

Kluwer Arbitration Blog

Practical Tips for Handling Construction Claims and Disputes: Managing Documentary Evidence

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This is one of the five construction arbitration posts, providing the technical discussion from the SCAI, CAM, TILPA conference in Geneva and Mexico City. The authors include: Ms Almudena Otero De La Vega (on State enterprises) Ms Tanya Landon & Ms Azal Khan (on evidence), Dr Manuel Arrollo (on multiple procedures), Mr Serge Y. Bodart (on dispute boards and PPPs) and Dr Jorge Huerta-Goldman (on prevention to arbitration & state disputes).

Construction projects typically involve complex technical issues and several parties working together over long periods of time. This results in complex facts, legal issues and most importantly, voluminous documentation. Contemporaneous documents are the backbone of any construction case because they provide the most accurate and credible evidence to support a party's claims and defences. For this reason, the proper management of documentary evidence in construction cases is crucial to the success of a party's case. Managing the documentary evidence is an ongoing process and should start from the very outset of the arbitration – in fact, even before the dispute arises – and continue until the end of the case.

Typical Documents in Construction Arbitration

Documentary evidence can come in many shapes and sizes: written documents, photographs, drawings and maps, in both physical and electronic media. While each construction dispute is unique and generates its own set of facts and corresponding documentation, the categories of documents typically seen in construction cases include:

- pre-contractual documents, including draft specifications and drawings, tender documents, and pre-contractual correspondence between the parties;
- contractual documents, including contracts, annexes and appendices, and final specifications and drawings;
- original and amended time schedules (particularly important in cases with delay claims);
- post-contractual correspondence between the parties, including notices dealing with day-to-day technical issues and/or legal notices;
- correspondence and other day-to-day records, including minutes of meetings, site logs and progress reports; and
- quantum documents, including invoices, receipts, proof of payments and costs documentation.

Document Management Before the Arbitration Begins

The “Paper Trail”

Documents should be consistently managed throughout the life of a construction project and the corresponding dispute. Starting the process early is essential because gathering the evidence from a voluminous and unorganized pool of documents only after the dispute arises can be a cumbersome, expensive and eminently frustrating process for all involved. It can also create unnecessary delay in starting the arbitration or responding to a claim.

Parties involved in construction projects should therefore adopt internal policies and practices to ensure that a “paper trail” of all the essential aspects of the project is kept and organized in a way that will be useable later on. Given that questions of contractual interpretation are staple issues in many construction disputes, parties should be mindful of recording their “intent” from the very beginning. Parties should also maintain records of every meeting, negotiation and transaction, and follow-up on any oral conversations with e-mails and notes to file. This becomes particularly important when signs of a dispute arise. It is also critical to document any mitigation attempts, which can later serve as proof in discharging a party’s burden to mitigate. Parties should consider engaging outside counsel early on, even before a dispute has formally arisen. This assists with the preparation of legal notices and other documents which will help to shape the narrative of the future dispute.

Use of EDMS

Parties involved in significant construction disputes should consider investing in electronic document management software (“EDMS”) to facilitate the storing, sorting and analysis of voluminous documents. While investing in EDMS can involve significant upfront purchase and training costs, for highly-complex, document-heavy construction disputes, it can be a gift that keeps on giving. EDMS can help filter out irrelevant documents in the early stages of the dispute, and drastically reduce the pool of documents that need to be reviewed. EDMS also allows parties to search and analyze documents based on chronology or theme, which can be very useful when it comes to crafting a compelling narrative and case theory that will help a party win its case. Moreover, with the rapid rise of artificial intelligence tools and machine learning, parties and counsel involved in construction disputes would be wise to invest the time and energy now to become knowledgeable and comfortable with these new technologies which are likely to revolutionize the way documentary evidence is handled in international disputes tomorrow.

Early Review of Documents

As soon as the signs of a dispute arise, parties should conduct an early case assessment, which necessarily involves a comprehensive document review. This can help a party separate out the documents that are most relevant, and identify those documents or categories of documents that it does not have, and which it will need to request from its counterpart or third parties once the arbitration begins. Early document review can also help spot privileged and confidential documents that a party can withhold in the upcoming arbitration. Again, engaging outside counsel to assist with the early review of documents as part of an early case assessment can pay off in spades later on in the dispute.

Document Management during the Arbitration

Document Production

As with other types of disputes, a party asserting a claim in a construction arbitration bears the burden of proof. To discharge this burden of proof, a party relies primarily on contemporaneous documents to prove its case and disprove the case of the other party. The document production phase of the arbitration plays a pivotal role in helping parties obtain the critical evidence they need to prove their claims.

When a party does not possess certain documents relevant to prove its claims, it may request the production of such documents from the opposing party during the document production phase. Based on international best practice as embodied in the IBA Rules on the Taking of Evidence in Arbitration, document requests in arbitration should be narrowly tailored, described in sufficient detail, be shown to be relevant to the case and material to its outcome, and must not be in the possession, custody or control of the requesting party. Since the arbitral tribunal may draw adverse inferences against a party which refuses to produce ordered documents, it is important for the parties to take the process seriously. On the other hand, international arbitration tribunals typically look unfavorably on fishing expeditions, and parties and their counsel are thus expected to do the hard work necessary to identify relevant documents with specificity. As discussed above, this is where an early document review with the help of EDMS can address these issues in advance and minimize the scope for any unpleasant surprises in the document production phase.

Presentation of Documentary Evidence

The golden rule in construction arbitration, which often involves not only voluminous but complex technical evidence, is to help the arbitral tribunal “cut through the noise” and present the most compelling evidence in the simplest manner possible.

Given that many construction disputes involve time-based or delay claims, a chronology-based presentation of events is often recommended. A good chronology presented to the arbitral tribunal at the outset of the case can be a strong foundation on which to build the party’s narrative throughout the proceedings. In complex and protracted disputes, an arbitral tribunal may request that the parties agree on the undisputed facts and prepare an agreed chronology. While this can help the arbitral tribunal and the parties to narrow the scope of issues to be addressed, it can be an arduous task to get two opposing parties to agree on a chronology of facts.

Once the chronology is established, a party should also consider presenting its case and arguments – in the written pleadings, witness statements and expert reports – by particular claim or issue. As various layers of evidence are submitted through the course of the proceedings, it is helpful to refresh the memory of the arbitral tribunal with regard to the status of the contentious issues, *e.g.*, if an assertion or evidence has not been challenged or if a party has reversed its earlier stance on an issue. For this purpose, “Scott Schedules” are a useful format to follow as they allow an arbitral tribunal to easily identify the status of a particular issue or claim.

Parties should also embrace the use of visual aids such as organizational charts, timelines, 3D or 4D programs, photographs, maps and diagrams to help simplify complex technical evidence for the arbitral tribunal.

Finally, in document-heavy construction disputes, parties and arbitral tribunals should seriously consider adopting systems to facilitate “paperless” arbitrations. These are typically web-based electronic filing systems which allow all parties involved in the arbitration to upload and download the written submissions and exhibits, leading to more efficient management of documents during

the proceedings and likely saving a significant number of trees! In a paperless system, the evidence can be collated and numbered into agreed working files and core bundles which can then be used by all participants at the hearings, and help to avoid the frequent situation of dozens (if not hundreds) of binders being shipped to hearing centers, containing multiple copies of the same exhibits. Parties are also frequently adopting technology to create e-briefs, which include hyperlinks to all the cited evidence. Though these trends are encouraging, these systems only work if the parties, and most importantly the arbitral tribunal, are comfortable using technology in real-time at the hearing.

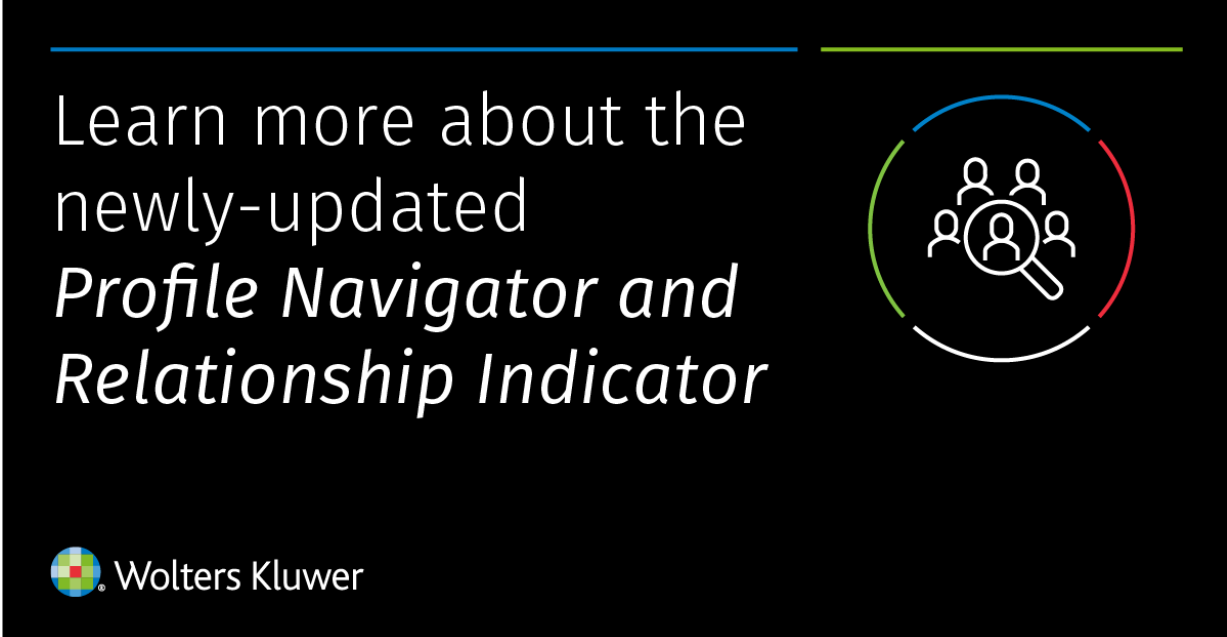
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The graphic features a black background with white text and a circular icon. The icon depicts a group of four stylized human figures, with a magnifying glass positioned over the central figure. The background is accented with horizontal lines in blue and green.

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