



Dealing With Documents During Arbitration Proceedings

Tribunals and senior lawyers typically don't get involved in document production until just before the hearing. But perhaps they should.

Preparing and producing documentary evidence in arbitrations requires legal teams and their service providers to deal with multiple complexities and trade-offs. These trade-offs often occur due to an asymmetry present between tribunal and document production obligations – whereas the overriding obligation of a tribunal is to provide a timely, cost-effective and fair resolution of the dispute, in document productions, tribunals have to also balance these considerations with an additional one of timeliness.

In these circumstances, taking a strategic approach to document collection, storage and production from the outset, can help practitioners to avoid complexity and improve hearing efficiency, as practitioners familiar and comfortable with how documents are formatted and where they are located will find they can more easily review, produce and present documents in arbitration.



PLAN YOUR DOCUMENT STRATEGY EARLY

Firms often have their own internal document management systems, but legal teams and their providers need to work collaboratively to establish a fit-for-purpose collection and storage methodology. In most instances,

this will require understanding and balancing the following trade-offs:

– Expediency vs. Access

The importance of collating all of the available documents into the document management system as soon as possible must be balanced with ensuring the data is structured in a way that's going to be useable and accessible at the later stages of the arbitration.

– Broad vs. Targeted

Collection expediency also needs to be balanced against effectiveness and the need to prevent re-collection. Collecting a broad universe of documents and then narrowing to an effective set once the issues have been identified will normally be more efficient overall than attempting to narrow the document pool up-front which often can result in re-collection or re-review.



CONSIDER ALL DOCUMENT TYPES

Now the world is working remotely, it's important to consider the full spectrum of electronic communications and their relevance to the issues in play. In many cases this

may mean not just emails, but messaging apps (e.g., Microsoft Teams, Twist, Slack, WhatsApp and WeChat) and collaboration platforms (e.g., OneDrive, Dropbox) require consideration.

In cases where non-email data is at play, or larger volumes are present, it will generally be wholly impractical for documents to be available in hard copy, and tribunals themselves are using document review platforms where all types of documents are readily accessible.

In either instance, obtaining advice from the right service provider can be highly assistive to scope, collect (or rule out) data sources, and assist in the selection of the appropriate platform to review unusual data types.



MANAGE SECURITY CONSTRAINTS

Privacy rules and data transfer restrictions, sovereign-state confidentiality, and other security requirements often mean documents cannot be physically taken out of a region, country – or sometimes even a building.

To address these issues, in-house or in-region eDiscovery environments need to be set up in order to review and store documents on location. Another option is to use a staging database or a repository to enable analysis and filtering so a more refined set of review documents scrubbed of any privacy or security concern can be made available for case development.

Whatever accommodation is used, it's vital that service providers record exactly what is stored where, how documents are stored, what searches have been conducted, and which documents have been accessed and produced. Proper authentication and tracking of documents is critical, and lawyers should expect some push back from providers when they receive a document and ask about its source and where it came from.



MAKE DOCUMENT PRODUCTION CATEGORIES MORE GRANULAR

Often, the most painful part of any arbitration is the document production process – partly because of a lack of detail in institutional rules, the International Bar Association Rules, and Chartered Institute of Arbitrators and International Chamber of Commerce guidelines on e-disclosure.

Lacking detailed guidance, tribunals typically follow a document production approach which the Federal Court is increasingly using in commercial cases:

1. A party wanting documents must request them as a 'category', explaining why the request is material to the case.
2. The opposing party can then accept or oppose the request on grounds such as relevance or oppression.
3. The requesting party has a right to reply.
4. Finally, the tribunal decides on all requests and issues a document production schedule.

The problem is, when you have potentially millions of documents, that merely ruling on categories for parties to engage in a proprietary search may not produce the right documents and can lead to unnecessary costs. To address this, introducing parameters which reduce the document universe perhaps by identifying date ranges, limiting potential custodians or agreeing on repositories which will not be relevant, can be assistive.

Rather than leaving it up to a tribunal, which is unlikely to be sufficiently familiar with the data, it's important for the parties to come up with reasonable and proportionate search methods to deal with categories effectively.



CONSIDER TECHNOLOGY-ASSISTED REVIEWS

When millions of documents need reviewing, technology can help.

For example, sampling is a technique that can be used to work out what search parameters are likely to retain the most responsive documents (keywords can only get you so far) and, upon completion of a review, sampling the unreviewed documents will also help defend and validate the review methodologies.

In cases where an experienced service provider has been engaged, it may also be appropriate to consider whether artificial intelligence and analytics can be deployed. These are powerful tools that can quickly pinpoint concepts and cluster of documents of interest together for a prioritised review. They can also support quality control to ensure consistency in the review.



A COLLABORATIVE EFFORT

Rather than being a last minute consideration, effective arbitration document productions require the early collaboration of all parties. Teams should take the time to look at the bigger picture, including what may be needed down the track, and prioritise from there.

Considerations should include what information about sources, decisions and work products must be tracked and recorded. When planned and deployed effectively, technology can assist lawyers to scope efficiently, narrow down broad category classifications, prioritise review and support a persuasive presentation.

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