Kluwer Arbitration Blog

Less is More?

Roger Alford (General Editor) (Notre Dame Law School) · Monday, July 18th, 2011

Toby Landau gave the keynote address at the recent ITA Workshop in Dallas and, as always, he was entertaining and provocative. One of the central themes of his discussion was how arbitration counsel fail to present a case in a manner sensitive to the needs of the arbitration panel. “Inequality of Arms” is the term he used for the asymmetrical relationship between counsel’s ability to produce information and arbitrator’s ability to digest it. Arbitration counsel has an army of lawyers capable of producing massive document dumps. Arbitrators have limited administrative or legal staff to help them make sense of a case.

The take away seemed to be that counsel should be more judicious in what they choose to present to the arbitrators for review. Mountains of documents do not help their cause. Briefs should be snappy, concise, and sensitive to the arbitrators’ limits. Less is more.

One should never be quick to dismiss Landau’s suggestions, but I’m frankly conflicted by his advice. I have no doubt that briefs should be presented in a manner that maximizes the potential for arbitrators to understand and digest the arguments. We are all familiar with situations in which the brief was not written to assist the arbitrators in resolving the case, but rather was written to score points with the client or against the opposing side. It’s good advice to maintain unrelenting focus on the intended audience: the arbitrators.

Does that mean that mountains of documents are inappropriate or counterproductive? It depends. There are pleadings we intend for the arbitrators to read, and there are pleadings we provide for ready reference. There are key documents and there are peripheral documents. I do not expect an arbitrator to be interested in the minutiae, but that does not mean minutiae should be omitted from the record. Why bother with boxes of invoices or gigabytes of email correspondence? Because we know that something could peak their interest, but we don’t know in advance what that something will be. An arbitrator might spot check invoices to verify the veracity of the claims, or search keywords in a particular email correspondence, or be unusually interested in a particular event that gave rise to the dispute. It’s reference material that is there if they need it.

If one thinks of pleadings in terms of concentric circles, there are (1) materials we *know* arbitrators will read; (2) materials we *expect* them to read; (3) materials we *hope* they will read; (4) materials we *doubt* they will read but are available in the record; and (5) materials we *know* they will not read and are *not* produced.

Landau seems to argue that counsel should focus on the inner concentric circles and not bother with peripheral pleadings, which do more harm than good. I’m willing to accept the legitimacy of

lawyers producing massive document dumps with no expectation that it will be read, but that is available for ready reference.

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