Kluwer Arbitration Blog

The New ICC Rules: Continuing Evolution of Case Management Powers to Control Costs and Delays in International Arbitration

Paul Friedland (White & Case LLP) · Tuesday, September 13th, 2011 · White & Case

The escalation of costs and delays in international arbitration and the consequent dissatisfaction of the system's users have become prime subjects for users of and commentators on international arbitration.[1)] An informal study by the Corporate Counsel International Arbitration Group (CCIAG) in 2010 found that every single corporate counsel who was surveyed thought that arbitration 'takes too long' and 'costs too much'.[2)]

It has also been correctly stated that "*[w]hether or not concerns about international arbitral efficiency are exaggerated, the international arbitration community must face this discontent and, more importantly, take steps to maintain its legitimacy with its users.*"[3)]

The problems of cost and delay in high value disputes are not, however, new subjects. In 1989 Lord Mustill posed the following (largely rhetorical) questions with respect to high value commercial arbitrations:

> Do the parties work together to achieve a result which is fair and sensible in commercial terms, or do they not rather seek out every procedural advantage to ensure that they win, regardless of the merits? Do the parties really want a speedy decision, or will not the defendant spin out the arbitration for as long as possible? Are the proceedings any longer imbued by informality, or do they not have all the elephantine laboriousness of an action in court, without the saving grace of the exasperated judge's power to bang together the heads of recalcitrant parties[4)]

Building on the foundations laid in the 1985 UNCITRAL Model Law,[5)] the major sets of arbitral rules have gradually evolved over the last 20 years to clarify: (i) the extent to which parties are obliged to conduct arbitrations in a timely and cost efficient manner; and (ii) the circumstances in which arbitral tribunals may in fact be empowered to bang parties' heads together.[6)]

The most recent step in that evolution was the publication of the revised ICC Rules on September 12, 2011, which come into effect from January 2012.

Article 22(1) of the new ICC Rules states:

> *The arbitral tribunal and the parties shall 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(1) thus contains an explicit contractual obligation on the parties to conduct their arbitration in a 'proportionate' manner. More often than not, however, when large sums of money are at stake and experienced counsel are engaged on both sides, at least one of the parties has a rational incentive to 'intensively litigate' the dispute, thus increasing costs and causing delays.

Once a dispute has arisen, it is unrealistic to expect either party to act contrary to its self-interest in pursuit of the 'higher ideal' of arbitral efficiency. In such situations, time and costs are best kept in check by empowering tribunals to take 'proportionality'-based case management decisions. The existence of such a power is common to most modern sets of rules, and is contained in Article 22(2) of the new ICC Rules:

> In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.

The innovation with regard to case management in the new Rules is Article 24, which makes it mandatory for the tribunal to convene an initial "*case management conference to consult the parties on procedural measures*" which may be held "*in person, by video conference, telephone or similar means of communication*". Article 24 also suggests that the tribunal may adopt one or more of the case management techniques described in Appendix IV.

Appendix IV contains a useful summary of case management techniques (such as bifurcation, limiting document requests, and limiting the length and scope of written submissions and witness evidence). It also emphasizes that "*[a]ppropriate control of time and cost is important in all cases. In cases of low complexity and low value, it is particularly important to ensure that time and costs are proportionate to what is at stake in the dispute.*"

While the case management techniques set out in Appendix IV will be familiar to all experienced arbitration practitioners, the 'codification' fulfils at least two important functions. First, it can reasonably be expected that the explicit encouragement to use such techniques will increase their use by less experienced arbitrators. Second, the explicit enunciation of case management techniques serves further to legitimize their use and hence to insulate awards from challenge on due process grounds.

One member of the CCIAG has suggested that "*[t]o fix arbitration, practitioners must return the process to its original state as a streamlined option for dispute resolution.*"[7] In practice, it is likely impossible to reverse the trend by which arbitration has absorbed certain features of litigation, but it remains realistic to hope that tribunals (which, unlike the national court judge, will see through a case from beginning to end) will use their case management powers to ensure that the procedure is

as streamlined a possible.

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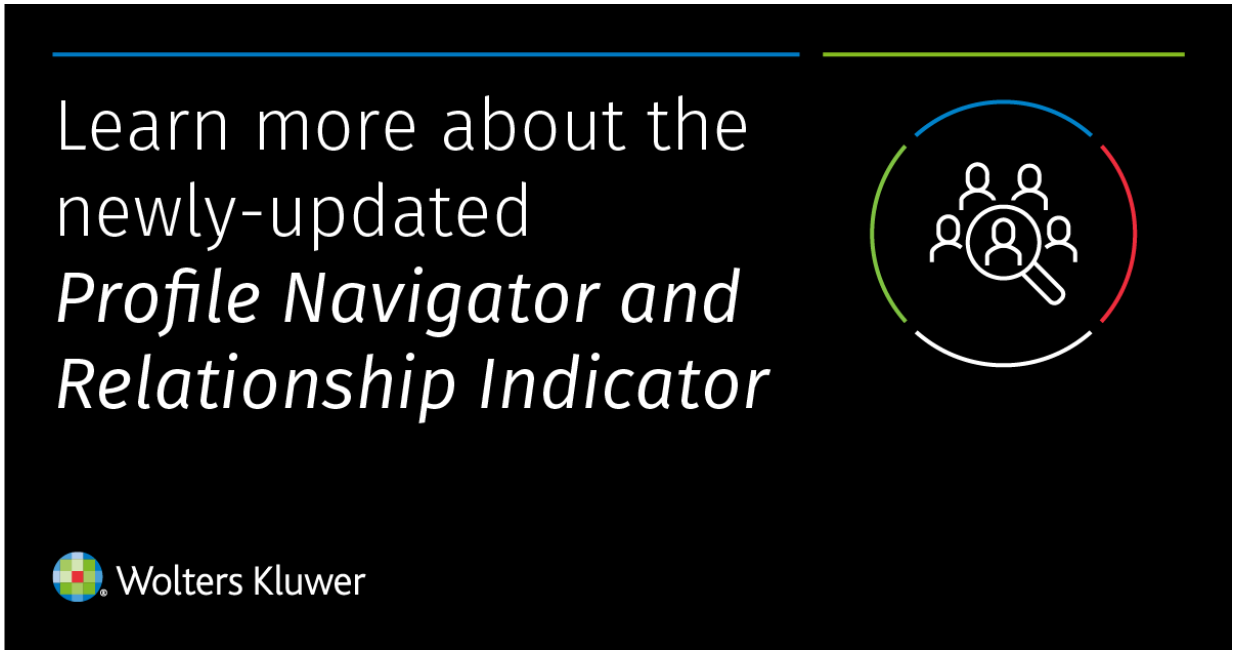

References

?1 See, for example, Jean-Claude Najar, 'Inside Out: A User's Perspective on Challenges in International Arbitration', Arbitration International, 25 (2009) 515, 517.

Lucy Reed, 'More on Corporate Criticism of International Arbitration', Kluwer Arbitration Blog, 16 July 2010 (https://wolterskluwerblogs.com/blog/2010/07/16/more-on-corporate-criticism-of-international-arbitration/)

?2 *"A recent study of the Corporate Counsel International Arbitration Group (CCIAG) found that 100% of the corporate counsel participants believe that international arbitration "takes too long" (with 56% of those surveyed strongly agreeing) and "costs too much" (with 69% strongly agreeing).*"

?3 Ibid.

[4] Lord Mustill, 'Arbitration: History and Background', Journal of International Arbitration 6(2) (1989) 43, 54-55.

[5] Article 19 of the Model Law states that, in the absence of agreement between the parties, "*the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*"

[6] See, for example, Article 14 of the LCIA Rules (1998), Article 16 of the AAA ICDR Rules (2009) and Article 17 of the UNCITRAL Rules (2010).

[7] Jean-Claude Najar, 'Inside Out: A User's Perspective on Challenges in International Arbitration', Arbitration International, 25 (2009) 515, 517.

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