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Techniques for Controlling Time and Costs in Arbitration

Second Edition

Report of the ICC Commission on Arbitration Task Force on Reducing Time and Costs in Arbitration

PREFACE TO THE SECOND EDITION

Arbitration is a valuable tool for the resolution of disputes. However, if it is to serve the needs of its users, it must be time and cost effective. The first edition of this Report, published in August 2007, provided a range of techniques that could be used to increase the time and cost efficiency of arbitration. The final paragraph of the preface to that edition expressed the hope that the Report would be of use in the crafting of efficient arbitration procedures. That hope has become a reality. Since its publication, the Report has been positively received by the users of arbitration, as well as by arbitrators and counsel, and the techniques set out in the Report have been widely applied in institutional and ad hoc arbitrations all over the world. The need to focus on the time and cost efficiency of arbitration has become generally recognized, and the ideas in the Report have inspired much discussion as well as a large number of other publications.

In 2009, the ICC Commission on Arbitration began its revision of the 1998 ICC Rules of Arbitration. A drafting subcommittee (the “DSC”) was established to propose modifications to the Rules, taking into account suggestions received from national committees, the ICC International Court of Arbitration and its Secretariat, and the arbitration community at large. The DSC included two in-house counsel who consulted with the user community worldwide. The users proposed that the approach to time and cost efficiency taken in the Report should be incorporated into the Rules. This was accomplished in Articles 22–24 and Appendix IV of the 2012 ICC Rules of Arbitration. Article 22(1) places an explicit obligation on both 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. Article 22(2) empowers the arbitral tribunal, in the absence of an agreement of the parties, to adopt appropriate procedural measures to ensure effective case management. Article 24(1) requires the arbitral tribunal to convene a case management conference to consult the parties on appropriate procedural measures to be adopted

pursuant to Article 22(2). It is expressly stated that those measures may include one or more of the techniques described in Appendix IV. Those techniques are taken directly from the Report.

In sum, the tailor-making of the arbitral procedure referred to in the preface to the first edition of the Report has become a formal requirement in the 2012 Rules, accomplished through the case management conference. Ideally, party representatives will be present so that they can participate in the choice of appropriate procedures for the case. To make an arbitration faster and cheaper, it may be necessary to forego certain steps, such as additional rounds of briefs, excessive document production, longer hearings, more experts, and the like. The goal at the case management conference is to arrive at procedures that are genuinely useful and necessary for the effective presentation of the case. Any additional procedures are likely to result in time and cost inefficiencies.

What, then, is the nature and function of this second edition of the Report? First, the Report has been updated to reflect the various modifications made in the 2012 Rules. Second, and more importantly, this edition of the Report should be seen as an adjunct to the 2012 Rules. It can be used to enhance the tailor-making process required by the Rules. In this edition the techniques set out in Appendix IV to the Rules are further discussed and explained. Additional techniques beyond those in Appendix IV are also presented. The hope that may be expressed for this edition of the Report is that it will help ensure the success of the tailor-making process under the 2012 Rules and thereby contribute to the increased effectiveness and attractiveness of international arbitration.

Peter M. Wolrich
Chairman, ICC Commission on Arbitration

PREFACE TO THE FIRST EDITION

One of the salient characteristics of arbitration as a dispute resolution mechanism is that the rules of arbitration themselves present a framework for arbitral proceedings but rarely set out detailed procedures for the conduct of the arbitration. For example, rules of arbitration do not generally specify whether there should be one, two or more exchanges of briefs. They do not contain any detailed provisions concerning document production. They do not specify how hearings should be conducted and how witnesses, if any, should be heard.

This important characteristic entails that the specific procedures can be tailor-made as appropriate for each dispute and adapted to the legal cultures of the parties and the arbitrators. In order to establish the appropriate procedures for a given arbitration, it is useful and efficient for the parties and the tribunal to make conscious decisions as early as possible on the procedures best suited to the dispute at hand. In making those decisions, it is possible to shape the arbitral proceedings so that the duration and cost of the arbitration are commensurate with what is at stake in the case and appropriate in light of the claims and issues presented.

With the above in mind, the Task Force on Reducing Time and Costs in Arbitration, set up by the ICC Commission on Arbitration and excellently co-chaired by Yves Derains and Christopher Newmark, has prepared the following document setting out a large number of techniques which can be used for organizing the arbitral proceedings and controlling their duration and cost. This document can provide valuable assistance to the parties and the tribunal in developing appropriate procedures for their arbitration. It is intended to encourage them to create a new dynamic at the outset of an arbitration, whereby the parties can review the suggested techniques and agree upon appropriate procedures and, if they fail to agree, the tribunal can decide upon such procedures. For example, an arbitral tribunal can send this document to the parties at the start of the proceedings, indicating that early in the proceedings they might seek to agree upon appropriate procedures in consultation with the tribunal. In that process, all may agree upon the use of certain techniques. If one party wishes to use a particular technique and the other party does not, the tribunal, after obtaining the views of each party on the matter, can decide whether or not to adopt that procedure. The use of this approach, coupled with the proactive involvement of the tribunal in the management of the proceedings, can result in meaningful savings of time and cost in the arbitration.

The techniques suggested in the document are not intended to be exhaustive. On the contrary, they are open-ended, and the parties and the tribunal are encouraged to think of this document as a basis from which to develop the procedures to be used. Indeed, it is the intention of the ICC Commission on Arbitration to revise and republish this document in the future, taking into account further suggestions which will emerge from the use of the document. As a corollary, it should be clear that parties and arbitrators are in no way obligated to follow any of the techniques. Moreover, the document is a product of the ICC Commission on Arbitration and not of the ICC International Court of Arbitration and thus it is not part of or interpretative of the ICC Rules of Arbitration or in any way binding upon the Court. Rather, it is a practical tool designed to stimulate the conscious choice of arbitral procedures with a view to organizing an arbitration which is efficient and appropriately tailor-made. Finally, while this document was conceived with the ICC Rules of Arbitration in mind, the vast majority of the techniques as well as the dynamics generated by the document can be used in all arbitrations.

It is the sincere hope of the Task Force that this document will be used and be of use in the crafting of efficient arbitration procedures in which time and cost will be proportionate to the needs of the dispute.

Peter M. Wolrich
Chairman, ICC Commission on Arbitration

INTRODUCTION

Costs incurred by the parties constitute the largest part of the total cost of international arbitration proceedings. It follows that if the overall cost of the arbitral proceedings is to be reduced, special emphasis needs to be placed on steps aimed at lowering the costs connected with the parties' presentation of their cases. Such costs are often caused by unnecessarily long and complicated proceedings with unfocused requests for disclosure of documents and unnecessary witness and expert evidence. Costs can also be unnecessarily increased when counsel from different legal backgrounds use procedures familiar to them in a manner that leads to needless duplication.

The increasing and, on occasion, unnecessary complication of the proceedings seems to be the main explanation for the long duration and high cost of many international arbitrations. The longer the proceedings, the more expensive they will be. The 2012 ICC Rules of Arbitration (the "Rules") have expressly addressed these concerns.

These Techniques for Controlling Time and Costs in Arbitration (the "Techniques") are designed to assist arbitral tribunals, parties and their counsel in devising tailor-made procedures for individual arbitrations pursuant to Articles 22–24 of the Rules.

In particular, the Techniques may be of benefit to the parties and the tribunal when preparing the case management conference and seeking agreement on procedures suitable for their case. If the parties cannot reach agreement, the Techniques may also assist the arbitral tribunal in adopting procedures that it considers appropriate, taking into account its obligation to conduct the arbitration in an expeditious and cost-effective manner. The Techniques are freely accessible online on the ICC's website (www.iccwbo.org) and in the ICC Dispute Resolution Library (www.iccdrl.com). They are in no way prescriptive. Rather, they provide suggestions that may assist in arriving at procedures that are efficient and will reduce both cost and time. Certain procedures will be appropriate for one arbitration, but inappropriate for another. There may be other procedures not mentioned here that are well suited to a particular case. In all instances, it is for the parties and the arbitral tribunal to select the procedures that are best suited for the case. The table of contents to this document can serve as a checklist of points to consider.

While the main focus of the Techniques is to provide guidance on the procedure during the arbitration, the first two sections give suggestions on the drafting of arbitration agreements and the initiation of arbitral proceedings.

ARBITRATION AGREEMENT

1 *Keeping clauses simple*

Simple, clearly drafted arbitration clauses will avoid uncertainty and disputes over their meaning and effect. They will minimize the risk of time and costs being spent on disputes regarding, for example, the jurisdiction of the arbitral tribunal or the process of appointing arbitrators. In all cases, ensure that the arbitration clause conforms with any relevant applicable laws.

2 *Use of the ICC model clause*

Use of the standard ICC arbitration clause is recommended. It provides as follows:

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

Modifications to the standard clause can result in unintended and undesirable consequences and therefore should be made only with great care and for specific purposes. In addition to the standard clause, the parties may wish to specify in separate sentences the place of the arbitration, the language of the arbitration and the rules of law governing the contract. Be cautious about adding to this clause further provisions relating to the procedure for the arbitration.

The Rules permit any party in need of urgent or conservatory measures that cannot await the constitution of an arbitral tribunal to make an application to the ICC International Court of Arbitration (the "Court") for the appointment of an emergency arbitrator to decide upon the request for such measures. The parties should consider whether the Emergency Arbitrator Provisions as set out in Article 29 and Appendix V of the Rules are desirable in their particular situation. If the parties do not want the Emergency Arbitrator Provisions to apply, they must agree to opt out of those provisions and may do so by using the following model clause:

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The Emergency Arbitrator Provisions shall not apply.

3 *Selection and appointment of arbitrators*

High-value and complex contracts can give rise to small disputes for which a three-member tribunal may be too expensive. Although parties may desire the certainty of appointing either a one- or a three-member tribunal in their arbitration agreement, consideration should be given to staying with the standard ICC arbitration clause and providing for one or more arbitrators. This will enable the ICC to appoint, or the parties to agree on, a sole arbitrator where the specific nature of any subsequent dispute does not warrant a three-member tribunal (Rules, Article 12(2)).

If the parties wish the ICC to select and appoint all members of the arbitral tribunal (see paragraph 11 below), then the following wording can be used: "All arbitrators shall be selected and appointed by the ICC International Court of Arbitration."

Adding special requirements regarding the expertise and qualifications of arbitrators to be appointed will reduce the pool of available arbitrators and may increase the time taken to select a tribunal.

4 *Fast-track procedures*

Consideration may be given to setting out fast-track procedures in the arbitration clause. Indeed, Article 38(1) of the Rules enables the parties to shorten time limits provided for in the Rules, while Article 38(2) enables the Court to extend those shortened time limits when necessary. Fast-track procedures are designed to enable an arbitration to proceed quickly, given the specific nature of the contract and the disputes that are likely to arise. However, experience shows that in practice it is difficult at the time of drafting the clause to predict with a reasonable degree of certainty the nature of disputes and the procedures that will be suitable for those disputes. Also, disagreements can arise later over the interpretation or application of fast-track clauses. Careful thought should therefore be given before such provisions are included in an arbitration agreement. Once a dispute has arisen, the parties could at that time agree upon a fast-track procedure, if appropriate.

5 *Time limits for rendering the final award*

One commonly used provision that can give rise to significant difficulties is the requirement that a final award be produced within a certain number of weeks or months from the commencement of the arbitration. Such specific time limits can create jurisdictional and enforcement problems if it turns out that the time limit specified is unrealistic or not clearly defined.

6 *More detailed arbitration agreement after the dispute has arisen*

If the parties agree to submit a dispute to ICC arbitration after the dispute has arisen, they can consider specifying in some detail the procedure for the arbitration, taking into account the nature of the dispute in question. This procedure may include some of the suggestions set out below to control time and costs.

INITIATION OF PROCEEDINGS

Selection of counsel

7 *Counsel with experience*

Consider appointing counsel with the skills necessary for handling the arbitration at hand and who are sensitive to the need for appropriate time and cost efficiency. Such counsel are more likely to be able to work with the arbitral tribunal and the other party's counsel to devise an efficient procedure for the case.

8 *Counsel with time*

Ensure that the counsel you have selected has sufficient time to devote to the case.

Selection of arbitrators

9 *Use of a sole arbitrator*

After a dispute has arisen, consider agreeing upon having a sole arbitrator, when appropriate. Generally speaking, a one-member tribunal will be able to act more quickly than a three-member tribunal, since discussions between tribunal members are not needed and diary clashes for hearings will be minimized. A one-member tribunal will obviously also be cheaper.

10 *Arbitrators with time*

Whether selecting a sole arbitrator or a three-member tribunal, it is advisable to make sufficient enquiries to ensure that the individuals selected have sufficient time to devote to the case in question. If there is a particular need for speed, this must be made clear to the ICC so that it can be taken into consideration when making any appointments.

11 *Selection and appointment by the ICC*

Consider allowing the ICC to select and appoint the arbitral tribunal, whether it be a sole arbitrator or a three-person tribunal. This will generally be the quickest way to constitute the arbitral tribunal if there is no agreement between the parties on the identity of all arbitrators. It will also reduce the risk of challenges, facilitate the constitution of a tribunal having a variety of specialist skills and create a different dynamic within the arbitral tribunal. If the parties wish to have input into the selection of the tribunal by the ICC, they can request that the ICC provide a list of possible arbitrators to be selected in accordance with a procedure to be agreed upon by the parties in consultation with the ICC.

12 *Avoiding objections*

Any objection to the appointment of an arbitrator will delay the constitution of the arbitral tribunal. When selecting an arbitrator, give careful thought to whether or not the appointment of that arbitrator might give rise to an objection.

13 Selecting arbitrators with strong case management skills

A tribunal that is proactive and skilled in case management will be able to play its role in managing the arbitration so as to make it as cost and time effective as possible, given the issues in dispute and the number and nature of the parties. Careful consideration should therefore be given to selecting tribunal members, especially the sole arbitrator or chair.

Request for Arbitration and Answer

14 Complying with the Rules

The claimant should ensure that the Request for Arbitration includes all of the elements required by Article 4(3), subparagraphs (a)-(h), of the Rules. Failure to do so may make it necessary for the Secretariat to revert to the Claimant before the Request can be forwarded to the Respondent in accordance with Article 4(5). This causes delay. Similarly, when filing its Answer, the Respondent should include all elements required by Article 5(1), subparagraphs (a)-(f), of the Rules.

15 Setting out a detailed statement of case

The Rules do not require a Request for Arbitration or an Answer to set out a full statement of case for either the claim or the defence (or, where applicable, a counterclaim). Whether or not a full statement is made in the Request can have an impact on the efficient management of the arbitration. Where the Request does contain detailed particulars of the claim, and a similar approach is taken by the respondent in the Answer, the parties and the arbitral tribunal will be in a position to make informed decisions at a very early stage in the proceedings regarding the procedural measures and case management techniques that are appropriate for the case. This will help to optimize the first case management conference held pursuant to Article 24(1).

16 Submitting additional information

The Rules expressly allow the parties to submit with a Request or an Answer any further documents or information that may contribute to the efficient resolution of the dispute (see Articles 4(3) and 5(1)). Those provisions allow for the submission of a full statement of case but also allow the parties simply to submit additional useful information. Consideration should be given to exercising this option, whether or not a full statement of case is provided.

Language of the arbitration

17 Determination of the language by the arbitral tribunal

If the parties have not agreed on the language of the arbitration, the arbitral tribunal, when determining the language, should consider doing so by means of a procedural order pursuant to Article 20 of the ICC Rules, prior to drawing up the Terms of Reference and after ascertaining the positions of the parties.

18 Proceedings involving two or more languages

Having two or more languages of the arbitration will normally increase time and cost. Consideration should be given to whether the use of two or more languages truly justifies the additional time and cost. On the other hand, where there is a single language of the arbitration, the use of an additional language should be considered if it would reduce time and cost. For example, where appropriate, the parties can agree that documents, legal materials and witness testimony in a particular language need not be translated into the language of the arbitration.

If the parties have agreed, or the arbitral tribunal has decided, that the arbitration will be conducted in two or more languages, the parties and the arbitral tribunal should consider agreeing upon practical means to avoid duplication. In cases where the members of the arbitral tribunal are fluent in all applicable languages, it may not be necessary for documents to be translated. Consideration should also be given to avoiding having the Terms of Reference, procedural orders and awards in more than one language. If this cannot be avoided, the parties would be well advised to agree upon the language that will prevail.

ESTABLISHING THE FRAMEWORK OF THE ARBITRAL PROCEEDINGS

The Rules call for the framework of the arbitral proceedings to be established in three steps: the Terms of Reference; the case management conference; and the procedural timetable. The paragraphs that follow provide suggestions on how to use each of these steps to optimize time and cost efficiency.

Terms of Reference

19 *Summaries of claims and relief sought*

The arbitral tribunal should consider whether it is appropriate for it to draft the summary of claims and/or the relief sought itself, or whether it would assist if each party were to provide a draft summary for inclusion in the Terms of Reference in accordance with Article 23(1), subparagraph (c), of the Rules. In the latter case, the arbitral tribunal should consider requesting the parties to limit their summaries to an appropriate fixed number of pages. Further guidance on preparing Terms of Reference can be found in the article of Serge Lazareff, "Terms of Reference", ICC International Court of Arbitration Bulletin, Vol. 17/No. 1 (2006).¹

20 *Empowering the president of the arbitral tribunal on procedural issues*

Where there is a three-member tribunal, it may not be necessary for all procedural issues to be decided upon by all three arbitrators. The parties should consider empowering the president of the arbitral tribunal to decide on certain procedural issues alone. In all events, consider authorizing the president to sign procedural orders alone.

21 *Administrative secretary to the arbitral tribunal*

Consider whether or not an administrative secretary to the arbitral tribunal would assist in reducing time and cost. If it is decided to use such a secretary, the parties and the arbitral tribunal should take into account the Note of the Secretariat of the Court on the Appointment, Duties and Remuneration of Administrative Secretaries. It is distributed to arbitrators in all cases and is reproduced in the ICC International Court of Arbitration Bulletin, Vol. 23/No. 1 (2012).

22 *Need for a physical meeting*

Consider whether it is appropriate to agree upon and sign the Terms of Reference without a physical meeting (e.g. by way of a telephone or video conference). In making that decision, the advantages of having a physical meeting at the start of the proceedings should be weighed against the time and cost involved. The holding of the case management conference should also be taken into account when deciding whether or not to hold a physical meeting (see paragraph 31 below).

23 *Counterparts*

If there is no physical meeting for signing the Terms of Reference, the arbitral tribunal should consider having the Terms of Reference signed in counterparts.

24 *Compliance with Article 23(3)*

If a party refuses to take part in drawing up the Terms of Reference or refuses to sign them, the arbitral tribunal should make certain that the Terms of Reference to be submitted to the Court for approval pursuant to Article 23(3) of the Rules do not contain any provisions that require the parties' agreement or a decision by the arbitral tribunal.

Case management conferences

25 *Timing*

Article 24(1) requires the arbitral tribunal to convene a case management conference when drawing up the Terms of Reference or as soon as possible thereafter. Consider whether it is most convenient and efficient to hold the case management conference immediately after the signing of the Terms of Reference and at the same meeting.

26 *Preparation*

For the case management conference to be most effective, the tribunal should consider asking the parties well in advance of the conference to submit joint or separate case management proposals. This will encourage them actively to consider and exchange views on the procedures and case management techniques that may be appropriate for the case. Any joint or separate proposals from the parties, any agreements between the parties, and any suggestions from the tribunal should be discussed at the case management conference. It should be noted that, in accordance with Article 22(2) of the Rules, the arbitral tribunal may not adopt procedural measures that are contrary to an agreement of the parties.

27 *Use of the Techniques*

Appendix IV of the Rules sets out examples of available case management techniques. These and additional examples are also contained in this Report. They can be used by the arbitral tribunal and the parties at the case management conference to assist in arriving at the most appropriate procedures for the case (see the section entitled "Subsequent procedure for the arbitration" below).

¹ The ICC International Court of Arbitration Bulletin is available from the ICC Bookstore (www.iccbooks.com) and online in the ICC Dispute Resolution Library (www.iccdrl.com).

28 *Providing information in advance of the conference*

The more information the arbitral tribunal has about the issues in the case prior to the conference, the better placed it will be to assist the parties in devising a procedure that will deal with the dispute as efficiently as possible. For example, a tribunal that has made itself familiar with the details of the case from the outset can be proactive and give appropriate, tailor-made suggestions on the issues to be addressed in documentary and witness evidence, the areas in which it will be assisted by expert evidence, and the extent to which disclosure of documents by the parties is needed to address the issues in dispute.

29 *Scope*

Whenever possible, the procedure for the entire arbitration should be determined at the first case management conference and reflected in the procedural timetable to be established pursuant to Article 24(2) of the Rules. However, it may not always be possible to do so, for example in very complex cases or in cases where insufficient detail has been provided prior to the first case management conference. In such situations, the procedural timetable would lay out the procedure as far as can be done (e.g. through a first round of briefs) and a second case management conference would be held promptly to determine the remainder of the procedure for the arbitration.

30 *Client attendance*

Article 24(4) of the Rules expressly allows the arbitral tribunal to request the attendance at the case management conference of the parties in person or through an internal representative. The tribunal should consider requiring such attendance. When clients are present at the case management conference, they can play an active role in the decision-making process. They should be empowered to make case management decisions. Such decisions call for a cost-benefit analysis. For example, is an additional round of briefs worth the time and expense? Is a degree of discovery-style document production likely to produce benefits justifying the time and cost?

31 *Need for a physical meeting*

As with the drawing up of the Terms of Reference (see paragraph 22 above) and as permitted by Article 24(4), consider whether it is appropriate to hold the case management conference by way of telephone, video conference or similar means of communication that do not involve a physical meeting. If the case management conference is to be held at the same time as the Terms of Reference are signed, consider whether that would justify a physical meeting for both purposes.

32 *Use of discretion in apportionment of costs*

Pursuant to Article 37(5) of the Rules, the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner may be taken into account by the arbitral tribunal in determining who shall bear what portion of the costs of the arbitration.

The arbitral tribunal should consider informing the parties at the case management conference that in exercising its discretion to allocate costs pursuant to the Rules, it will take into consideration any unreasonable failure to comply with procedures agreed upon or ordered in the arbitration or any other unreasonable conduct (see paragraph 82 below).

33 *Further case management conferences*

Consider holding further case management conferences during the course of the arbitration, as appropriate. Such conferences may be held prior to significant phases in the procedure (e.g. the exchange of witness statements) so as to ensure that the procedure provided for that phase remains appropriate. Short telephone conferences may also be held at regular intervals (e.g. once a month) to enable the arbitral tribunal to check on progress and discuss with the parties any unforeseen procedural issues that have arisen or may shortly arise.

Procedural timetable

34 *Compliance with the procedural timetable*

Consistent with their obligation under Article 22(1) of the Rules to make every effort to conduct the arbitration in an expeditious and cost-effective manner, the arbitrators and the parties should make all reasonable efforts to comply with the procedural timetable. Extensions and revisions of the timetable should be made only when justified. Any revisions should be promptly communicated to the Court and the parties in accordance with Article 24(2) of the Rules.

35 *Need for a hearing*

Consider whether or not it is necessary for there to be a hearing in order for the arbitral tribunal to decide the case. If it is possible for the arbitral tribunal to decide the case on documents alone, this will significantly reduce costs and time.

36 *Fixing the hearing date*

If a hearing is necessary, then early in the proceedings (ideally at the first case management conference) consider fixing the date for this hearing. This will reduce the likelihood that the arbitral proceedings become drawn out and will enable the procedure leading up to the hearing to be adapted to the time available.

37 *Pre-hearing conference*

Consider organizing a conference with the arbitral tribunal, which may be by telephone, to discuss the arrangements for any hearing. At such a pre-hearing conference, held a suitable time before the hearing itself, the parties and the arbitral tribunal can discuss matters such as time allocation, use of transcripts, translation issues, order of witnesses and other practical arrangements that will facilitate the smooth conduct of the hearing. The arbitral tribunal may consider using the occasion of the

pre-hearing conference to indicate to the parties the issues on which it would like them to focus at the forthcoming hearing.

38 *Short and realistic time periods*

When deciding upon the length of the final hearing and the amount of time required for all procedural steps leading up to that hearing, choose the shortest times that are realistic. Unrealistically short periods of time are likely to result in longer rather than shorter proceedings, should they need to be rescheduled.

39 *Bifurcation and partial awards*

The arbitral tribunal should consider, or the parties could agree on, bifurcating the proceedings or rendering a partial award when doing so may genuinely be expected to result in a more efficient resolution of the case.

40 *Briefing everyone involved in the case*

As soon as the proceedings start, parties should give thought to the input that will be needed for each step in the anticipated timetable. Once the timetable is set, the parties should consider precisely what is required of them to comply with the timetable. It will be useful for all relevant personnel to be briefed accordingly (e.g. management within the client organization, witnesses, internal and external lawyers, experts). This will greatly assist in enabling everyone to reserve the time needed to provide input at the relevant point in the procedure and will assist in enabling each party to adhere to deadlines set in the timetable.

Settlement

41 *Arbitral tribunal's role in promoting settlement*

The arbitral tribunal should consider informing the parties that they are free to settle all or part of the dispute at any time during the ongoing arbitration, either through direct negotiations or through any form of ADR proceedings. For example, ADR proceedings can be conducted under the ICC ADR Rules, further information on which can be found in the article of Peter Wolrich entitled "ICC ADR Rules: The Latest Addition to ICC's Dispute Resolution Services" in *ADR—International Applications*, 2001 Special Supplement of the ICC International Court of Arbitration Bulletin.

42 *Settlement initiatives taken with the parties' agreement*

The parties may request the arbitral tribunal to suspend the arbitration proceedings for a specific period of time while settlement discussions take place. The parties may also agree that the arbitral tribunal should take other steps to facilitate settlement of their dispute, provided that such steps are not inconsistent with the tribunal's duty under Article 41 of the Rules to make every effort to make sure that its award is enforceable at law.

SUBSEQUENT PROCEDURE FOR THE ARBITRATION

The paragraphs that follow give guidance on the points to be discussed by the parties and the arbitral tribunal at the case management conference. They provide suggestions that may assist in reducing the cost and duration of the proceedings.

Written submissions

Written submissions come in different forms and are given different names. They include the Request for Arbitration and the Answer, statements of case and defence, memorials and other written arguments, and opening and closing written submissions. These comments apply to written submissions generally.

43 *Setting out the case in full early in the proceedings*

If the parties set out their cases in full early in the proceedings, the parties and the arbitral tribunal will be better able to understand the key issues at an early stage. Doing so will help ensure that the procedure defined at the case management conference is efficient and that time and money are not wasted on matters that turn out to be of no direct relevance to the issues to be determined.

44 *Avoiding repetition*

Avoid unnecessary repetition of arguments. Once a party has set out its position in full, it should not be necessary to repeat the arguments at later stages (e.g. in pre-hearing memorials, oral submissions or post-hearing memorials), and the arbitral tribunal may direct that there be no such repetition.

45 *Sequential or simultaneous delivery*

Consider whether it is more effective for written submissions to be sequential or simultaneous. Whilst simultaneous submissions enable both parties to inform each other of their cases at the same time (and this may make things quicker), it can also result in inefficiency if the parties raise different issues in their submissions and extensive submissions are required in response.

46 *Specifying form and content*

Consider specifying the form and content of written submissions. For example, clarify whether the first round of written submissions should or should not be accompanied by witness statements and/or expert reports.

47 *Limiting the length of submissions*

Consider agreeing on limiting the length of specific submissions. This can help focus attention on the key issues to be addressed and is likely to save time and cost.

48 *Limiting the number of submissions*

Consider limiting the number of rounds of submissions. This may help to avoid repetition and encourage the parties to present all key issues in their first submissions.

Documentary evidence

49 *Organization of documents*

From the outset of the case the parties should consider using a coherent system for numbering or otherwise identifying documents produced in the case. This process can start with the Request for Arbitration and the Answer, and a system for the remainder of the arbitration can be established with the arbitral tribunal at the time of the first case management conference.

50 *Producing documents on which the parties rely*

The parties will normally each produce the documents upon which they intend to rely. Each party should consider avoiding requests for production of documents from another party unless such production is relevant and material to the outcome of the case. When the parties have agreed upon non-controversial facts, no documentary evidence should be needed to prove those facts.

51 *Establishing procedure for requests for production*

Consider whether requests for production of documents are genuinely necessary. If they are, the parties and the arbitral tribunal should consider establishing a clear and efficient procedure for the submission and exchange of documents. In that regard, they could consider referring to Article 3 of the IBA Rules on the Taking of Evidence in International Arbitration for guidance. In addition, the parties and the arbitral tribunal should consider establishing an appropriate time frame for the production of documents. In most situations, this is likely to be after the parties have set out their cases in full for the first time. If issues concerning the production of electronic documents arise, consider referring to the ICC Commission Report *Managing E-Document Production*² for information and guidance on how to manage such production in an efficient and cost-effective manner.

52 *Managing requests for production efficiently*

Time and costs associated with requests for production of documents, if any, can further be reduced by agreeing upon one or more of the following:

- Limiting the number of requests;
- Limiting requests to the production of documents (whether in paper or electronic form) that are relevant and material to the outcome of the case;

- Establishing reasonable time limits for the production of documents;
- Using the Schedule of Document Production devised by Alan Redfern (often referred to as the Redfern Schedule) in the form of a chart containing the following four columns:

First Column: identification of the document(s) or categories of documents that have been requested;

Second Column: short description of the reasons for each request;

Third Column: summary of the objections by the other party to the production of the document(s) or categories of documents requested; and

Fourth Column: left blank for the decision of the arbitral tribunal on each request.

53 *Avoiding duplication*

It is common for each of the parties to produce copies of the same documents, appended to their statements of case, witness statements or other written submissions. Avoiding duplication where possible will reduce costs.

54 *Selection of documents to be provided to the arbitral tribunal*

It is wasteful to provide the arbitrators with documents that are not material to their determination of the case. In particular, it will usually not be appropriate to send to the arbitral tribunal all documents produced pursuant to production requests. This not only generates unnecessary costs, but also makes it harder for the arbitral tribunal to prepare efficiently.

55 *Keeping hard copies to a minimum*

Consider minimizing the volume of paper documents that need to be produced. Exchanging documents in electronic form can reduce costs (see the ICC Commission Report *Managing E-Document Production* and the 2004 Special Supplement of the ICC International Court of Arbitration Bulletin, *Using Technology to Resolve Business Disputes*).

56 *Translations*

Try to agree how translations of any documents are to be dealt with. Reducing the need for certified translations will help to lower costs. Certified translations may be required only where translation issues emerge from unofficial translations.

57 *Authenticity of documents*

Consider providing that documents produced by the parties are deemed to be authentic unless and until such authenticity is challenged by another party.

² Available in print as ICC Publication 860 and online at www.iccdri.com.

Correspondence

58 *Correspondence between counsel*

Avoid unnecessary correspondence between counsel. The arbitral tribunal may consider informing the parties that the persistent use of such correspondence may be viewed as unreasonable conduct and be taken into consideration by the arbitral tribunal when exercising its discretion in allocating costs pursuant to the Rules (see paragraph 82 below).

59 *Sending correspondence to the arbitral tribunal*

Avoid sending correspondence between counsel to the arbitral tribunal unless a decision of the arbitral tribunal is required. Any such correspondence that is addressed to the arbitral tribunal should be copied to the Secretariat in accordance with Article 3(1) of the Rules.

Witness statements

60 *Limiting the number of witnesses*

Every witness adds to the costs, both when a witness statement is prepared and considered and when the witness attends to give oral evidence. Costs can be saved by limiting the number of witnesses to those whose evidence is required on key issues. The arbitral tribunal may assist in identifying those issues on which witness evidence is required and focusing the evidence from witnesses on those issues. This whole process will be facilitated if the parties can reach agreement on non-controversial facts that do not need to be addressed by witness evidence.

61 *Minimizing the number of rounds of witness statements*

If there are to be witness statements, consider the timing for the exchange of such statements so as to minimize the number of rounds of statements that are required. For example, consider whether it is preferable for witness statements to be exchanged after all documents on which the parties wish to rely have been produced, so that the witnesses can comment on those documents in a single statement.

Expert evidence

62 *Presumption that expert evidence not required*

It is helpful to start with a presumption that expert evidence will not be required. Depart from this presumption only if expert evidence is needed in order to inform the arbitral tribunal on key issues in dispute.

63 *ICC International Centre for Expertise*

If either the parties or the arbitral tribunal require assistance in identifying an expert witness, recourse can be had to the ICC International Centre for Expertise pursuant to the ICC Rules for Expertise. Where an ICC arbitral tribunal seeks a proposal

from the Centre for a tribunal-appointed expert, the services of the Centre are available at no cost. Further information regarding the operation of the ICC Rules for Expertise and the services of the Centre can be found in Jason Fry, Simon Greenberg, Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (ICC Publication 729).³

64 *Clarity regarding the subject matter and scope of reports*

It is essential for there to be clarity at an early stage (by agreement, if possible) over the subject matter and scope of any expert evidence to be produced. This will help to ensure that the experts appointed by the parties have similar expertise and address the same issues.

65 *Number of experts*

Other than in exceptional circumstances, it should not be necessary for there to be more than one expert per party for any particular area of expertise.

66 *Number of reports*

Consider agreeing on a limit to the number of rounds of expert reports and consider whether simultaneous or sequential exchange will be more efficient.

67 *Meetings of experts*

Experts will often be able to narrow the issues in dispute if they can meet and discuss their views after they have exchanged reports. Consideration should therefore be given to providing that experts shall take steps to agree on issues in advance of any hearing at which their evidence is to be presented. Time and cost can be saved if the experts draw up a list recording the issues on which they have agreed and those on which they disagree.

68 *Use of single expert*

Consider whether a single expert appointed either by the arbitral tribunal or jointly by the parties might be more efficient than experts appointed by each party. A single, tribunal-appointed expert may be more efficient in some circumstances. An expert appointed by the arbitral tribunal or jointly by the parties should be given a clear brief and the expert's report should be required by a specified date consistent with the timetable for the arbitration.

Hearings

69 *Minimizing the length and number of hearings*

Hearings are expensive and time-consuming. If the length and number of hearings requiring the physical attendance of the arbitral tribunal and the parties are minimized, this will significantly reduce the time and cost of the proceedings.

³ Available from www.iccbooks.com and online at www.iccdri.com.

70 Choosing the best location for hearings

Pursuant to Article 18(2) of the Rules, hearings do not need to be held at the place of the arbitration. The arbitral tribunal and the parties can select the most efficient place to hold hearings. In some cases, it may be more cost-effective to hold hearings at a location that, for example, is convenient to the majority of the witnesses due to give evidence at that hearing.

71 Telephone and video conferencing

For procedural hearings in particular, consider the use of telephone and video conferencing, where appropriate. Also, consider whether certain witnesses can give evidence by video link, so as to avoid the need to travel to an evidentiary hearing.

72 Providing submissions in good time

The arbitral tribunal should be provided with all necessary submissions (e.g. pre-hearing briefs, if any) sufficiently in advance of any hearing to be able to read them, prepare and become fully informed of the issues to be addressed.

73 Cut-off date for evidence

In advance of any evidentiary hearing, consider setting a cut-off date after which no new documentary evidence will be admitted unless a compelling reason is shown.

74 Identifying core documents

Consider providing the arbitral tribunal, in advance of any hearing, with a list of the documents it needs to read in preparation for the hearing. Where appropriate, this can be done by preparing and delivering to the arbitral tribunal a bundle of core documents on which the parties rely.

75 Agenda and timetable

Consider agreeing on an agenda and timetable for all hearings, with an equitable division of time between each of the parties. Consider the use of a chess clock to monitor the fair allocation of time.

76 Avoiding repetition

Consideration should be given to whether it is necessary to repeat pre-hearing written submissions in opening oral statements. This is sometimes done because of concern that the arbitral tribunal will not have read or digested the written submissions. If the arbitral tribunal has been provided with the documents it needs to read in advance of the hearing and has prepared properly, no such repetition will be necessary.

77 Need for witnesses to appear

Prior to any hearing, consider whether all witnesses need to give oral evidence. This is a matter on which the parties' counsel can confer and seek to reach agreement.

78 Use of written statements as direct evidence

Cost and time can be saved by limiting or avoiding direct examination of witnesses. When appropriate, witness statements can substitute for direct examination at a hearing.

79 Witness conferencing

Witness conferencing is a technique in which two or more fact or expert witnesses presented by one or more of the parties are questioned together on particular topics by the arbitral tribunal and possibly by counsel. Consider whether this technique is appropriate for the arbitration at hand.

80 Limiting cross-examination

If there is to be cross-examination of witnesses, the arbitral tribunal, after hearing the parties, should consider limiting the time available to each party for such cross-examination.

81 Closing submissions

Consider whether post-hearing submissions can be avoided in order to save time and cost. However, if post-hearing submissions are required, consider providing for either oral or written closing submissions. The use of both will result in additional time and cost. In order to give focus, the arbitral tribunal should consider providing counsel with a list of questions or issues to be addressed by the parties in the closing submissions. Any written closing submissions should be provided by an agreed date as soon as reasonable following the hearing.

Costs

82 *Using allocation of costs to encourage efficient conduct of the proceedings*

The allocation of costs can be a useful tool to encourage efficient behaviour and discourage unreasonable behaviour. Pursuant to Article 37(5) of the Rules, the arbitral tribunal has discretion to award costs in such a manner as it considers appropriate. It is expressly stated that, in making its decisions on costs, the tribunal may take into consideration the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner. The tribunal should consider informing the parties at the outset of the arbitration (e.g. at the case management conference) that it intends to take into account the manner in which each party has conducted the proceedings and to sanction any unreasonable behaviour by a party when deciding on costs. Unreasonable behaviour could include: excessive document requests, excessive legal argument, excessive cross-examination, dilatory tactics, exaggerated claims, failure to comply with procedural orders, unjustified applications for interim relief, and unjustified failure to comply with the procedural timetable.

Deliberations and awards

83 *Anticipating the time required*

Before closing the proceedings, the arbitral tribunal should ensure that time has been reserved in each of the arbitrators' diaries for deliberation promptly thereafter. The arbitral tribunal should promptly comply with Article 27 of the Rules and indicate to the Secretariat and the parties the date by which it expects to submit its draft award to the Court.

84 *Prompt completion of the award*

The arbitral tribunal must use its best efforts to submit the draft award as quickly as possible and should follow the guidance on drafting awards in the ICC Award Checklist sent to all arbitrators when the case file is transmitted to them. Further guidance can be found in the article "Drafting Awards in ICC Arbitrations" by Humphrey LLoyd, Marco Darmon, Jean-Pierre Ancel, Lord Dervaird, Christoph Liebscher and Herman Verbist, published in the ICC International Court of Arbitration Bulletin, Vol. 16/No. 2 (2005).

SPECIAL CONSIDERATIONS

Multiparty and multicontract arbitrations

85 *Conditions imposed by Articles 7–9 of the Rules*

Subject to certain conditions set forth in the Rules, Article 7 expressly permits the joinder of additional parties; Article 8 expressly permits claims between multiple parties; and Article 9 expressly permits claims arising out of more than one contract to be brought in a single arbitration, even if the claims are made under more than one arbitration agreement. Clearly, time and cost will be wasted if a party seeks to apply those provisions when the conditions set forth in the Rules are not met. For example, a Request for Joinder pursuant to Article 7 will be successful only if the joined party is bound by the arbitration agreement under which the claims in the arbitration are made; in addition, no additional party may be joined after the confirmation or appointment of any arbitrator, unless otherwise agreed. While Article 9 allows claims to be made in a single arbitration under more than one arbitration agreement, those claims will be sustained only if the different arbitration agreements are compatible. The conditions imposed by Articles 7, 8 and 9 should be carefully studied so as to avoid wasting time and money by making claims that will be rejected or by claiming against parties over whom the tribunal will have no jurisdiction.

86 *Adapting procedures to multiparty and multicontract cases*

The presence of one or more additional parties, the existence of one or more claims between claimants or between respondents, and the existence of claims under more than one contract are likely to complicate the proceedings. Care should be taken at the case management conference to devise tailor-made procedures, appropriate to the specifics of the case at hand, for dealing with the presence of additional parties, cross-claims and multicontract claims.

Consolidation

87 *Consider consolidating related cases*

Article 10 of the Rules provides for the consolidation of two or more separate arbitrations brought under the Rules when all of the parties to those arbitrations consent to the consolidation. Consider whether giving such consent would result in a more efficient resolution of the disputes.

Emergency arbitrator proceedings*88 Issues to consider before initiating emergency arbitrator proceedings*

Subject to the conditions set forth in the Rules, the Emergency Arbitrator Provisions allow a party to seek urgent interim or conservatory measures from an emergency arbitrator acting under the Rules. The emergency arbitrator offers an alternative forum to state courts for seeking such relief. In deciding whether to file an Application for Emergency Measures, a party should consider a number of issues: first, whether it is genuinely useful and necessary to spend time and money on seeking to obtain interim or conservatory measures; second, whether an application for Emergency Measures under the Rules is preferable to seeking interim measures in a state court. Furthermore, the party should make sure that the conditions for bringing emergency arbitrator proceedings under the Rules are met. For example, the party making the application must be able to demonstrate that it needs urgent interim or conservatory measures that cannot await the constitution of the arbitral tribunal. Also, emergency arbitrator proceedings may only be brought against a signatory of the arbitration agreement or the signatory's successor. An attempt to bring emergency arbitrator proceedings that do not meet all of the conditions will result in needless expenditure and loss of time.

