

UNEP GLOBAL JUDGES PROGRAMME

APPLICATION OF ENVIRONMENTAL LAW BY NATIONAL
COURTS AND TRIBUNALS

PRESENTATION 7

MANAGING ENVIRONMENTAL CASES

OUTLINE OF PRESENTATION

Case Management Generally

Common Complaints About Litigation

Case Dynamics in the Environmental Context

Influence of Environmental Protection Principles on Case Mgt.

Priorities for Case Management in the Environmental Context

Case Management Capacity is Variable Across Jurisdictions

Attributes of Effective Case Management

Objectives of Case Management

Tools for Case Management

Conclusions

WHAT IS JUDICIAL CASE MANAGEMENT?

Judicial Case Management: Judicial intervention in the litigation process to influence, guide or direct the course of litigation in a manner that enhances its efficiency, affordability, rationality and fairness.



JUDICIAL CASE MANAGEMENT CAPACITY IS JURISDICTION-DEPENDENT

- Civil law tradition versus common law tradition
- Variation in local procedural rules



COMMON COMPLAINTS ABOUT LITIGATION GENERALLY

- Too expensive
- Too slow in resolving disputes
- Too complex
- Inequitable and inaccessible, favoring wealthy litigants over those that are under-resourced



WHY “MANAGE” ENVIRONMENTAL CASES?

- Environmental cases can be complex, and complex cases in particular benefit from active judicial case management
- Judicial case management can substantially help achieve foundational environmental protection principles



CASE DYNAMICS IN THE ENVIRONMENTAL SETTING

- Environmental degradation is often associated with enterprises having both the incentive to avoid the costs of environmentally responsible behavior and the finances needed to litigate aggressively
- Environmental impacts often borne by ordinary citizens and public resources
- Frequently an imbalance in the capacity to litigate in environmental cases



A “PRINCIPILED” LOOK AT MANAGING ENVIRONMENTAL LITIGATION

- Principle of Prevention: Justice delayed is justice denied, particularly in environmental context
- Rio Principle 10 calls for effective access to judicial and administrative proceedings, including redress and remedy



A PRINCIPLED APPROACH (CONT.)

A principled approach to environmental case management attempts to produce a litigation process that is:

- Just and fair
- Speedy
- Inexpensive
- Proportionate
- Simplified



ATTRIBUTES OF EFFECTIVE JUDICIAL CASE MANAGEMENT

- Active Rather Than Passive
- Focused on Substance, Not Just Procedure
- Quick to Act
- Consistent
- Firm, but Fair
- Informed



GENERAL OBJECTIVES FOR CASE MANAGEMENT

- Ensuring Proper Sequencing and Flow of Case
- Reducing Legal Issues to a Central Few
- Reducing Facts to Material, Disputed Facts
- Exploring Settlement and Alternative Dispute Resolution Opportunities
- Resolving Preliminary Matters Before Trial
- Policing Against Abusive and Dilatory Tactics



POTENTIAL TOOLS FOR MANAGING ENVIRONMENTAL CASES

- Pre-trial Orders and Hearings
- Litigation Plans
- Alternative Dispute Resolution
- Use of Non-Judges for Ministerial Acts
- Court Management of Expert testimony
- Stipulation to Facts and Evidence
- Bifurcation, Summary Judgment, and Other Expeditors



PRE-TRIAL ORDERS: PROVISIONAL OR INTERIM REMEDIAL MEASURES

- Where environmental damage may continue pending trial
- Where there is risk that evidence may be destroyed



PRE-TRIAL ORDERS: SCHEDULING AND INFORMATION EXCHANGE

- Requiring Counsel to Meet and Confer
- Requiring Counsel to Submit a Draft Schedule
- Requiring Counsel to Identify Any Related Litigation
- Requiring a Joint Statement of the Case Identifying Agreements and Disputes
- Requiring Parties to Exchange Witness Lists and Exhibits to be Presented as Evidence at Trial



PRE-TRIAL HEARINGS: WHY HOLD THEM?

- Check whether all necessary parties are before the Court
- Check for issues requiring recusal by the judge
- Identify need for interim or protective orders
- Focus issues
- Establish, or check compliance with, deadlines
- Help the Judge learn about the case
- Rule on pre-trial motions
- Check on readiness for trial
- Explore whether settlement is an option



PRE-TRIAL HEARINGS: WHEN TO HOLD THEM?

- Early in the Case
- After All Necessary Parties are Joined
- After Discovery is Completed



LITIGATION PLAN

A Litigation Plan sets procedural steps with deadlines for the case to move through pretrial proceedings to summary disposition or trial. It often includes:

- Description of factual disputes and stipulations
- Deadlines for discovery and/or information exchange, witness identification, deadline for pretrial motions, anticipated trial date
- Establish procedures for handling documents/evidence at trial



CONTENTS OF LITIGATION PLAN

- Agreed and disputed facts
- Deadlines to add parties
- Coordinate litigation in other courts
- Identify jurisdictional issues
- In multi-party cases, defining counsel roles
- Evidence preservation requirements
- Numbering system for documentary evidence
- Procedures for exchanging evidence
- Guidelines and schedules for disclosure
- Deadlines for motions
- Setting trial date
- Identify issues proposed for split trial



ALTERNATIVE DISPUTE RESOLUTION (ADR)

NEGOTIATION

MEDIATION

NEUTRAL EVALUATION

ARBITRATION



USE OF COURT-DESIGNATED PERSONNEL TO ASSIST IN CASE MANAGEMENT

What case management functions might be assigned to a non-judge?

1. Meetings for reports on progress;
2. Monitor discovery and identify disputes for Court decision
3. Take phone calls and screen issues for Court decision;
4. Help the parties identify central and peripheral issues;
5. Identify opportunities for settlement or ADR.



COURT MANAGEMENT OF EXPERT TESTIMONY

- Restricting areas of expert testimony
- Structuring trial to group expert testimony by topic
- Determining methods for the “vetting” of expert testimony
- Court-appointed experts



STIPULATIONS

- Stipulations of facts
- Stipulations to admissibility of evidence
- Agreements as to points of law



OTHER POTENTIAL CASE “EXPEDITERS”

- Summary Judgment
- Bifurcation
- Offers of Judgment



TOOLS IN MULTI-PARTY CASES

- Require attorneys to coordinate filings to avoid duplication
- Require attorneys to select a lead counsel for questioning witnesses
- Require a uniform tracking system for documents



PROCEDURAL SANCTIONS AS AN ELEMENT OF CASE MANAGEMENT

- Sanctions for violation of procedural deadlines or disclosure requirements are sometimes necessary.
- Sanctions should be narrowly tailored to punish the violation.
- Reasons for the sanction should be clearly stated.
- They should be imposed only after notice and an opportunity for explanation.



PROCEDURAL SANCTIONS – GUIDING PRINCIPLES

- Nature and consequence of the misconduct
- Whether it was willful, or by mistake
- Whether it was isolated or a pattern
- Any extenuating circumstances?
- Who should be sanctioned (counsel/client)?
- What the sanction will accomplish?
- Timing of sanctions may disrupt the Case



PROCEDURAL SANCTIONS -- TYPES

- Reprimand of Counsel
- Monetary Fine
- Cost shifting
- Denial of Compensation/fees
- Grant/Denial of Extra Time
- Removal/bar Counsel
- Preclusion/waiver/striking
- Judgment Against (i.e., default)
- Referral for Criminal Investigation



CONCLUSIONS

