

# Techniques for Controlling Time and Costs in Arbitration

Report from the ICC Commission on Arbitration



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# Preface

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

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Statistics provided by the ICC International Court of Arbitration based on ICC cases that went to a final award in 2003 and 2004 show that the costs incurred by the parties in presenting their cases constituted the largest part of the total cost of ICC arbitration proceedings. On average, the costs in these ICC arbitration cases were spread as follows:

Costs borne by the parties to present their cases:	82%
(including, as the case may be, lawyers' fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration other than those set forth below)	
Arbitrators' fees and expenses:	16%
Administrative expenses of ICC:	2%

It follows that if the overall cost of the arbitral proceedings is to be minimized, special emphasis needs to be placed on steps aimed at reducing 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.

These Techniques for Controlling Time and Costs in Arbitration are designed to assist arbitral tribunals, parties and their counsel in this regard.

Pursuant to Article 15 of the ICC Rules of Arbitration, the procedure in an ICC arbitration is governed firstly by the ICC Rules and, where they are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on. Many other arbitration rules provide for similar solutions. As a result, arbitrations may be conducted using different procedural traditions, depending on the origins of the parties, their counsel and the arbitrators.

These Techniques provide guidance to the parties and their counsel on certain procedures that they may be able to agree upon for the efficient management of their proceedings. The solutions proposed herein are not the only ones available and it is not suggested that they are appropriate to all kinds of arbitrations.

This document can be provided to the parties by the arbitral tribunal as soon as it has received the file, so that they can discuss and seek to reach 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, under Article 20(1) of the ICC Rules, to establish the facts of the case within as short a time as possible, whilst ensuring that each party has a reasonable opportunity to present its case.

The Techniques are in no way prescriptive, nor should they be regarded as a code of best practice. Rather, they provide ideas 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.

The Techniques embody two underlying principles. First, wherever possible, the parties and the arbitral tribunal should make a conscious and deliberate choice early in the proceedings as to the

specific procedures suitable for their case. Second, the arbitral tribunal should work proactively with the parties to manage the procedure from the outset of the case.

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**

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### *Keeping clauses simple*

- 1 Simple, clearly drafted arbitration clauses will avoid uncertainty and disputes as to 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 standard ICC arbitration clause, which can be found in the booklet containing the ICC Rules of Arbitration (ICC Publication 846), is recommended. Modifications to the standard clause can result in unintended and undesirable consequences. In addition to the standard clause, 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 further provisions to this clause relating to the procedure for the arbitration. However, multi-party and multi-contract transactions may require specific additional provisions.

### *Selection and appointment of arbitrators*

- 3 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-person 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 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-person tribunal (See ICC Rules, Article 8(2)).
- 4 If the parties wish ICC to select and appoint all members of the arbitral tribunal (see paragraph 13 below), then the following wording can be used: 'All arbitrators shall be selected and appointed by the ICC International Court of Arbitration.'
- 5 Adding special requirements as to 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.

### *Fast-track procedures*

- 6 Consideration may be given to setting out fast-track procedures in the arbitration clause. Indeed Article 32(1) of the ICC Rules enables the parties to shorten time limits provided for in the Rules, while Article 32(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 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 as to 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.

### *Time limits for rendering the award*

- 7 One commonly used provision that can give rise to significant difficulties is the requirement that an 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.

### *Submission to ICC arbitration*

- 8 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 reduce time and costs.

## **INITIATION OF PROCEEDINGS**

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### **Selection of counsel**

#### *Counsel with experience*

- 9 Consider appointing counsel with the skills necessary for handling the arbitration at hand. 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.

#### *Counsel with time*

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

### **Selection of arbitrators**

#### *Use of sole arbitrator*

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

#### *Arbitrators with time*

- 12 Whether selecting a sole arbitrator or a three-person 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 particular need for speed, this must be made clear to ICC so that it can be taken into consideration when making any appointments.

#### *Selection and appointment by ICC*

- 13 Consider allowing 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 with 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 ICC at this stage, they can request that ICC disclose the names of possible arbitrators for selection by ICC in accordance with a procedure to be agreed upon by the parties in consultation with ICC.

### *Avoiding objections*

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

### *Selecting arbitrators with strong case-management skills*

- 15 A tribunal that is proactive and skilled in case management will be able to assist in managing the arbitration so as to make it as cost- and time-effective as possible, given the issues in dispute and the nature of the parties. This may be of particular value where the parties wish to use a fast-track procedure. Careful consideration should therefore be given to selecting tribunal members, especially the sole arbitrator or chairman.

## **Request for Arbitration and Answer**

### *Complying with the ICC Rules*

- 16 The Claimant should ensure that it includes all of the elements required by Article 4 of the ICC Rules in its Request for Arbitration. Failure to do so can result in the Secretariat needing 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 of the Rules.
- 17 The ICC Rules do not require a Request for Arbitration or an Answer to set out full particulars of either the claim or defence (or, where applicable, a counterclaim). Whether or not detailed particulars of the claim are given in the Request for Arbitration 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 hold a case-management conference to establish the procedure for the arbitration at a very early stage in the proceedings (see paragraphs 31–34 below).

## **PRELIMINARY PROCEDURAL ISSUES**

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### **Language of the arbitration**

#### *Determination of language by the arbitral tribunal*

- 18 If the parties have not agreed on the language of the arbitration, the arbitral tribunal should consider determining the language of the arbitration by means of a procedural order, pursuant to Article 16 of the ICC Rules, prior to establishing the Terms of Reference and after ascertaining the position of the parties.

#### *Proceedings involving two or more languages*

- 19 In general, the use of more than one language should be considered only when doing so would reduce rather than increase time and cost. 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 it is not possible to avoid preparing one or more of those

documents in more than one language, the parties would be well advised to agree that only one version shall be binding.

## **Relationship among the Terms of Reference, the provisional timetable and the early case-management conference**

- 20 Pursuant to Article 18 of the ICC Rules, the Terms of Reference must be drawn up as soon as the arbitral tribunal has received the file from the Secretariat (see paragraphs 24–30 below). Article 18(4) also requires the arbitral tribunal to establish a provisional timetable for the conduct of the arbitration either when drawing up the Terms of Reference, or as soon as possible thereafter.
- 21 While an early case-management conference (sometimes called a ‘procedural conference’) is not required under the ICC Rules, such conferences are commonly used in ICC arbitrations. Such a conference can play an important role in enabling the parties and the arbitral tribunal to discuss and agree on a procedure that is tailored to the specific case and enables the dispute to be resolved as efficiently as possible (see paragraphs 31–34 below).
- 22 Where the parties have set out their cases in sufficient detail in the Request for Arbitration and the Answer, it may be possible to hold a case-management conference during the meeting at which the Terms of Reference are finalized and immediately following their signature. In such circumstances, it may be possible for the provisional timetable required by Article 18(4) to include detailed provisions on procedure for the entire arbitration.
- 23 Where the case has not been set out in such detail at the time the Terms of Reference are finalized, it may be necessary to defer the case-management conference until after the parties have set out their cases in sufficient detail. In such circumstances, the provisional timetable required by Article 18(4) will need to describe the steps that the parties are to take in order promptly to set out their cases in sufficient detail prior to the case-management conference. At the case-management conference, a revised provisional timetable can be established and communicated to the parties and the International Court of Arbitration in accordance with Article 18(4).

## **Terms of Reference**

### *Summaries of claims and relief sought*

- 24 The arbitral tribunal should consider whether it is appropriate for it to draft the summary of claims and/or the relief sought or whether it would assist if each party provided a draft summary for inclusion in the Terms of Reference in accordance with Article 18(1)(c) of the ICC Rules. In the latter case, the arbitral tribunal should consider requesting that the parties 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, pp. 21–32).

### *Use of discretion in apportionment of costs*

- 25 The arbitral tribunal should consider promptly informing the parties that any unreasonable failure to comply with procedures agreed or ordered in the arbitration or any other unreasonable conduct will be taken into account by the arbitral tribunal in determining who shall bear what portion of the costs of the arbitration, pursuant to Article 31 of the ICC Rules (see further at paragraph 85 below under the heading ‘Costs’).

### *Empowering chairman on procedural issues*

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

### *Administrative secretary to the arbitral tribunal*

- 27 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 ICC International Court of Arbitration on the Appointment of Administrative Secretaries by arbitral tribunals (published in the *ICC International Court of Arbitration Bulletin*, Vol. 6/No. 2—November 1995, pp. 77–78) which deals with the duties of the secretary, the secretary's independence, the tribunal's responsibility for the secretary's work, and the basis for payment of the secretary.

### *Need for a physical meeting*

- 28 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, as appropriate. 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.

### *Counterparts*

- 29 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.

### *Compliance with Article 18(3)*

- 30 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 International Court of Arbitration for approval pursuant to Article 18(3) of the ICC Rules do not contain any provisions that would require the parties' agreement or any decisions by the arbitral tribunal.

## **Early case-management conference**

### *Timing of case-management conference*

- 31 Consider holding a case-management conference (sometimes called a 'procedural conference') as soon as the parties have set out their respective cases in sufficient detail for the arbitral tribunal and the parties to identify the issues in the case and the procedural steps that will be necessary to resolve the case. If the Request for Arbitration and the Answer do not set out the substance of the case in such detail, consideration should be given to holding the case-management conference as soon as this has been done (see paragraph 23 above).

### *Proactive case management*

- 32 At the case-management conference, directions concerning the procedure for the arbitration will be agreed upon or ordered. The more information the arbitral tribunal has about the issues in the case prior to such conference, the better able it will be to assist the parties to devise 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 as to the issues to be addressed in documentary and witness evidence, the areas on which it will be assisted by expert evidence, and the extent to which disclosure of documents by the parties is needed in order to address the issues in dispute. The techniques set out in this document can be used by the arbitral tribunal and the parties at the case-management conference to assist in arriving at the most appropriate procedures (see section entitled ‘Subsequent procedure for the arbitration’ below). A provisional timetable with the shortest times that are realistic should be established.

- 33 The arbitral tribunal should consider informing the parties that it will proactively manage the procedure throughout the arbitration so as to assist the parties in resolving the dispute as efficiently as possible.

#### *Client attendance*

- 34 The parties should consider having a person from within the client’s organization attend the case-management conference. Client representatives and witnesses, including any experts, should be kept informed of the input that will be required from them in order to comply with each step in the provisional timetable. The arbitral tribunal may specifically request that client representatives attend this conference.

### **Timetable for the proceedings**

#### *Compliance with the provisional timetable*

- 35 The arbitrators and the parties should make all reasonable efforts to comply with the provisional 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 18(4) of the ICC Rules.

#### *Need for a hearing*

- 36 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 save significant costs and time.

#### *Fixing the hearing date*

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

#### *Pre-hearing conference*

- 38 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 the parties to focus at the forthcoming hearing.

#### *Use of IT*

- 39 The arbitral tribunal should consider discussing with the parties how IT systems can be used during the arbitration. The parties can be referred to the ICC publication *Using Technology*

to *Resolve Business Disputes* (2004 Special Supplement of the *ICC International Court of Arbitration Bulletin*), which contains useful guidance on the use of IT in international arbitration proceedings. The parties can also be offered the use of the online ICC service NetCase, which enables correspondence and documents for the arbitration to be stored and exchanged within a secure online environment hosted by ICC. Consideration can also be given to the use of video and telephone conferences for procedural and other hearings where attendance in person is not essential.

#### ***Short and realistic time periods***

- 40 In deciding upon the length of the final hearing and the amount of time required for all procedural steps up until that hearing, choose the shortest times that are realistic. Unrealistically short time periods are likely to result in a longer rather than a shorter proceeding, should they need to be re-scheduled.

#### ***Bifurcation and partial awards***

- 41 The arbitral tribunal should consider 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.

#### ***Briefing everyone involved in the case***

- 42 As soon as the proceedings are started, parties should give thought to the input that will be needed in order to comply with each step in the anticipated timetable. Once the timetable is set, the parties should consider precisely what input is needed in order to meet 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, etc.). This will greatly assist in enabling everyone to reserve the time they need 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**

#### ***Arbitral tribunal's role in promoting settlement***

- 43 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 course of 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*). The parties may also request the arbitral tribunal to suspend the arbitration proceedings for a specific period of time while settlement discussions take place.

## **SUBSEQUENT PROCEDURE FOR THE ARBITRATION**

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### **Introduction**

- 44 The paragraphs that follow give guidance on the points to be discussed by the parties and the arbitral tribunal when establishing procedural directions for the arbitration. They provide suggestions that may assist in reducing the cost and duration of the proceedings.

### **Written submissions**

- 45 Written submissions come in different forms and are given different names. They include the Request for Arbitration and Answer, statements of case and defence, memorials or other

written arguments, and opening and closing written submissions. These comments apply to written submissions generally.

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

46 If the parties set out their cases in full early in the proceedings, this will enable the parties and the arbitral tribunal to understand the key issues at an early stage and adopt procedures to address them in its procedural orders (see paragraphs 17, 22–23 and 31 above). It will help ensure that the procedure used during the case is efficient and that time and costs are not spent on matters that turn out to be of no direct relevance to the issues that need to be determined.

### ***Avoiding repetition***

47 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 (for example, in pre-hearing memorials, oral submissions and post-hearing memorials), and the arbitral tribunal may direct that there be no such repetition.

### ***Sequential or simultaneous delivery***

48 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 reply submissions are required.

### ***Specifying form and content***

49 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.

### ***Limiting the length of submissions***

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

### ***Limiting the number of submissions***

51 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**

### ***Organization of documents***

52 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 case-management conference.

### ***Producing documents on which the parties rely***

53 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.

### ***Establishing procedure for requests for production***

54 When there are to be requests for the production of documents, 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 Commercial 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.

### ***Managing requests for production efficiently***

55 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 and 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.

### ***Avoiding duplication***

56 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 save costs.

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

57 It is wasteful to provide the arbitrators with documents that are not material to their determination of the case. In particular, it will not usually 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.

### ***Minimizing creation of hard copies***

58 Consider minimizing the volume of hard copy paper that needs to be produced. Exchanging documents in electronic form can reduce costs (see the ICC publication *Using Technology to Resolve Business Disputes* referred to in paragraph 39 above (2004 Special Supplement of the *ICC International Court of Arbitration Bulletin*)).

### ***Translations***

59 Try to agree how translations of any documents are to be dealt with. Minimizing the need for certified translations will reduce costs. Such certified translations may only be required where translation issues emerge from unofficial translations.

### *Authenticity of documents*

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

## **Correspondence**

### *Correspondence between counsel*

- 61 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 a factor taken into consideration by the arbitral tribunal in the exercise of its discretion on costs (see paragraph 85 below).

### *Sending correspondence to the arbitral tribunal*

- 62 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 ICC Rules.

## **Witness statements**

### *Limiting the number of witnesses*

- 63 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.

### *Minimizing the number of rounds of witness statements*

- 64 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**

### *Presumption that expert evidence not required*

- 65 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.

### *ICC International Centre for Expertise*

- 66 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 tribunal seeks a proposal from the Centre in respect of 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 the 'Guide to ICC Expertise', produced by the Task Force on

Guidelines for ICC Expertise Proceedings, chaired by Hilmar Raeschke-Kessler (published in the *ICC International Court of Arbitration Bulletin*, Vol. 16/No. 1—Spring 2005, pp. 19–31).

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

67 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 ensure that experts with the same subject-matter expertise are appointed by both parties and that they address the same issues.

#### *Number of experts*

68 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.

#### *Number of reports*

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

#### *Meetings of experts*

70 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 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.

#### *Use of single expert*

71 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**

#### *Minimizing the length and number of hearings*

72 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.

#### *Choosing the best location for hearings*

73 Pursuant to Article 14(2) of the ICC Rules, hearings do not need to be held at the place of 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.

#### *Telephone and video conferencing*

74 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.

### ***Providing submissions in good time***

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

### ***Cut-off date for evidence***

- 76 Consider fixing a cut-off date in advance of any evidentiary hearing, after which no new documentary evidence will be admitted unless a compelling reason is shown.

### ***Identifying core documents***

- 77 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.

### ***Agenda and timetable***

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

### ***Avoiding repetition***

- 79 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, this will not be necessary.

### ***Need for witnesses to appear***

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

### ***Use of written statements as direct evidence***

- 81 Witness statements are commonly used as direct evidence at a hearing. Cost and time can be saved by limiting or avoiding direct examination of witnesses.

### ***Witness conferencing***

- 82 Witness conferencing is a technique in which two or more fact or expert witnesses presented by one or more 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.

### ***Limiting cross-examination***

- 83 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.

### ***Closing submissions***

- 84 Consider whether post-hearing submissions can be avoided in order to save time and cost. 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 submissions should be provided by an agreed date as soon as reasonable following the hearing.

## Costs

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

85 The allocation of costs can provide a useful tool to encourage efficient behaviour and discourage unreasonable behaviour. The arbitral tribunal has discretion to award costs in such a manner as it considers appropriate. It may be helpful to specify at the outset of the proceedings that in exercising its discretion in allocating costs the arbitral tribunal will take into account any unreasonable behaviour by a party. Unreasonable behaviour could include: excessive document requests, excessive legal argument, excessive cross-examination, dilatory tactics, exaggerated claims, failure to comply with procedural orders, unjustified interim applications, unjustified failure to comply with the procedural calendar, etc.

## Deliberations and awards

86 Before closing the proceedings, the arbitral tribunal should ensure that time has been reserved in each of the arbitrators' diaries for prompt deliberation thereafter. The arbitral tribunal should promptly comply with Article 22(2) of the ICC Rules and indicate to the Secretariat an approximate date by which it will submit the draft award to the International Court of Arbitration. The arbitral tribunal shall use its best efforts to submit the draft award as quickly as possible. Further guidance on drafting awards 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, pp. 19–40).

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**Techniques for Controlling Time and Costs in Arbitration** is the result of a study conducted by a Task Force within the Commission on Arbitration. Drafted by renowned arbitrators, it reflects the lessons of long-standing and wide-ranging experience.

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