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Effective Management of Arbitration; A Guide for In-House Counsel and Other Party Representatives

Mirèze Philippe · Tuesday, July 22nd, 2014 · ArbitralWomen

The worldwide launch of the Guide for In-House Counsel and Other Party Representatives on Effective Management of Arbitration Guide took place on 6 June 2014 in Paris. The Guide provides a checklist for the procedural decisions that need to be made at each principal phase of an arbitration. Useful in both large and small cases, it enables in-house counsel worldwide to participate effectively in the tailor making process throughout the arbitration proceedings. The Guide was drafted by a Task Force of the ICC Commission on Arbitration & ADR ("Commission").

John Beechey (President of the ICC International Court of Arbitration) launched the conference, noting that the ICC Rules of Arbitration ("ICC Rules") require parties and arbitrators to conduct cases in a time and cost efficient manner. "I sometimes see letters from in-house or outside counsel, complaining of delay in the arbitral process. If we establish that our systems or procedures are at fault, we take the criticism on board and improve things. However, when users say that they own the case, we tell them: "OK, we will help you, but if it is your case, own it and make sure you take an active part." The Guide is intended to encourage a more pro-active role on the part of users of arbitration services" said Beechey.

"In order to assist arbitration users, this Guide is specifically designed to provide them with tools for making decisions to ensure the cost effectiveness of each arbitration", added **Peter Wolrich**, Former Chairman to the ICC Commission of Arbitration & ADR. He explained that the ICC Rules were drafted to enable the parties and the arbitrators to create a tailor-made procedure that is adapted to the particular needs of each case. However, too often, the parties and arbitrators do not tailor-make the procedure but either apply standardized procedures or decide procedural matters piecemeal as the case moves along. This tends to increase time and cost. This is why it is necessary to determine which procedures are cost effective, i.e. whether their benefit in terms of improving chances of success is worth the cost. For example, it is faster and cheaper to have one round of briefs rather than three. In each case it is necessary to determine whether the benefit of additional rounds is worth the cost. This is ultimately a business decision. Parties must have a good understanding of the procedural options and the pros and cons of the various options so that they can make an effective cost/benefit analysis and choose the optimum procedure for their case. The new guide provides party representatives with tools to assist them in accomplishing this important task. Wolrich walked through the guide by explaining the sections on 'settlement considerations' and 'case management conference' and the various Topic Sheets: 1. Request for Arbitration; 2. Answer and Counterclaims; 3. Multiparty Arbitration; 4. Early Determination of Issues; 5. Rounds

of Written Submissions; 6. Document Production; 7. Need for Fact Witnesses; 8. Fact Witness Statements; 9. Expert Witnesses; 10. Hearing on the Merits; 11.Post-Hearing Briefs.

A panel of in-house counsel, moderated by **Vera van Houtte** (Vice President, ICC International Court of Arbitration) shared their experience about each of the stages defined in the Topic Sheets.

Maria Vicien-Milburn (General Counsel, UNESCO) provided an insight of how party representatives from international organisations deal with decisions related to arbitral procedural issues. International organisations are usually in the position of respondent and rarely institute arbitration, although they have the legal capacity to do so. Vicien-Milburn covered the topic sheets "answer and counterclaim" which she considered in many aspects similar to preparing a request for arbitration.

Jeffrey Robert Holt (Head of Legal Affairs, Saipem Offshore Norway) dealt with the Topic Sheet "multi-party arbitration". Holt was of the opinion that having multi arbitrations joined together is possible, but it is something parties may wish to avoid. CEOs may be of the view that it is possible to get all involved in the various arbitrations around one table and solve the problem, but that is where the in-house counsel has a role to play; the pros and cons in the Topic Sheet are helpful.

Pierre-Jérôme Abric (Vice President, General Counsel Litigation, AREVA) added that the tailor making approach is achieved with the *case management conference* where parties and arbitrators must be able to determine the best timetable for the case. The process is a partnership matter between in-house and outside counsel, and parties should not let outside counsel take any direction without the input of the client.

Holt and Abric addressed the issue of *experts* and whether there should be any. One of the difficulties of this issue is the difference of cultures of the parties.

The *early determination of issues* that can dispose of all or a meaningful part of a case has been a controversial topic and the failure to consider this possibility can lead to the highest level of frustration among in-house counsel, said **Michael McIlwrath** (Global Chief Litigation Counsel, GE Oil & Gas). Because early disposition is one of the procedural tools that is most effective and the least used, the Guide rightly encourages parties to contemplate at the outset what issues can have a critical impact on the life of the case; for example, it often makes sense to split quantum and damages, or determine the application of key contractual provisions. With respect to *the number of rounds of written submissions*, McIlwrath noted that the Guide encourages parties to consider what is really necessary for their case rather than just following the usual script, which he said is a trap, even for experienced professionals. "This Guide is extremely useful not just for in-house counsel but for everyone, parties, counsel and arbitrators. There is nothing new under the sun here, as the Guide refers to concepts which have been around for a while, but it is helpful to remind all of the stakeholders about how to adapt arbitration to the needs of each case."

Isabelle Hautot (General Counsel, Orange) described "this Guide as an important turning point in the life of arbitration". In-house counsel feel shy and do not have the courage or knowledge to interfere. Parties should not embark in proceedings as something inevitable. The arbitration is not the final word even if the award is successfully enforced; settlement remains always possible. Parties may also decide to keep one or two fundamental issues for the arbitration and discuss other matters which may be settled or left out of the arbitration.

Van Houtte referred to the obligation under the ICC Arbitration Rules to list the issues in the terms of reference which forces the parties and the arbitrators to focus on what is really at stake. Nonetheless terms of reference often do not list the issues and arbitrators and parties miss the opportunity to verify, whether there are among the issues any which may be the subject of early determination. Van Houtte, tongue in cheek, finally asked whether it may become a professional duty or at least best practice for counsel in arbitration to refer their clients to this Guide and to suggest that they read it thoroughly before starting the arbitration?

In his closing remarks, **Jean-Claude Najar** (Founder & Member, Steering Committee, Corporate Counsel International Arbitration Group, CCIAG,) said that “The users’ voice is heard”. The Guide is a do-it-yourself toolkit allowing the parties to take business decisions and to participate in the shaping of the arbitration. “My plea to in-house counsel is ‘please participate’”.

The conclusions were made by **Andrea Carlevaris** (Secretary General, ICC International Court of Arbitration). In-house counsel were absent from the arbitration scene for a long time and nothing was done to take them into consideration for many reasons. This has changed and in-house counsel now regularly participate in conferences on arbitration, including as speakers, and have a prominent role even in the bodies of some institutions including the ICC International Court of Arbitration and the ICC Commission on Arbitration and ADR. We all welcome these developments. However, these developments are not sufficient. In order for in-house counsel to re-appropriate a system that belongs to them, appropriate tools were put in place to allow them to be involved in the relevant procedural decisions. The Guide contributes to filling this gap. “The Guide puts in-house and outside counsel on the same footing” he added. Strategy is part of the process but it is not part of this Guide. “The Guide was drafted with the ICC Rules and ICC arbitration in mind but can be used in any kind of arbitration and by all participants. It is the kind of contribution an institution like the ICC is expected to make in the interest of users” Carlevaris concluded.

Mirèze Philippe, Special Counsel, Secretariat of the ICC International Court of Arbitration, with special thanks to Dr. Helene van Lith, Secretary to the ICC Commission on Arbitration and ADR and member of the Drafting Group.

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