GAR Global Arbitration Review

Presenting Evidence in Briefs

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03 September 2021

Introduction

The principal function of the written submission in international arbitration is to present each party's case – inclusive of all claims, counterclaims and defences – in full to the tribunal. Regardless of whether there will be an oral hearing on the merits, this is a crucial opportunity to present evidence supporting the factual allegations and legal arguments and to persuade the tribunal as to the outcome of the case.

The use of evidence in international arbitration is neither as rigid nor as rule-bound as it is in state court litigation in many jurisdictions. There is not much guidance nor many standard procedures for presenting evidence in the written phase, and under most arbitral rules, tribunals have wide discretion over the conduct of proceedings, including the use of evidence. Unless the tribunal or the applicable rules order a specific method for the introduction or presentation of evidence, counsel are free to introduce evidence in whatever manner is deemed most effective for their case.

With procedural flexibility being one of the defining features of arbitration, and what sets it apart from litigation, there is no 'one size fits all' approach to handling evidence in a written brief. There are a variety of methods for presenting evidence and counsel are advised to adapt their presentation of evidence in a manner that undergirds the written arguments, complements the overarching case strategy and complies with the applicable rules and law.

General considerations and best practices

Arbitrations have become increasingly document-heavy in the past couple of years, drawing on a wealth of sources of information, including documentary evidence and written reports from witnesses and experts. This underscores the importance of augmenting the presentation of evidence in written submissions, as it can be the main mode of proving one's case and the driving force for the tribunal's fact-finding. In this respect, several considerations may apply, the starting point being the applicable law or rules. It is worth reiterating, however, that as each dispute turns on its particular factual, legal and procedural matrix, the considerations discussed below may be inapposite or irrelevant, in whole or in part, in a given case. At the same time, additional considerations may well be critical in the presentation and evaluation of evidence.

Refer to the applicable law or arbitral rules

Most arbitration rules and laws contain general provisions on the use of evidence. As mentioned above, these provisions tend to afford the arbitral tribunal broad discretion to manage the conduct of the proceedings, subject to the parties' agreement and with a view towards efficiency and fairness,[2] and to make determinations on the admissibility, relevance and weight of evidence.[3] However, parties should not take for granted their right to introduce evidence and they should be attentive to any mandatory provisions of the arbitration law applicable at the seat of the arbitration and to other rules of procedure of a national law that could reasonably be applied.[4] National law and judicial practice on the presentation of evidence differ widely from jurisdiction to jurisdiction, and parties should be prepared to accept – and accommodate – these differences when preparing their briefs. This applies not only to any mandatory rules of local law, which might conceivably regulate the presentation of evidence, but also to any national court rules or practice that are not directly binding on the proceedings but nonetheless affect how evidence is used. The arbitral tribunal may be influenced by these rules as the law of the seat or simply if they are the most familiar.

Counsel and arbitrators should keep in mind, therefore, how the various legal rules or systems may affect the tribunal's reception of evidence based on its source or composition.[5] Issues to look out for in the applicable arbitration rules or law include:

- the types of evidence that may be submitted in the proceedings;[6]
- time limits on the introduction of evidence and the consequences of late submission (e.g., cost consequences or the inadmissibility of late-submitted evidence); and
- formalities on how evidence may be introduced, such as a requirement to specifically refer to, or exhibit, all supporting exhibits in the submission itself (as opposed to the accompanying witness or expert reports).

Best practices

In addition to complying with the applicable procedural rules, counsel in arbitration proceedings should keep in mind a number of practical considerations with respect to the presentation of evidence.

Consider which stage of the pleadings to introduce evidence

In the absence of a specific agreement by the parties or directions from the tribunal, due consideration should be made regarding the timing of disclosure of evidence. This is especially relevant for claimants, who might have tactical reasons to hold on to certain evidence in the first round of written submissions. In many instances, but certainly not all, it can be advantageous to introduce evidence – including any expert reports and witness statements – at the earliest possible point in the proceedings. This might put the tribunal in a position to assess at an early stage the essential facts and arguments of the party's case and narrow the issues between the parties. In some cases, frontloading a case with the essential arguments and evidence can be a prime opportunity to piece a party's case into a coherent and persuasive whole, well ahead of the hearing.

There are, of course, situations that militate in favour of withholding the presentation of evidence until a subsequent round of written submission. Issues in dispute might not crystallise until a later stage in the proceedings. Conversely, certain facts might not be in dispute between the parties, making it unnecessary for a party to plead them in full, with supporting evidence, at the outset. Unreasonable strategic withholding of compelling evidence and arguments for the purpose of limiting the other party's ability to respond, however, may draw ire from that other party and, possibly, the tribunal. In these circumstances, considerations of fairness and due process should be weighed carefully against any (perceived) tactical advantage for late presentation of evidence.

Align the presentation of evidence with the case strategy

This may strike the reader as self-evident, but when drafting a submission, counsel should always have in mind the overarching arguments and strategy of the case. The written brief is an invaluable opportunity to guide the tribunal through all the arguments and supporting evidence and convince it of the merits of the party's case. Supporting evidence should be deployed selectively and strategically, in a manner that facilitates the tribunal's understanding of facts and law supporting the party's claims or defences.

This entails identifying and highlighting in the submission the most compelling evidence. Unless the procedural rules stipulate otherwise,[7] there is no need to exhaust the entire evidentiary record. Even if the evidentiary burden is strictly applied, it is important not to lose sight of the fact that not all evidence carries the same weight or materiality. The focus should be on the evidence that establishes the main facts and issues for determination. Structuring or approaching the written brief by a particular claim or issue can help to identify the most critical evidence. In the context of setting out each claim or issue, the key exhibits should be identified, as should the purpose and proof for which each exhibit has been submitted.[8]

At the same time, to be persuasive, a written brief should tell a story – who are the parties, how did the dispute arise, why is each party entitled (or not) to its claims for relief. Exhibits can anchor and enhance the story that counsel is trying to tell in the arbitration.[9] This could involve, for example, establishing a chronology and contextualising the key exhibits within that chronology.

Integrate witness and expert evidence

The ability to tell a story through the evidence extends to witness statements. Strong and compelling witness statements can enhance the overall narrative, engage the tribunal, and undermine arguments and competing accounts raised by the opposing side and its own witnesses. Subject to any procedural rules to the contrary, witness statements should be integrated into the main submission for maximum effect. This might involve expressly referring to witnesses and involving them as key characters in the overarching story, quoting directly from their testimony and incorporating details from the witness statements and accompanying exhibits in the brief.

As with all matters concerning the presentation of evidence, additional consideration should be given to the particular disposition and expectations of the tribunal members towards witness evidence as well as the strength of that evidence. For example, it is advisable to avoid relying heavily on a witness statement if the tribunal is inclined to give greater weight to documentary evidence or if there are concerns about the ability of a witness to withstand cross-examination. At the same time, especially where the witness's account can be supported by documentary evidence, weaving his or her testimony into the brief to create a coherent narrative can be an effective means of establishing the credibility of the witness and persuading the tribunal ahead of the hearing.

A word of caution: counsel should be careful that neither the structure nor the language of a witness statement mirrors that of the brief, as this can create the appearance of undue involvement by counsel in the preparation of the witness's statement and undermine its weight.

The written brief can be invaluable in bridging the gap between the expert report and the tribunal. The challenge of incorporating the expert report into the brief lies in accurately and cogently distilling the expert's findings on the technical aspects of the case. Effective use of expert evidence therefore requires the content of the report in the written submission to be streamlined and ensuring that the evidence is fully understood in the context of the party's claims or defences. This is especially important if the expert's evidence involves highly complex issues of a technical or specialised nature, or when there are multiple reports with conflicting data sets or methodologies. In such instances, weaving the contents of the expert report into the brief will assist the tribunal to engage with the evidence in an efficient and meaningful fashion that enables it to make a determination on the technical issues relevant to the case.

As an initial step, to establish the authority of the expert, it is advisable when introducing the expert report into the submission, to explain in one or two sentences the basis of the expert's authority. The submission should then proceed to explain and contextualise the key findings of the report. The challenge for counsel is to find a balance between using clear, precise and straightforward language and ensuring sufficient detail remains so that the tribunal has a solid understanding of the technical evidence. The extent to which the expert's opinions and analysis must be translated into layperson's terms will depend on the subject matter of the dispute and the specialisation or expertise of the tribunal members. Summaries and demonstrative exhibits such as tables, graphs and diagrams can go a long way towards conveying the expert's findings in a succinct and striking manner. To further assist the tribunal, any documents relied on for this purpose should be clearly identified, as should references to the corresponding page or paragraph in the expert report.

Make an impact

To enhance the tribunal's understanding of a party's case, supporting evidence should be presented as clearly and concisely as possible in written submissions. This is doubtless easier said than done, particularly in respect of large, complex disputes such as a construction arbitration, where the volume of evidence can be enormous and the subject matter highly technical. Although there may be no way to avoid a complex or massive arbitration, the following strategies for integrating the evidence into the submission could be used, where appropriate, to assist the tribunal in navigating all the materials and understanding the client's position.[10]

- Highlight, emphasise and revisit the key exhibits: This can be achieved by, for example, inserting quotations from or screenshots (snips) of the most relevant part of a document. Adopting a defined term for a key exhibit (such as the March Invoice or the Supply Agreement) makes it easier to refer to that exhibit and reinforce its significance.
- Present evidence in a visual or easily digestible way: Demonstrative exhibits and visual aids, such as pictures, graphs, tables, decision trees and timelines, when used selectively,[11] can be an immensely effective means of conveying information.[12] This applies in particular to expert reports and any supporting evidence, which can be very technical, lengthy and complex. Demonstrative exhibits should fairly and accurately reflect the underlying evidence on which they are based, which should be available to the opposing party and tribunal.[13]
- Limit the length of documentary evidence put on the record: Although this goes beyond the scope of the brief itself, parties to a complex or document-heavy arbitration should seek to reach an agreement on the presentation of large or lengthy documents. One solution might be to highlight the relevant passages in lengthy documents, omit email attachments, or provide excerpts or summaries only, to assist reference by the tribunal and counsel. If supporting evidence contains largely repetitive, near-duplicative or ancillary details or materials, the information could be presented in the form of a table or chart.[14] Reducing the overall volume of information for the tribunal to review and consider can promote greater efficiency and reduce the costs of the arbitration.

Consider how to address adverse evidence

No case is without its weak spots. In most instances, counsel will be aware of documentary or witness evidence that is damaging to its case. This raises the question of whether it is better to address adverse evidence head on in a written brief, to pre-empt the opposing party's account, or to remain quiet about the damaging information unless or until the opposing party raises it.

As is often the case, how a party chooses to approach adverse evidence will depend on the particular circumstances. When the damaging information is contained in a document that is already on the record or on which one party seeks to rely, it is perhaps better that the party does not draw attention to it in the submission. However, when there is little uncertainty that the other party will seize on the damaging information in its own submission, it may be prudent to use the brief as an opportunity to recontextualise or reframe the evidence to diffuse the risk that it presents to the party's case.

Be mindful of the influence of different jurisdictions, legal systems, approaches and practices

Exhibits should be tailored to their audience, taking into account their legal or cultural background, which may differ substantially, depending on whether participants have a common law or civil law background. Strategic considerations on the effective use of evidence encompass not only what is best for the case and most damaging for the opposing party, but also what is likely to be acceptable to the tribunal.[15]

Much has been said about the putative differences between civil and common law lawyers and their respective approaches to evidence. For example, in civil law countries, greater weight tends to be assigned to documentary evidence than oral testimony from fact and expert witnesses.[16] As a result, an arbitrator with a civil law background might be less receptive to witness evidence, particularly when there is documentary evidence that is sufficient to serve as that witness's evidence. Whether or not these cultural gaps between civil and common law countries are overstated or oversimplified, particularly in the context of international arbitration, counsel should be mindful of the different approaches to assessing the evidentiary record. These differences could be cultural or linguistic in origin, or they might be linked to the practice of litigation in different jurisdictions. Regardless of their origin, they highlight the importance of considering the diversity of experience and the perspective of tribunal members and how this might have a bearing on how they received evidence.

In many cases, a tribunal's expectations regarding particular forms of evidence may be evident, such as when it adopts rules of evidence or procedure from a specific jurisdiction or limits the extent to which oral evidence may be presented. If parties have concerns about how specific types of evidence may be received, they are advised to enquire about this during the arbitrator selection process and agree on a framework for its use in the proceedings.

Concluding remarks

The use of evidence is an important tool for effective advocacy. Although there has been much reflection on taking evidence, in particular the disclosure of documents, drafting witness statements, and examination of witnesses and experts, the presentation of evidence in the parties' written submissions should not be ignored. This is because the written submission can serve as the foundation of the party's case and the basis on which the tribunal can connect, weigh and consider the constitutive elements. By integrating witness, expert and documentary evidence into the submission, counsel have the means of shaping the case into a coherent and compelling story.

Notes

[1] Moritz Keller is an arbitration partner, Tim Schreiber is a partner, Paul Hauser is a counsel and Sarah Lemoine is a senior associate at Clifford Chance Partnerschaft mbB.

[2] See, e.g., 2014 LCIA Arbitration Rules, Articles 14.4, 14.5; 2021 ICC Arbitration Rules, Article 22; 2018 DIS Arbitration Rules, Article 21.3; 2017 SCC Arbitration Rules, Articles 23; 2018 HKIAC Administered Arbitration Rules, Article 22.3; UNCITRAL Arbitration Rules, Article 17.1; 2016 SIAC Arbitration Rules, Rule 19.1; English Arbitration Act 1996, Section 33; Singapore Arbitration Act, Articles 22, 23(1), 23(2).

[3] See, e.g., 2017 SCC Arbitration Rules, Article 31; 2016 SIAC Arbitration Rules, Rule 19.2; 2018 HKIAC Arbitration Rules, Article 22.2; UK Arbitration Act 1996, Section 34; Swiss Private International Law Act, Article ß184; German Arbitration Act, Section 1042(4); Singapore Arbitration Act, Article 23(3); Swedish Arbitration Act, Section 25.

[4] 2021 ICC Arbitration Rules, Article 19, for example, expressly permits an arbitral tribunal to apply to the arbitration rules of a national law on any matter on which the ICC Arbitration Rules are silent and to the extent the parties have not agreed otherwise.

[5] Julian David Mathew Lew, 'Document disclosure, evidentiary value of documents and burden of evidence' (Chapter 1) in Teresa Giovannini and Alexis Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*, Dossiers of the ICC Institute of World Business Law, Volume 6 (Kluwer, ICC, 2009) 11, p 12.

[6] Under most arbitral rules, tribunals have flexibility to admit any form of evidence that is relevant and material (for example, the ICC Rules, UNCITRAL Arbitration Rules and IBA Rules all include a broad definition of 'document'). If the parties wish to exclude these from presentation, they should restrict this definition as appropriate.

[7] The procedural order may, for example, require the parties to present all supporting exhibits – both factual and legal – in the main submission, including exhibits to any witness statements or expert reports.

[8] Jeffrey Maurice Waincymer, 'Documentary Evidence', op.cit., p. 883.

[9] Lucy Reed, 'The Kaplan Lecture 2012: Arbitral Decision-making: Art, Science or Sport?', p. 12, https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media113581569903770reed_tribunal_decision-making.pdf (last accessed 28 June 2021).

[10] This is the 'master trail map' analogy articulated by Lucy Reed in her 2012 Kaplan Lecture on arbitral decision-making. She posits that failure to balance the volume and complexity of a pleading against the tribunal's ability to process the information can foster reliance on intuition and heuristics as a fallback position. Lucy Reed, 'The Kaplan Lecture 2012: Arbitral Decision-making: Art, Science or Sport?', op.cit., pp 12–13.

[11] Instead of embodying the strength of the case, overuse of documentary or demonstrative exhibits can have the opposite effect, namely that counsel are trying to distract the tribunal from weak arguments. See Bernd Ehle, 'Effective Use of Demonstrative Exhibits in International Arbitration' in *Czech (& Central European) Yearbook of Arbitration* (2012) 43, para. 3.31.

[12] UNCITRAL Notes on Organizing Arbitral Proceedings (2012), para. 13(54).

[13] Bernd Ehle, 'Effective Use of Demonstrative Exhibits in International Arbitration', op.cit., paras. 3.26, 3.28

[14] UNCITRAL Notes on Organizing Arbitral Proceedings, para. 13(54); Jeffrey Maurice Waincymer, 'Documentary Evidence', op.cit., p. 883.

[15] George M von Mehren, Claudia T Solomon, 'Submitting Evidence in an International Arbitration: The Common Lawyer's Guide', in *Journal of International Arbitration* 20(3) (2003) 285, p. 286, citing to Paul D Friedland, 'A Standard Procedure for Presenting Evidence in International Arbitration' in *Mealey's International Arbitration Rep*. 11(4) (1996).

[16] Julian David Mathew Lew, 'Document disclosure, evidentiary value of documents and burden of evidence', op.cit., p. 15, citing to W Laurence Craig, William W Park, Jan Paulsson, *International Chamber of Commerce* (3rded, 1998), pp. 428–29; Alan Redfern, Martin Hunter, Nigel Blackaby, Constantine Parasides, *Law and Practice of International Commercial Arbitration* (4th ed, 2004), pp. 354–55, para. 6-69.

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