First SIFoCC International Working Group:

International Best Practice in Case Management

The Standing International Forum of Commercial Courts (SIFoCC) was established in 2017. SIFoCC has three objectives:

- *First, to serve users – that is, business and markets – better, by sharing best practice between courts and by courts working together to keep pace with rapid commercial change.*
- *Second, to assist courts to work together in order to make a stronger contribution to the rule of law, and through that contribute to stability and prosperity worldwide.*
- *Third, to support developing countries long encouraged by agencies such as the World Bank to enhance their attractiveness to investors by offering effective means for resolving commercial disputes.*

The First SIFoCC International Working Group was established in September 2018, to develop Working Presumptions on International Best Practice in Case Management. The Working Group was chaired by Hon. James Allsop AO (Chief Justice of the Federal Court of Australia) and Rt. Hon. Sir Peter Gross (then a Lord Justice of Appeal in England and Wales).

The enclosed Working Presumptions were prepared by the Working Group after consultation first with a panel of expert judges and then with all member jurisdictions of SIFoCC.

The document was endorsed by SIFoCC as a whole in May 2020.

The document seeks to state, at an appropriate level of generality, the fundamental elements of, and approach to, case management. The purpose of the document is to provide a principled framework for individual courts to develop more particular approaches, rules or practice notes suitable for their individual requirements, situations, legislative contexts and circumstances.

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1. SIFoCC objectives include sharing best practice in commercial dispute resolution and promoting the Rule of Law. The Rule of Law is essential in this area, as in all others. The stability, fairness and equality before the law that come with the Rule of Law protect and encourage investment. Commercial law exists to facilitate commerce, but its development promotes best practice and the Rule of Law in other areas too. Timely judicial decisions by independent judiciaries that can effectively and predictably resolve a dispute at a reasonable cost will contribute to commerce and promote public trust in the Rule of Law.
2. Case Management, largely judicially developed, exists (in this context) to assist in the resolution of commercial disputes. It is not process for its own sake. The mindset, culture or ethos is central. It should be seen as a means to an end to resolve disputes, that is, to solve problems recognising that problems are mutual.
3. Case Management entails a judicial "grip" on the proceedings at all stages: pre-trial, trial, appellate and enforcement.
4. Fundamental to Case Management is the early identification of what is common ground and what are the real issues. This streamlines the proceedings (pre-trial, mediation, other ADR and at trial) and facilitates the effective, efficient and expeditious resolution of disputes – thereby helping the objectives of achieving proportionate and fair dispute

resolution and doing justice in the individual case. It further permits the isolation of discrete issues for early determination or out of the usual order, where appropriate.

5. Save exceptionally, delay is the enemy of justice and Case Management requires that applications for adjournments should be subjected to rigorous scrutiny. Case Management, however, is not about process for its own sake and should permit sufficient flexibility to accommodate relaxation of court-imposed timetables where appropriate in the interests of justice.
6. Judicial leadership is *necessary* for successful Case Management. Its exercise will depend on the legal culture and system of each jurisdiction. But Judicial leadership alone is not *sufficient.* The disputes are those of the parties and they and their representatives should approach Case Management as part of the problem-solving engagement, not as the venue or medium for process directions.
7. The cooperation of the legal profession/s is fundamental; judicial time spent achieving it is time well-spent. It can be secured by way of a duty on parties and their representatives to cooperate in complying with an "overriding objective". This should not be seen as radical. It is no more than requiring the parties through their representatives to identify common ground and issues, and to behave honestly, reasonably, constructively and proportionately so that problems are identified and then resolved. As between representatives, such cooperation is to be viewed as professional best practice. It can be assisted by judicial "knocking of heads together". It can also be developed by encouragement and the supporting of parties and representatives who show that they recognise the value of the approach, especially if they are fighting intransigence.
8. It is important that the Court retains overriding control over Case Management matters, including timelines, notwithstanding any agreement between representatives. The

underlying aim is to meet the proper needs of the commercial community. This means using procedure, backed by appropriate firm timetabling and appropriate sanctions where necessary (ideally empowered by legislation or rules), to prepare to solve the substantive problem and not to increase the dispute.

9. Case Management must be seen as an integral part of the judicial role in commercial disputes. It forms a part of the judicial leadership mission. Sufficient time must be allowed by presiding Judges and administrators for the proper performance of this role.

10. National jurisdictions will strike their own balance as to the number and mode of pre-trial hearings – i.e. whether pre-trial disputes are dealt with by oral hearings with the parties present, telephone or skype (or similar "virtual") hearings conducted electronically, or applications made and considered on documents. Decisions as to the number and mode of pre-trial hearings have costs consequences, best resolved by national jurisdiction rules. It is to be expected that such costs should be proportionate, having regard to the nature and size of the dispute (at least save where there is good reason for some different order). Whatever the procedure followed, Case Management will be necessary. Case Management tools (for example, case memoranda, lists of issues and the like) can be utilised to ensure that any pre-trial hearings are productive and that the parties are engaging with the real issues in the case. It is a requirement of effective Case Management that legal representatives attending pre-trial hearings should be appropriately instructed with the requisite authority to ensure proper engagement by the parties. Parties may be held accountable for non-compliance with Case Management requirements.

11. While some jurisdictions may see benefit in deploying Case Management Judges or Registrars to conduct pre-trial hearings, the handling of such hearings by trial

(Commercial) Judges (rather than by more junior Judges) has demonstrable advantages. The number of Commercial Judges deployed to undertake Case Management is a matter for each jurisdiction. In appropriate cases, there may be advantages in considering "docketing" to assist with continuity.

12. Approaches may well vary as to discovery/disclosure and other matters. The important point is not the differences between systems but the mindset/ ethos/ culture of Case Management as a problem-solving tool, not process driven, and its shared attraction to both Common Law and Civil Law systems.
13. The extent to which Commercial Judges involve themselves directly in ADR is a matter for individual jurisdictions. However, consideration of ADR can have real value as part of the judicial engagement, again as part of the problem-solving approach. Settlement can thereby be facilitated in appropriate cases without loss of face to the parties. Even apart from ADR, a Case Management Conference furnishes an opportunity for canvassing settlement prospects. A Court may wish to consider, in appropriate cases, inviting the parties themselves, or their corporate representatives, to attend a Case Management Conference to facilitate these objectives.
14. Technological developments should be harnessed to improve Case Management, as in all areas of commercial proceedings- a matter compellingly demonstrated as justice systems have sought to cope with the Covid-19 pandemic (and discussed in the SIFoCC May 2020 Note, "Delivering justice during the Covid-19 pandemic and the future use of technology").
15. Case Management does not end at the conclusion of the trial. It applies as well to appellate proceedings, with the aim of ensuring the timely disposal of appeals by appellate Judges with appropriate expertise. ADR may also be an option for some

appellate matters: an unsuccessful attempt at ADR or an unwillingness to attempt ADR in the course of the first instance proceedings does not preclude ADR from being re-visited at the appellate stage in appropriate cases.

16. Case Management remains relevant to enforcement proceedings. A variety of issues may arise at this stage (by way of examples only, jurisdiction and public policy) where the discipline of Case Management would be necessary or, at the least, beneficial.

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