

ASA Below 40 / DIS40 Seminar

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FLOODED WITH DOCUMENTS? A SURVIVAL GUIDE

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Basics to keep in mind

- The presentation of evidence is of great importance to the outcome of almost every dispute
- Many arbitral tribunals prefer to rely on documentary evidence
- Contemporaneous documents can be the most persuasive evidence (particularly in civil law jurisdictions)
- No universally correct way of presentation – each style has its own merits

Case Preparation (1)

Organize the documents internally

- Collecting / reviewing documents
- State-of-the-art: electronic database
 - allows searching (keywords; type / title / date / author of document)
 - world-wide accessibility
- Exhaust the client's (human) resources
- Use existing classifications (e.g. "E-construction")
- Translations



Case Preparation (2)

Decide carefully which docs to produce

- First full submission:
 - present the party's case in a sufficiently complete way
 - accompanied by all documentation you consider relevant and necessary to support and prove the case
- Select the best documents as documentary evidence
- Avoid the temptation of producing too many documents
- No unsolicited US-style “document dumping”



Case Presentation (1)

Organize the documents externally

- Seek early guidance from the Arbitral Tribunal (procedural meeting / ToR)
- Expectations regarding the presentation of documents?
 - Means of physical presentation
 - Soft-cover spiral binding or ring binding? Size (DIN A4 or A5)?
 - CD-Rom?
 - Numbering (e.g. C-.../R-...) / labelling (tabs) / indices
 - Categorization?
 - Highlighting?
 - Bundling?

Case Presentation (2)

Facilitate Access to Evidence

- Don't underestimate the persuasive effect of well presented and well organized documents
- Think as a user, i.e. "arbitrator-friendly"
- Practicability: documents must be easy to find and to handle (e.g. at hearing)
 - Logical system and accessible format of classification
 - Separate volume of all relevant agreements and other normative instruments to which reference will have to be made (DIN A5)
 - Easy access allows easy assessment of evidence!

Case Presentation (3)

Sequential vs. Chronological Order

- “Traditional” organization: order of reference in the pleadings
 - Problem: consecutive reading of documents difficult and confusing
- Arbitrators’ preference: chronological order
 - Allows the documents to speak for themselves
- Both?
- Make precise references in the text of the memorial

Case Presentation (4)

Create Document Categories

- Relevant categories of documentary evidence
 - E.g. Contracts & Amendments, Correspondence, MoM, etc.
- Separate files for each category
 - In chronological order
 - Color schemes to assist in easy identification
 - All documents recorded in a single table
- Separate files for each witness (cross-examination)



Case Presentation (5)

Core Bundles

- Set of frequently referred to “key” documents
 - Documents that the arbitrators are expected to review carefully (as opposed to those filed for the sake of completeness, in case they may become of interest, but which the arbitrators are otherwise not necessarily expected to review)
- More manageable / accessible
- Common core bundle?

Case Presentation (6)

Common Bundles

- Unified set of documentary evidence on which the parties agree
 - Most arbitrators prefer a single set of documents to work with
 - Common list of cross-referencing to exhibits produced by each party
- Joint system for production of documentary evidence
 - At early stage in the proceedings
 - Parties each add their documents to “growing” common bundle
 - All documents recorded in one table (passed from one party to another for updating whenever new evidence is produced)

Case Presentation (7)

“Growing” Common Bundle – Example:

Document Category	Exhibit Number	Name of Document	Producing Party	Date of Production
Agreements and Drafts	A 1	Contract	Claimant	2 May 2005 (RfA)
	A 2	Contract Variation	Respondent	15 June 2005 (Answer)
Correspondence	C 1	Respondent's letter of 10 January 2004	Claimant	2 May 2005 (RfA)
	C 2	Claimant's e-mail of 3 February 2004	Respondent	15 June 2005 (Answer)
Minutes of Meeting	M 1	Meeting of 5 March 2004	Claimant	2 May 2005 (RfA)
Legal Materials and other Documents	LM 1	Claimant's press release of 6 March 2004	Respondent	15 June 2005 (Answer)

During the Hearing

- Keep track of and collect new exhibits produced
- Demonstrative exhibits: don't forget to assign exhibit numbers
 - Evidence presented through visual aids and expressly created for the hearing
 - Examples: charts, photographs, enlarged documents, maps
 - The use of demonstrative exhibits can be an effective tool of persuasion in arbitration hearings when well-dosed and compliant with certain procedural standards

Conclusion

- Ask the arbitrators for their expectations
- Agree on the presentation of evidence as early as possible in the proceedings
- Make it as easy as possible for the arbitrators
- Use electronic means, if available
- Consider a “growing” common bundle



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THANK YOU