

How to Reduce the Cost and Time of Arbitration?

Importance of In-House Counsel Participation in ICC Arbitrations to Reduce Time and Cost.

On June 6, 2014, the International Chamber of Commerce (ICC) launched, in Paris, a new document entitled “Effective Management of Arbitration: A Guide for In-House Counsel and Other Party Representatives” (the “Guide”), which was conceived and co-drafted by my partner Peter M. Wolrich, from our Paris office.

The Guide seeks to answer a growing concern for parties involved in arbitration proceedings, namely the trend in such proceedings of being too long and too expensive.

According to ICC statistics, on the average, 82% of the cost of an arbitration under its administration is comprised of lawyers’ fees, and other expenses related to the presentation and defense of cases, as well as the presentation of witnesses and experts; 16% of the cost constitutes the arbitrators’ fees and expenses; and only 2% of the arbitration cost is comprised of the administrative fees charged by the ICC.

Therefore, the purpose of the new document is to focus on how to control the costs disbursed by the parties in the presentation and defense of their cases.

The ICC Rules of Arbitration grant its users great procedural flexibility, and purportedly do not contain provisions related to the number of rounds or lengths of briefs, document production, bifurcation, examination of witnesses, or oral arguments and post-hearing memos, among other matters. The absence of such provisions provides the parties and the tribunal with the possibility of designing proceedings that suit the specific nature of each arbitration. However, on many occasions, the parties and the tribunal do not develop the tailor-made procedures that are required for such proceedings, but either apply boiler plate procedures or resolve the procedural aspects as the arbitration moves along, which often results in excessive document production, in the presentation of too many witnesses and experts, and in several, long hearings, all of which increases the duration and costs of arbitration.

The main purpose of the ICC’s new document is to explain how to arrive at cost effective procedures that are appropriate given the importance, complexity and value of the dispute.

In order to achieve its purpose, the document proposes that each party determines the optimal procedure in terms of the rounds and length of the briefs, as well as the number of witnesses and experts, and the length of hearings.

Parties can attempt to reach agreements regarding these procedural matters, which, according to Article 22(2) of the ICC Rules of Arbitration, must be applied by the tribunal.

In case such an agreement is not reached, parties may present their positions to the tribunal during the so-called early case management conference, which, in the end, will establish the procedural steps that it deems adequate, and that, according to Article 24(2) of the ICC Rules of Arbitration will be reflected in the procedural timetable.

Obviously, the parties' lawyers in an arbitration proceeding are not the ideal persons to perform a cost-benefit analysis of all of these matters, which requires the making of business decisions. In-house counsel on the other hand, should perform this analysis, since they have the best knowledge of the companies' goals in a particular arbitration, and they are the ones who can determine how much the company is willing to spend, weighing the costs of the arbitration with the benefits that the company seeks to obtain, and evaluating the level of risk that they are willing to assume to reduce the time and money spent in the arbitration. Of course the parties' lawyers and the members of the tribunal may contribute to this analysis with their experience regarding the pros and cons of each alternative, in order for the parties to make a good decision.

Article 24(4) of the ICC Rules of Arbitration encourages the participation of the parties' representatives at the case management conference, including in-house counsel, to allow them to have a good understanding of the procedural options available, and the pros and cons of each of them.

The new ICC Guide seeks to ease the parties' decision-making with regards to these procedural matters, by establishing a series of 11 topics which include the following:

- Request for Arbitration
- Answer and Counterclaims
- Rounds of Written Submissions
- Early Determination of Issues
- Document Production
- Fact and Expert Witnesses
- The Hearing

In the Guide, each of these topics is divided in the following sections:

- The first section explains the topic under discussion;
- The second section enumerates the available options with respect to each topic;
- The third section analyses the pros and cons of the different options;
- The fourth section presents a cost-benefit analysis of each of the options;
- The fifth section outlines a list of questions that can ease the decision-making;
- Finally, the sixth section establishes collateral issues that may be considered.

In this manner, the ICC seeks to assist the parties' in tailor-making the arbitration procedures so that the time and cost of the arbitration is in line with the complexity and value of the dispute.

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