



ICC COMMISSION REPORT

Construction Industry Arbitrations Recommended Tools and Techniques for Effective Management 2019 Update

In 2016, the ICC Commission's Steering Committee gave a narrow mandate for the update of the report. The purpose of the update was twofold: 1) to reflect the various modifications made by the ICC Rules of Arbitration as revised in 2017 and 2) to reflect recent developments in the practice of arbitration in construction disputes. This update is meant to cover specifically construction arbitrations and is therefore meant to complement, rather than reiterate for construction arbitrations, the contents of the report of the ICC Commission on Arbitration and ADR Task Force on Controlling Time and Costs in Arbitration.

Summary of Tools and Techniques for effective Management of Construction Arbitration

1. Particularities of construction industry disputes	In many respects no different from other international commercial arbitrations, except that they are more complex (factually and technically; they can generate difficult points of law and procedure relating to specialized forms of contract, require many more documents to be examined than other types of disputes.
2. Selection of arbitrators	Key qualities parties should consider when selecting arbitrators: i) familiarity with the industry ii) familiarity with relevant law/legal traditions iii) strong case management skills iv) "Balanced" tribunal v) availability vi) diversity.
3. Initial stages	Covers the practical steps after the filing of a Request for Arbitration, the Answer to the request and Reply to them and the transmission of the file to the tribunal. If misunderstandings become apparent, additional information should be requested by the tribunal.
4. Terms of References (ToR)	Tribunal and the parties should ensure that the disputes are clearly described. ToR should set out scope and limits of the duties of the tribunal and include full names and description of the parties and arbitrators and the place of arbitration. ToR may also contain a list of issues to be determined by the tribunal.
5. Summary of the claims	No party may make claims which fall outside the limits of the ToR unless authorized to do so by the arbitral tribunal. A balance must be struck and a summary should be devised that sets out the claims accurately without being too precise.
6. The issues	A list of the issues has to be determined unless the tribunal considers it inappropriate. The parties' position may not always be sufficiently developed (especially in major engineering and construction cases) at the outset of the case to allow a useful list of issues to be prepared.
7. Procedural rules	Unless the parties have already agreed on specific rules, it is recommended that, in order to avoid prolonged discussions, no attempt should be made to do more than describe the framework in the usual general terms.
8. Case management conference and procedural timetable	First case management conference (CMC) is vital to the creation of a sound working relationship which will facilitate the establishment of the first procedural order and timetable. The CMC establishes a formal process to organize the arbitral proceedings (differs from ToR, ToR must be signed before CMC begins).

<p>9. Timetable, practicability of steps and hearing date</p>	<p>During or following the CMC, the tribunal shall establish the procedural timetable that it intends to follow for the conduct of the arbitration. It is imperative to balance the need for expedition against the detriment of not providing sufficient time for a party to set out properly its case.</p>
<p>10. Procedures</p>	<p>There may be significant differences in law and practice within common and civil law jurisdictions. At the first CMC the tribunal ascertains if there are any mandatory requirements of the law applicable to the proceedings and what the parties' common expectations are regarding the procedure of arbitration.</p>
<p>11. Further working documents and schedules</p>	<p>The parties' further pleadings should usually be accompanied by i) a list of the key persons involved ii) a chronology of relevant events iii) a glossary of terms. Such documents are extremely useful since most construction arbitrations are about the performance of a relatively long-term contract, involve numerous persons, companies or other entities.</p>
<p>12. Tests and site visits</p>	<p>If a claim concerns the unsuitability or malfunction of a plant, equipment or work, the tribunal will need to ascertain what tests have already been carried out and whether the results have been agreed or are sufficient for the purposes of arbitration. It may be necessary to order new tests.</p>
<p>13. Programmes and critical path networks</p>	<p>Construction disputes often include claims for delay/disruption that involve large sums of money. To help the tribunal decide such claims, it is essential that the events which caused such delay be clearly identified. To this end, at an early stage of the proceedings, the tribunal should invite the party who claim an extension of time beyond contractual date to specify the method it has adopted or proposes to adopt to determine the causes of the delay.</p>
<p>14. Computation of claims</p>	<p>As early as possible, the tribunal invite the parties to jointly establish, if possible, an accurate computation of claims so that the respondent will have a clearer picture of what is allegedly recoverable, which may result in a possible settlement of some or all claims between the parties. To establish a clear computation of claims, evidence justifying the amount of a claim should be produced by the claimant.</p>
<p>15. Splitting case</p>	<p>Construction cases can involve parties having a matrix of claims and counterclaims by and against one another, so it may be desirable to split the case, not only between liability and quantum, and between jurisdiction and liability and quantum but also between issues common to all parties involved and issues affecting only some parties.</p>
<p>16. Documents and document control</p>	<p>It is recommended that tribunals should raise issues relating to documents early on with counsel, ideally at the first CMC and after consultation with the parties about their preferences, issue directions relating to document control and communication. The tribunal should consider directing the parties to organize the documents appropriately as they emerge during the proceedings (avoid duplication, allow easy electronic access).</p>
<p>17. Witnesses</p>	<p>If the evidence of the witness is not in the language of the arbitration, an accredited translation must be provided. If the statement deals with technical/legal matters, the tribunal should ensure that the translator is both qualified and familiar with the subject matter. All witness statements should be provided in good time before the preparation of any pre-hearing submissions.</p>

18. Experts	The tribunal consults the parties at the first CMC to find out whether they are both intent on tendering evidence from experts and why such expertise is required. If the parties wish to provide evidence from experts, then the matter must be discussed with the tribunal, which must check the scope of the evidence in order to ensure that it is confined to the issues and does not deal with matters capable of being proved in other ways.
19. Hearing(s) on the merits	The tribunal should decide as early as possible in which order the main issues should be heard and whether certain issues should be decided by a partial award before other issues are heard. The tribunal should further persuade the parties to agree which issues can be decided on the basis of written submissions and evidence only (the parties may be free to decline it).
20. Interim measures	The tribunal can order interim or conservatory measures, unless the parties agree otherwise. This power can be relevant in construction arbitration: The provision is intended to protect the status quo pending a decision on the merits of the dispute and could extend to situations where, following a contested contract termination, use might be made of plant or materials on site or rights under a technology transfer provision need to be protected from threatened misuse. A tribunal will need to be satisfied that there is good reason for intervention.
21. Settlement in arbitration	The tribunal should consider reminding the parties that they are free to settle all or part of the dispute at any time during the ongoing arbitration, either through direct negotiations or through any form of ADR proceedings.
22. Translations	The effective management of translation can affect beneficially the cost of arbitration. Given the different nationalities of parties involved in a construction project, it is not unusual for a party to continue to prepare internal documents in a language other than the language for communications under the contract. When such documentation needs to be submitted as evidence, consideration needs to be given by the tribunal to the question of who is to bear the cost of translation. The tribunal is strongly advised to deal in the first procedural order with these matters and their implications.