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Paperless Arbitrations – Where Do We Stand?

Gillian Carmichael Lemaire · Wednesday, February 19th, 2014 · ArbitralWomen

The views expressed are those of the author alone.

Technology in arbitration is of course a vast subject which has been addressed extensively by a number of writers. This article focuses briefly on the issue of reducing paper in arbitrations. It considers: How are practitioners currently dealing with paper reduction at the various stages of an arbitration, especially the hearing ? (Although discovery can consume significant amounts of paper, it merits its own consideration and is not therefore addressed in this article.) Are any facilities, rules and/or guidance available on the subject? Are there any drawbacks to using technology to cut down on paper? What is the way forward?

Most of us like to think that we at least try to keep paper to a reasonable minimum in arbitration. As well as being conscious of the need to protect the environment and prevent unnecessary destruction of trees and forests, we seek to cut costs and are keen to render the arbitral process more efficient. However, is an across-the-board effort really being made? Or are some practitioners sticking their heads in the sand when it comes to using technology?

In a recent case in which the writer was involved, which is hopefully an exceptional example, a huge number of paper copies were generated at the Statement of Claim stage at significant cost. These included voluminous printouts of electronic files prepared by technical experts: it was not possible to read the paper versions in any meaningful way nor would experts for the opposing party have been able to verify certain data on paper. An application was made to the arbitral tribunal to allow the experts' documents to be filed only by electronic means (at least in the first instance, which would have given participants an opportunity to work out which documents, if any, were truly required in paper form). Information was given to the tribunal about the number of binders that were about to be produced and the cost consequences. The application was refused, most likely because the opposing party insisted on receiving a hard copy of every document in the arbitration. It is probably safe to say that no one was going to read every sheet of paper. A truck was required to transport the documents and significant storage space was needed to accommodate them. And that was only the start of the case.

Recent interviews on paperless courts ("Paperless courts: Screen savings", The Lawyer, 14 October 2013) provide some up-to-date insights from counsel and judges on their experiences of paperless court hearings. The advantages are well-known. Being able to work from any location, not having to transport files to and from a hearing, easy cross-reference between documents using hyperlinks, full-text search, more effective preparation and presentation by being able to organise

and annotate documents, and easier updating of documents are some of the benefits cited in those interviews.

Are there any facilities, rules or guidelines on the subject?

Some institutions offer electronic case facilities (e.g., NetCase at the ICC, WebFile at the AAA and Electronic Case Facility (ECAF) at WIPO) which are platforms that allow certain case-related activities to be conducted on line, such as filing documents.

In their article "Lists, Checklists, Guidelines, Principles, Techniques, Protocols, Best Practices : Are They Useful?", Karen Mills, Mirèze Philippe and Ileana M. Smeureanu (Kluwer Arbitration Blog, posted 16 January 2014) refer to several documents published by the International Chamber of Commerce in relation to technology in arbitration. The "ICC Techniques for Controlling Time and Costs in Arbitration" include a recommendation to consider minimizing the creation of hard copies (ICC Publication 843, 2007, revised 2012, Report from the ICC Commission on Arbitration, recommendation 58). The ICC Commission's Task Force on IT in Arbitration set out a wealth of issues to be considered in "Issues to be Considered When Using IT in International Arbitration" and "Operating Standards for Using IT in International Arbitration" ("Using Technology to Resolve Business Disputes", ICC Special Supplement 2004, pages 63-98). The Issues to be Considered include a helpful Q&A section on electronic exchange of documents at p. 68. The Standards are "boilerplate" standard IT procedures and their use is voluntary. They include a useful set of Standards for paperless files on pages 79-82.

In "Information Technology and Arbitration: A Practitioner's Guide" (Thomas Schultz with Foreword by Gabrielle Kaufmann-Kohler, Kluwer Law International, 2006), a valuable set of "Checklists, Reminders, and Charts" is provided as a reminder to practitioners of important questions that should be considered when planning for the use of technology in an arbitration, including exchange of electronic documents.

It is hard to know to what extent the available advice is being followed or at least considered. There are reasons why paper reduction or elimination may not be desirable or possible. Whilst in many cases it will be cost-effective to reduce or eliminate paper, this will not be true for all cases. In The Lawyer article already mentioned, interviewees were asked whether using technology in the run-up to trial and at the hearing brings cost benefits. Their answers revealed, for example, that cost benefit may not be as great if technology is not used by all participants in a case, and it must be borne in mind that preparation of an electronic trial bundle is a "formidable" exercise. Probably the most important reason given for not systematically using technology is the need to preserve the fundamental principles of the process, including equality of treatment. [1)] If parties are not on an equal footing as regards technology (a simple example being that they may use different hardware and software), the differences between them could prejudice due process. Thomas D. Halket explores this and many other issues related to the use of technology in arbitration in his excellent and thorough article "The Use of Technology in Arbitration: Ensuring the Future is Available to Both Parties" (Thomas D. Halket, St. John's Law Review, Vol. 81:269, 2007).

As for the way forward:

- It does not seem beneficial to impose overly specific or complicated rules or guidelines, as they would most likely quickly be overtaken by technology: case by case consideration of the use of technology appears preferable.

- Notwithstanding this, tribunals should ensure that the use of technology is at least considered at the outset of a case. There should also be greater collaboration between counsel on the subject. In addition, more sharing of experiences (good and bad) among practitioners would be worthwhile.
- As regards hearings, where the types of case management facilities mentioned above are not used, it should be straightforward to put in place a simple system to populate a common hearing bundle from the start of a case. Documents which parties and the Tribunal would normally want to have available at the hearing, including procedural orders, pleadings, exhibits, witness statements, experts' reports and procedural correspondence, could be added on an ongoing basis. At the relevant time before a hearing counsel could add items such as agreed (or not) chronological or key document bundles and any individual party presentations. Although this may seem obvious, the extent to which a single hearing can involve multiple methods of document management and little effort to streamline hearing documents is remarkable.
- Whilst it is comfortable to use paper, should we not ask ourselves whether we could increase our efforts to turn and mark up pages on a computer? After all, many of us have easily adapted to reading e-books. At the very least, we could make an effort to print only the most important and frequently-used documents.

If any reader stops to think about his or her own approach to paper, then this necessarily limited article will have served its purpose.

References

?1 ICC Special Supplement 2004, p.5, Foreword by Robert Briner, former Chairman, ICC International Court of Arbitration: “In the field of dispute resolution, as in any other field, it is important that this adaptation should be undertaken with due care and reflection so as not to undermine the fundamental principles of the process. The use of new technology brings risks as well as opportunities. Parties may not be equally well equipped or experienced, resulting in a disparity that could be detrimental to due process. The ease and speed with which communications take place could lead to misunderstandings, omissions or even errors. Also, attention should be paid to preventing automation from overriding party autonomy in international arbitration” and “Although the advantages offered by modern technology are strongly persuasive, there is no suggestion that they should be imposed against a participant’s will.”

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