

Litigation Meets International Arbitration – Using Litigation Tactics and Skills in Your International Arbitrations

VERIFICATION CODE

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What are the opportunities?

Selection of tribunal

Limited, targeted discovery

Limited witness direct testimony

Opportunity to argue your case from beginning

More engaged panel (more likely to ask direct questions)

Courts of England and Wales

Procedural essentials

Long-standing influence over arbitration institutions and procedure

No juries in civil matters

No “bare denials” in pleadings

Written witness statements stand as evidence in chief

No “coaching” of witnesses

“Loser” pays the “winners” costs

Costs awards against the “loser” of an application

Continuous procedural innovation

Innovations by Courts of England and Wales



- Justification
- Disclosure
- Witness statements
- Role of the lawyer

Justification for innovation

Proportionality

Early identification of issues

Assist in a practical and proportionate approach to Disclosure

Avoid satellite disputes about Disclosure

Improve quality of witness evidence

Ensure materials in front of the judge are relevant

Disclosure (aka Discovery)

“Legal Hold” (and possibility of adverse inferences)

“Initial Disclosure” (appended to pleadings)

Agreed list of issues for Disclosure (derived from pleadings)

Disclosure Review Document (to record **agreed** search parameters)

Models for disclosure (to be **agreed**)

Models for Disclosure (aka Discovery)

All known adverse documents must be produced - PLUS

Model A	Known adverse documents only
Model B	<p>“Limited Disclosure” of key documents on which they rely and key document to enable other parties to understand the claim or defence they have to meet</p> <p>No obligation to carry out additional searches beyond any search already conducted for the purposes of obtaining advice or preparing pleadings.</p>
Model C	Disclosure of particular documents or narrow classes of documents (pursuant to reasonable and proportionate requests).
Model D	Narrow search based disclosure, with or without Narrative Documents : a party is required to carry out a reasonable and proportionate search by reference to identified issues to identify documents likely to support or adversely affect its case.
Model E	Wide search based disclosure (exceptional cases)

Witness statements

- Factual witnesses give factual evidence within their own knowledge, not argument, opinion or commentary on documents.
- PD57AC: human memory is a “fluid and malleable state of perception concerning an individual’s past experiences” and it is “vulnerable to being altered by a range of influences”.
- The conduct of witness interviews must avoid leading questions, suggestions or through iterative drafts. Documents can be used to jog the memory of the witness but all such documents need to be listed in the statement. Both the witness and the solicitor taking the statement have to certify that proper practice has been followed
- Witnesses should not participate in “narrative building” exercises.

Role of the lawyer

Front loading

Management of client expectations (especially Defendants)

Professional conduct – new duties

Certificates of compliance and privilege

Supporting obligations

Legal Hold administration

Statements of truth on pleadings (signed by client)

Certificate of compliance re disclosure (signed by client)

Statements of truth and compliance (witnesses)

Statement of compliance re witness evidence (signed by solicitors)

Litigation vs. International Arbitration Management Conference



**International
Arbitration**

Litigation

Litigation vs. International Arbitration Management Conference



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Create List of Agreed Issues

- Work diligently to identify those issues from the defensive perspective
- Working through defining issues when Claimant's counsel is disengaged
- Keep email/letter writing log of conferences to identify issues for future use
- Prior to Case Management Conference, get Claimant to sign off on those issues

Litigation vs. International Arbitration Management Conference



Limit Document Production to the Defined Issues

- Handle document retention protocols with your from the outset of claim
- Learn client's document retrieval process
- Have early conferences with opposing counsel to determine ***what they believe*** are responsive documents
- Use issue based approach to organize document production
- Work with client to identify responsive documents as you work through identifying the issues on your own and with opposing counsel
- Keep your client in the loop

Litigation vs. International Arbitration Management Conference



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Why Staying on Top of issue Based Document Production is Key

- Witness statements are evidence in chief
- No coaching allowed of witnesses
- Removes ability to use persuasive trial skills to smooth over bad witnesses/facts
- From outset, must be focused on creating clear narrative from the documents because must be referenced in witness statements

Litigation vs. International Arbitration Management Conference



Implications

- What are you losing?
- What do you gain?
- How to use the rules to your benefit
 - Eliminate issue creep
 - Expose opposing counsel's failure to comply with tribunal rules
 - Review witness statements closely
 - Challenge witness memory, if possible

Opportunities for Persuasion – Using Oral Advocacy in International Arbitration

- What does the Tribunal Expect vs. Need?
- Building a Winning Open
- Addressing Differences with Tribunal Members
- Use of visuals
- Handling Witnesses
- Closing Argument – How to Wrap it All Up!

Tribunal Expectations vs. Needs

- Learning your panel
 - Do your homework - think IADC First!
- Opening Conference
 - First impressions matter – make everyone's job easier
 - Learn Preferences and bond
- Be the first to be clear
 - Keep it simple – cases can be boiled down to a few questions
 - Using MILs to Prime the case

Winning the Open

- Power statement – 1-3 sentences that says why “I win”
- Introductions
- Tell your story – 3 rules
- Address weaknesses head-on
- Big Finish

Winning the Open

- Additional Considerations:
 - Developing a theme/power statement – answering three questions
 - Be intentional in choosing language
 - Avoid Pejoratives and Hyperbole

Managing the Eclectic Panel

- Problems with Seniority and Deference – Empower the Weak Link
- Ask Preferences and Be Ready to Meet Them

Use of Visuals

- Civil law emphasizes documents
 - People more likely to recall if they see and hear
- Timeline and chronology
- Power Points: simple and clean
 - Emphasize strengths but pace information for digestion
- Stay Focused on the key issues

Handling Witnesses - Direct

- Proliferation of witness statements create significant strategic questions
 - If direct is permitted – (1) hit key points; (2) chronology; (3) short/simple
- Witness preparation – do everything you're permitted to do
- Re-Direct when critical

Handling Witnesses - Cross

- Order of operations: (1) favorable testimony; (2) credibility/bias; (3) clean impeachments
- Focus should be on key issues
- Cross is often not limited to content of witness statement
- Direct the tribunal to keep their attention

Handling Witnesses - Cross

- Short, simple questions –deliberate language, pacing, and tone
- Watching and Listening is as important as speaking
- See difficult witnesses and forgetful witnesses as gifts
- Preparation is key – especially with exhibits

Handling Witnesses - Experts

- Preparation - set an expert to catch an expert
- Privately retained vs. independent experts
- Same order of operation
- Areas of inquiry: (1) expertise; (2) methods; (3) assumptions; (4) bias

Closing Argument/Submissions

- May be able to ask the tribunal what it needs/wants for closing submissions
- Written submissions; Oral submissions; Combination
- Handling questions from the panel

Delivering a Winning Close

- Power statement – call back to the opening
- Set the framework – the key issues
- Look to favorable cross points: undisputed evidence in your favor
- Credibility cross points: undermine the opposing position
- Big finish – tie it all together

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