

**EFFECTIVE CASE MANAGEMENT OF AN INTERNATIONAL  
ARBITRATION UNDER ICC ARBITRATION  
AND ADR RULES**

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**ABSTRACT:** *While producing an enforceable award is the main goal of an international arbitration, time and cost efficiency are, also, leading requirements, since the parties are entitled to find out, without delay and at appropriate costs, if and when they may plan on the financial resources that are subject to their dispute. Effective case management is the main tool that may comply with those requirements, providing for procedural measures and appropriate planning of the arbitration proceedings, so as to enable a swift and effective solution of the case. ICC Arbitration Rules (2012) provide updated case management procedures to ensure efficiency within the dispute resolution process.*

**KEY WORDS:** *ICC Arbitration Rules, Time and Cost Efficiency, Case Management, Terms of Reference, Case Management Conference, Case Management Techniques.*  
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**1. INTRODUCTORY REMARKS**

Whenever a case is submitted to arbitration, the parties have already reached a state of intense disagreement regarding each other's way of construing and/or performing its contractual obligations. Since, at that time, they need to relinquish their dispute to a person whose expertise and judgment they trust, it is fair to reckon that they do not share a common perspective anymore and, therefore, enthusiastic cooperation during the arbitral proceedings, in order to speed up the procedure, is not to be expected.<sup>1</sup>

More than that, being obstinately oriented for a solution that will embrace their own claims or defenses, the parties that are fearing and anticipating that the arbitral tribunal may reach a different conclusion than the one they sought after, will often make recourse to "hostile" procedural means and "guerilla tactics" in order to undermine the process of arbitration.

Those tactics are usually consuming time and adding costs and, therefore, are challenging the arbitral tribunal ability to fight and avoid perturbing factors that are causing delays and disruptions of arbitral procedure. Since both time and costs are issues that define the effectiveness of the arbitration procedure, it is reasonable to consider

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appropriate means to attain a solution of the parties' dispute as soon as suitable, with appropriate costs, while keeping a balance between speed and costs, on one hand, and fairness and international worth of the award, on the other hand (Blackaby, et al., 2009).

Consequently, planning efficiently the arbitration proceeding and managing properly the specific issues of the case at hand are instruments that any arbitral tribunal should consider carefully, as a base for an accurate and truthful performance.

The new Rules of Arbitration of the International Chamber of Commerce (ICC Rules), in force as from 1 January 2012, replacing the current ICC Rules in force as from 1 January 1998, have updated the case management procedures as to provide the parties and the arbitrators with more efficient instruments.<sup>2</sup>

## 2. GENERAL UNDERLINE OF THE CASE MANAGEMENT CONCEPT

According to Article 22(1) of ICC Rules, the parties and the arbitrators are requested to make "*any effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute*". In other words, this text is requesting the arbitral tribunal, first and foremost, to ensure an effective case management. As a general rule, effective case management measures will be ensured by the arbitral tribunal throughout the whole arbitration process, although the first steps in planning and conducting the procedure are the most important.

While imposing on the arbitral tribunal and on the parties such duties of efficiency in terms of time and costs, the ICC Rules are, meanwhile, emphasizing that such requirements are to be balanced against the need to appropriately consider the complexity of the case at hand and the value of the dispute. That means that the arbitral tribunal will always need to ponder the need for speed and reduced costs with the more important commandment of observing the specific circumstances of the case of hand, including the complexity of the issues to be solved and the value of the dispute.<sup>3</sup>

Consequently, to manage an arbitral case at hand, the arbitral tribunal has not only to use its judicatory powers but also has to display an organizational and relational ability, involving parties in participating in determination of various case aspects as setting timetables, establishing procedural rules and applying rules of material law, pondering between written submissions and oral hearings and so on.

Therefore, in arbitration, the case management concept illustrates the cooperation of parties and of the arbitrators in assessing, planning, deciding and conducting the arbitration procedure in an expeditious and cost-effective manner, taking into considerations the circumstances of the case of hand, in order to deliver an enforceable award.

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<sup>2</sup> See International Chamber of Commerce Publication 850E, *ICC Arbitration and ADR Rules*. All quotes and remarks concerning articles of the ICC Rules are meant to refer to the ICC Rules in force as from 1 January 2012.

<sup>3</sup> Of course, the value of the dispute is important in regard of the costs of the arbitration; when having to decide upon a dispute of low value, the arbitrators will ensure that costs are proportionate with the value of dispute. Same *rationale* goes for the time constraints, being ineffective to spent a lot of time on a dispute of low value.

### 3. CASE MANAGEMENT CONFERENCES

In most of the cases, as far as the parties did not provide specific instructions regarding the applicable rules, the arbitrators enjoy discretionary rights to establish procedural rules. Of course, such discretion is limited sometimes by the law, by parties' agreement or even by applicable rules of arbitration.

Article 22(2) of ICC Rules is prompting the arbitral tribunal to establish, as soon as feasible, after consulting the parties, a set of procedural rules and measures, as it considers appropriate, in order to ensure an effective case management. Some of such measures concern obligations of the arbitral tribunal – to draft the Terms of Reference, to issue procedural orders, to establish timetables or to establish rules of taking evidence; some of them may result from the specific circumstances of the case at hand. For instance, the arbitral tribunal may ask the parties to draft a list of issues that may be solved by agreement of parties or of their experts or, upon request of any party, may issue procedural orders regarding the confidentiality of the arbitration proceeding and related matters, if the parties' dispute is concerning trade secrets or commercial information.<sup>4</sup>

But, before providing a set of rules that will govern the procedure, the arbitral tribunal is requested to consult the parties. That requirement is based on the assumption that the powers of the arbitrators are, primarily, determined by the parties will and that any procedural rules established by the arbitral tribunal should not be contrary to any agreement of the parties.

Such consultation is organized by the arbitral tribunal through a case management conference, as provided for by Article 24(1) of the ICC Rules. The ICC Rules in force as from 1 January 1998 did not provide for such a conference, although the majority opinion was that the arbitral tribunal may consider a preliminary meeting of the parties, aiming to convey them a general idea of how the arbitration will be conducted or seeking, whenever the parties are coming from different legal systems and backgrounds, to familiarize the arbitral tribunal with the parties' expectations and understanding of the arbitral process (Boeckstiegel, 1999).

The case management conference may be convened when drawing the Terms of Reference or as soon as possible thereafter. The conference may consist in a meeting in person of the parties or in a communication by video or telephone or any similar and effectual means of communication. In determining the need for a meeting in person of the parties, the arbitral tribunal will have to ponder the usefulness of such meeting against the time and cost constraints.

Whenever requested by the parties or required by the procedural developments, the arbitral tribunal may convene further conferences and may further adopt or amend the procedural rules or measures, as to ensure a continuing effective case management.

As a matter of practice, the arbitrators are often agreeing upon internal or pre-conference meetings, in order to arrange privately their own agenda of the case management conference. The agenda of the case management conference depends upon the progress of the procedure of the time of the conference. If the Terms of Reference

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<sup>4</sup> See Article 22(3) of ICC Rules.

were not yet drafted or signed, the agenda will include items related to the content of the agenda, including such procedural issues as the place of arbitration (if not already established by agreement of the parties), particulars of the applicable procedural rules, suggestions on provisional timetable and any other specific issues, as, for instance, a “roadmap” of the parties’ submissions or rules of evidence.

During the conference, the arbitral tribunal will discuss and agree with the parties the way it intends to conduct the procedure and will explain the parties’ duties in regard of the procedural rules that are meant to ensure an effective case management. In the same time or following the conference, the arbitral tribunal will establish the procedural timetable of the arbitration, shaping the rhythm of the procedure and determining the times, procedural activities and responsibilities of the parties regarding such activities. Such procedural activities may consist in submissions of the parties on exceptions or merits of the case, witness or expert’s testimonies, disclosure of documents and other evidence, hearings of the parties and post hearing briefs.

For effective management of the case at hand, the arbitral tribunal has to establish a schedule of procedural activities that is compatible with the complexity and circumstances of the case. For instance, where one of the parties is a State or a state entity, supplementary time should be granted in order to allow the bureaucratic mechanism to respond properly. Too short times may result in delays and endless extension of time request that may prove to be an inefficient planning of procedural activities.

Extension of time dates provided for in the timetable shall be granted by the Arbitral Tribunal at its discretion, in exceptional cases only and provided that a request is submitted before or, if not possible, immediately after the event preventing a party from complying with the deadline. The parties may also agree between themselves short extensions of time, on the basis of mutual courtesy, as long as they do not materially affect the timetable and provided that the arbitral tribunal is properly informed.

#### **4. PROCEDURAL INSTRUMENTS OF CASE MANAGEMENT**

According to Article 23 of ICC Rules, the arbitral tribunal shall draw up the Terms of Reference as soon as has received the file from the Secretariat of the Court and will transmit such terms to the Court, signed by the tribunal and all parties, within two months of the date of receipt of the file.

Although it may be preceded by a first set of rules issued by the arbitral tribunal upon the convening of a case management conference or, independently, by a procedural order, the Terms of Reference are the main document that shall include the determination of the applicable procedural rules as well as particulars of those rules.

The Terms of Reference not only describe the purpose and structure of the arbitration process but are also an instrument of case management, providing the procedural history of the case, a summary of the parties’ claims and a list of the issues to be determined; by that, accurate and timely drafted Terms of Reference may help the parties and the arbitral tribunal to keep track of their mission and objectives and to avoid delays and interference in the procedure. Therefore, Article 23(4) of the ICC Rules provide that, after the approval of the Terms of Reference by the Court, no new claims which fall outside of the limits of the Terms of Reference are admissible, unless expressly authorized by the arbitral tribunal. In taking its decision to issue this authorization the arbitral tribunal will consider

not only the nature of such new claims, but also the requirements of an effective case management, regarding the stage of the arbitration, the delay of the procedure or the costs of providing additional submissions or evidence.

Another instrument of case management and, probably, the most efficient, is the timetable of the procedural activities. Usually, the arbitral tribunal, after consulting with the parties, will issue a provisional timetable, that may be amended by further procedural orders, at the arbitral tribunal's initiative or by request of the parties. The final form of the timetable will be defined only at a later stage, when a clear vision of the procedural roadmap is attained.

During various stages of the arbitration procedure, the arbitral tribunal may issue, at its discretion, appropriate procedural orders, fine-tuning or re-shaping the procedure, according to latest developments or requirements of its mission. Such procedural orders are an efficient instrument of case management, since they may prompt the parties to comply with specific demands of the arbitral tribunal, in due time and under specific conditions. Therefore, Article 22(5) of the ICC Rules ask the parties to comply to any order made by the arbitral tribunal.

## 5. . CASE MANAGEMENT TECHNIQUES

According to the ICC Rules, appropriate control of time and cost is important in all cases.<sup>5</sup> Therefore, in an exemplificative manner, the ICC Rules are providing various techniques to ensure an effective case management.

1. Bifurcating the procedure is one of the possibilities that the arbitral tribunal may use to avoid delay in the procedural. In order to avoid intricate procedures and unnecessary costs the arbitral tribunal may provide bifurcate the procedure, for instance, into separate liability and damages proceedings. Consequently, in the first stage of the arbitration the arbitral tribunal will decide on the merits of the claim and, only if defendant will be found liable, will continue to assess the damage or the quantum of the relief sought by the claimant ( Park, 2008). That may prove to be cost and time effective, since the rebuttal of the claim on merits will save the tribunal and the parties the efforts to assess further evidence on the quantum that may include, often, expert reports and hearings.

2. Rendering one or more interim or partial awards on key issues may also be an efficient case management technique. By doing so, the arbitral tribunal may decide upon procedural or material exceptions which, if admitted, will conclude the procedure without assessing the merits of the claims; for instance, deciding on jurisdiction issues or on limitation status may put an end to the arbitration procedure without further costs and delays implied by the assessment of the merits of the claim.

3. Identifying issues that can be resolved by agreement of the parties will save time and costs; such issues may concern the facts of the case or specific legal provisions applicable to a case at hand. For instance, the parties may decide upon the date when the limitation status started to run or may ask their experts to establish jointly the rate of interest applicable to the principal claim. The parties may also agree on evidentiary

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<sup>5</sup> See, for instance, Appendix IV to ICC Rules, regarding various techniques of case management.

documents that will be produced and on sequence of various submissions to be provided to the arbitral tribunal.

4. One of the most time consuming procedural activities may be the production of documentary evidence, due to huge volume of supplied papers. While the most important evidentiary documents on which a party relies is provided at the first stages of arbitration, parties tend to supplement their documentary evidence as soon as each round of submissions are exchanged. Therefore, in order to properly manage this procedural issue, the arbitral tribunal may avoid or limit document production whenever appropriate to control time and cost or when facts of the case are satisfactory proved by previously produced documents.

Organizing the production of documentary evidence is also an efficient instrument of case management; the arbitral tribunal may establish reasonable time limits for provision of documents, may indicate what categories of documents are relevant to the outcome of the case and may use a schedule of document production, rebutting unsolicited production of documents or documents that are produced after the time limits expired.

5. The main stream of the arbitration procedure relies on parties written submissions and on evidentiary documents. In order to avoid unsolicited submissions and repetition of already argued points of fact or law, it is important that the arbitral tribunal should establish a sequence of the written submissions that will make clear to the parties the expectation of the tribunal. Written pleadings or submissions are usually submitted in a sequence, starting with the claimant request and following with the respondent answer. That pattern follows throughout the all procedure, excepting when, at a later stage, the arbitral tribunal decides to direct the parties to remit their submissions and their answers concomitantly; that is, especially the case of post-hearing briefs, the rationale of such a decision being the fair treatment that each party should enjoy (Bernini).<sup>6</sup>

Regarding the written pleadings and especially the post-hearing briefs, the arbitral tribunal may also direct the parties to focus on certain key issues that are relevant to the outcome of the arbitration and which arise during the hearing.

The above mentioned are only a few of the techniques that may be used by the arbitral tribunal in order to effectively manage the case at hand. There are no limits to the procedural measures that the arbitral tribunal may approve to that end, as long as they are not contrary to the agreement of the parties.

## 6. FINAL CONSIDERATIONS

At the end of the day, the arbitration is a service provided to the parties by an entity and/or by persons which are trusted by the parties (Pinkston, 2011). As any service provided to a consumer, the quality, the time of delivery and the cost of procuring the service are paramount. For that reason, besides the main goal of the arbitration – that is to produce an enforceable award that will stand a set aside proceeding ( Lalive, 2009), which equals to an undisputed fair quality of the said service - time and cost constraints are key issues of the whole procedure.

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<sup>6</sup> Giorgio Bernini, "International Arbitration, a Contemporary Perspective" (Lecture delivered in Bologna, 5 June 2008), p. 18, available at <http://www.arbitration-icca.org/articles.html>.

Case management requirements, measures and techniques are, therefore, of utmost importance to the reputation of international arbitration that is facing, nowadays, the competition not only of the state courts but, also, of other alternative dispute resolution methods as mediation, conciliation or dispute resolution boards.

As a result, the new ICC Rules are designed as to offer to the arbitral tribunal the instruments to effectively manage their case at hand, with a balance between time and cost constraints and the material circumstances of the case.

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