and time can nevertheless be reduced by making appropriate choices with respect to the organization of the hearing.

COST/BENEFIT ANALYSIS

In deciding whether to request or agree upon a hearing, the parties should take various factors into consideration. Hearings tend to be most useful when there are disputed issues of fact to be addressed by fact and expert witnesses. Parties may consider proceeding without a hearing, for example, when:

- the case turns exclusively on questions of contract interpretation that do not require witness testimony;
- the case turns exclusively on a question of law;
- no respondent is participating;
- the value of the dispute is low;
- there is a need for a quick decision.

It should be determined whether the potential benefits of a hearing justify the associated time and cost. The choices made with respect to the organization of the hearing may reduce time and cost and may affect the decision on whether or not to hold a hearing at all.

Appropriate location

Pursuant to Article 18(2) of the Rules, hearings may be conducted at any location and not necessarily at the place of the arbitration. The cost of the hearing can be reduced if a location likely to be advantageous in terms of cost is chosen.

Dates

To avoid delay, the dates for the hearing should be set at the earliest reasonable opportunity and recorded in everyone's calendars. Ideally, the hearing dates should be fixed during the first case management conference.

Attendees

Attendees should be limited to those genuinely necessary for the conduct of the hearing.

Time and cost can be reduced if an informed and knowledgeable party representative with decision-making authority participates in the preparation of and attends the hearing. Such a person will be in a position to make cost/benefit decisions in consultation with outside counsel. For companies, the party representative is often an in-house counsel. For states or state entities, an individual with decision-making authority can be appointed.

Appropriate duration

Under the Rules, there is no prescribed length for hearings. In practice, parties often request hearings that are longer than necessary. However, the longer the hearing, the greater the cost. The length of the hearing should be carefully chosen so as to allow no more time than is necessary for adequately presenting the case.

Use and duration of opening/closing statements

An opening statement is an opportunity to make a summary and synthesis of the case and can help focus the arbitral tribunal's attention on the key issues. The longer the statement, the greater the cost. When the case has already been fully developed in briefs with supporting documents and witness statements, it may not be necessary to repeat these matters in an opening statement.

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10. HEARING ON THE MERITS

A closing statement is an opportunity to make a summary and a synthesis of what happened at the hearing. However, if the parties are not given sufficient time to prepare a closing statement, it may be of little use. Furthermore, it may not be necessary to have both a closing statement and a post-hearing brief, as they are likely to repeat each other and unnecessarily increase time and cost.

Direct examination, cross-examination, witness conferencing

In some legal systems, the questioning of witnesses is largely conducted by the arbitral tribunal, with counsel for each side being invited to ask follow-up questions. Under this approach there is no direct examination or cross-examination.

In other legal systems, and increasingly in international arbitration, the questioning of witnesses is largely conducted by counsel through direct examination and cross-examination, with the arbitral tribunal having the right to interject questions or ask questions at the end of the witness's testimony.

The first approach will often result in a shorter and less expensive hearing. The second approach will often allow a more comprehensive examination of the witnesses. Since the first approach leaves the arbitral tribunal largely in control, there is little scope for the parties to make cost/benefit decisions. While the overall duration and cost of the second approach will often be greater, a number of choices can be made to reduce the time and cost, as follows:

Direct examination

Direct examination is the questioning of a witness by the party presenting that witness. In international arbitration, witnesses often submit written witness statements setting forth their evidence. When such statements have been submitted, direct examination may be dispensed with entirely or kept short (e.g. 10 or 15 minutes). This will reduce the length and cost of the hearing.

Cross-examination

Cross-examination is the questioning of a witness presented by the opposing party. If each side is given an

overall allocation of time at the hearing, a party is free to determine how much time to use for each witness so long as the total time is not exceeded. Alternatively, time and cost can be reduced by setting time limits on the cross-examination of witnesses.

Consideration should also be given to the appropriate scope of cross-examination. Limiting its scope to matters covered in a witness's statement or in direct examination, if any, may reduce the length and cost of the hearing.

If it is not necessary to cross-examine certain witnesses who have provided statements for the other side, time and cost can be saved by not doing so. However, in that case, it may be necessary to obtain agreement from the other side or an order from the tribunal stipulating that the decision not to cross-examine a witness does not constitute an admission of the truth of that witness's written statement.

Witness conferencing

Witness conferencing can function as an alternative or an addition to cross-examination. In witness conferencing, two or more witnesses dealing with the same area of evidence are questioned together either by the arbitral tribunal first and then by counsel, or vice versa. The witnesses are also given the opportunity to debate with each other.

Witness conferencing (in particular of expert witnesses) can save time and cost insofar as it helps to focus on, clarify and resolve areas of evidential disagreement.

If the witness conferencing is directed by the arbitral tribunal, the arbitrators will need to prepare carefully beforehand in order to be able to fulfil their inquisitorial role effectively. It may deprive the parties of some control over the presentation of the case.

If the witness conferencing is directed by counsel, they retain greater control over the process and debate can still occur between the witnesses. In addition, the tribunal will have the opportunity to ask its own questions. However, some of the benefits of witness conferencing may be lost as the process is likely to be longer, more expensive and less focused.

Nature of transcripts, if needed

Transcripts are expensive, especially daily transcripts and live transcripts (i.e. real-time transcripts available electronically to participants during the hearing). A cost/benefit decision should be made on what is genuinely necessary. A transcript enables the parties and the tribunal to have a complete and accurate record of the evidence adduced at the hearing. It can be very helpful to the parties when preparing post-hearing briefs, if any, and to the tribunal when preparing the award. In very low value or simple cases, it may be possible to save the expense of a transcript at no great loss. In complex cases with many witnesses, the additional cost of daily transcripts and live transcripts may well be justified. They will facilitate effective cross-examination and be useful when preparing further witness questioning.

Consecutive or simultaneous interpreting, if needed

A choice must be made between simultaneous and consecutive interpreting.

Consecutive interpreting requires fewer interpreters and equipment, but is more than twice as long as simultaneous interpreting, which makes it more costly due notably to the extra time lawyers and experts will have to spend at the hearing. While it may be easier to control the accuracy of consecutive interpreting, that benefit must be weighed against the considerable time and cost it may add to the hearing.

Use of videoconferencing for all or part of the hearing

While it is generally preferable to hold hearings in the physical presence of the arbitrators, the parties and the witnesses, the significant time commitment and travel expenditure this may require from certain witnesses can be avoided by using videoconferencing.

QUESTIONS TO ASK

1. Is an oral hearing necessary for the fair determination of the issues in dispute so as to justify the extra time and cost it involves?
2. Is it necessary to test a written witness statement by cross-examining the witnesses at a hearing?

3. Is there a more convenient location for the hearing than the place of arbitration?
4. What is the earliest time at which dates for the hearing can be set?
5. Who genuinely needs to attend the hearing?
6. Should fact witnesses and/or expert witnesses be allowed to attend the hearing while other witnesses are giving testimony?
7. Taking into account the nature of the issues in dispute, the value of the dispute and the number of witnesses, what is the total number of days genuinely necessary for the hearing? Is the proposed length of the hearing justified in terms of cost?
8. How should the total time of the hearing be allocated between the parties?
9. Should there be an opening statement and if so, how long should it be? Is it genuinely necessary to have both a closing statement and a post-hearing brief? If there is to be a closing statement, how long should it be and how much time should be allocated for its preparation?
10. Does every witness need to be cross-examined?
11. Which areas of evidence require examination and what is the most efficient method of examination (cross-examination or witness conferencing)?
12. Should the hearing be transcribed and if so, should there be daily transcripts and/or live transcripts?
13. If interpreting is needed, should it be consecutive or simultaneous?
14. Should videoconferencing be used for all or part of the hearing?

11. POST-HEARING BRIEFS

PRESENTATION

Parties in an arbitration have the opportunity to present their legal arguments and the relevant facts in pre-hearing submissions and during the hearing itself. The issue here is whether it is necessary or useful for the parties to submit post-hearing briefs.

Post-hearing briefs may be used to draw the arbitral tribunal's attention to relevant facts that have emerged at the hearing and place them in the context of the parties' claims and defences. They may be drafted in a manner that assists the arbitral tribunal with drafting the arbitral award. In some cases, the arbitral tribunal may identify key issues to be addressed by the parties in their post-hearing briefs.

If closing statements are made at the end of a hearing, post-hearing briefs may be unnecessary. Conversely, if there are post-hearing briefs, closing statements may be unnecessary.

Issue: Should there be post-hearing briefs and/or closing statements?

OPTIONS

- A. Proceed directly from the hearing to an award with no closing statements or post-hearing briefs.
- B. Provide for closing statements immediately after the hearing or at some agreed time thereafter, but no post-hearing briefs.
- C. Provide for post-hearing briefs but no closing statements.
- D. Provide for both closing statements and post-hearing briefs.
- E. Post-hearing briefs, if any, can be submitted simultaneously or sequentially, and there can be more than one round of post-hearing briefs.

PROS AND CONS

The submission of post-hearing briefs can serve a number of useful purposes, as mentioned above. In a

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11. POST HEARING BRIEFS

long and complex hearing, it may be useful for each party to sum up what they consider to have been demonstrated at the hearing. Post-hearing briefs can include valuable references to the hearing transcript and present a short final synthesis of the evidence and facts of the case, which can be of great value to the arbitral tribunal when drafting the award.

On the other hand, post-hearing briefs add to the cost of the arbitration and may delay the rendering of the award. In addition, they may be of little use if they merely repeat facts and arguments already well understood by the arbitral tribunal.

COST/BENEFIT ANALYSIS

The additional time and expense required for post-hearing briefs need to be balanced against the likelihood that they will genuinely serve one of the purposes indicated above. For example, post-hearing briefs will be especially useful where there are numerous witnesses, complicated or disputed facts, or extensive cross-examination. In all cases, the time and cost associated with post-hearing briefs should be weighed against their likely impact on the arbitral tribunal's decision.

The time and expense required for post-hearing briefs can often be reduced if measures are agreed to keep them relatively short and concise, e.g. limiting the number of pages.

QUESTIONS TO ASK

1. Does the case justify the extra time and expense required for post-hearing briefs, closing statements, or both?

And, in particular,

2. Are post-hearing briefs genuinely useful or necessary for a party to make its case to the arbitral tribunal, and if so, why?

3. What is the estimated cost of preparing the post-hearing briefs?

4. Is the benefit worth the cost, and if so, why?

OTHER POINTS TO CONSIDER

Consider limiting the scope, length and timing of any post-hearing briefs.

Consider having post-hearing briefs filed simultaneously to save time.

In some cases, it may be genuinely necessary to allow each party a short period of time in which to reply briefly to the other party's post-hearing brief.

In some cases, simultaneous post-hearing briefs may have the undesirable consequence of creating a need for further rounds of submissions. Care should therefore be taken to define properly the parameters of post-hearing briefs.

Post-hearing briefs may include submissions on costs, which are normally not discussed at the hearing. This can also save time.

ICC COMMISSION ON ARBITRATION AND ADR

The ICC Commission on Arbitration and ADR is the ICC's rule-making and research body for dispute resolution services and constitutes a unique think tank on international dispute resolution. The Commission drafts and revises the various ICC rules for dispute resolution, including arbitration, mediation, dispute boards, and the proposal and appointment of experts and neutrals and administration of expert proceedings. It also produces reports and guidelines on legal, procedural and practical aspects of dispute resolution. In its research capacity, it proposes new policies aimed at ensuring efficient and cost-effective dispute resolution, and provides useful resources for the conduct of dispute resolution. The Commission's products are published regularly in print and online.

The Commission brings together experts in the field of international dispute resolution from all over the globe and from numerous jurisdictions. It currently has over 850 members from some 100 countries. The Commission holds two plenary sessions each year, at which proposed rules and other products are discussed, debated and voted upon. Between these sessions, the Commission's work is often carried out in smaller task forces.

The Commission aims to:

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- Provide guidance on a range of topics of current relevance to the world of international dispute resolution, with a view to improving dispute resolution services.*
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