

## The Use of Digital Demonstrative Exhibits and Presentations for International Arbitration

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Traditionally, Courtroom technology has been reserved for precisely that – the courtroom. Over the past decade there has been an increase in the number of international disputes being referred to arbitration. In addition to the traditional joint venture disputes, deriving in particular from infrastructure projects, there is an appreciable growth in the number of cases arising out of disputes in the energy sector. Given the recent volatility in this sector, the trend is not surprising. The cases are both upstream and downstream, and range from disputes over capital construction costs, delay and disruption experienced during the design and construction phases, to oil and gas concessions and the pricing of fuels. While this article is not about the advantages, or trends, in the use of International Arbitrations, less restrictive international trade barriers and the globalization of business and consolidation in the Construction Industry is likely to continue the trend toward more, and larger, disputes being handled through International Arbitration.

An exceptional oral advocate has always had a powerful advantage in the international arbitration arena, but today, presentation technology and demonstrative exhibits has leveled the playing field. Studies have shown that after 72 hours, people remember as little as 10 percent of the information presented to them orally. When the same information is presented both orally and visually, however, people retain as much as 87 percent.

Carefully planned legal strategy and strong content remain the hallmark of a solid case. Carefully planned visual strategies and compelling graphics are the hallmark of a persuasive electronic presentation. It is the combination of the two that win International Arbitrations. There are certain considerations that must be addressed when creating a technology-based presentation for arbitration. For maximum impact, care must be taken to select the correct type of exhibit as well as a presentation medium that will work best within the presentation arena.

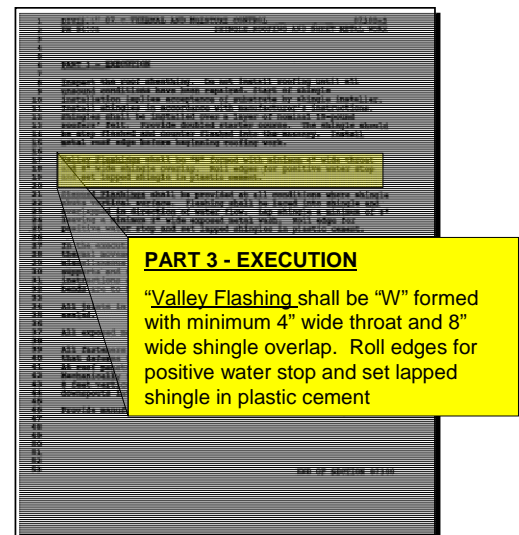
### Case In Point

Consider the example of an owner building a sports stadium, which will seat 53 thousand people. The concrete contractor (American) files a claim for £15 million against the General Contractor and the owner (both British) for delays allegedly caused by the two parties. The piles must be driven, surveyed and cut before the concrete contractor can pour the concrete caps, slabs and decks. The contractor claims that work on the piles was delayed by the owner and general contractor and that he had no where to work causing him to release part of his work force, while continuing to pay for equipment already on site. The concrete contractor further claims that this delay, prevented him from completing his work on time, forcing his labor and material costs to escalate.

In response to this claim, the owner and GC retain a consultant (expert on sports stadiums) to assist in the formulation of a defensive strategy.

The expert came to the following conclusion: After looking at pile driving logs, aerial photographs, timesheets and daily reports, in the expert’s opinion, the owner and general contractor did not delay the project, the concrete contractor actually delayed himself by not providing adequate staffing for the first several months of the project. The expert went on to say that the pile driving work was also completed within the planned sequence and that there was always work available to the concrete contractor...

Sound familiar? Two completely different versions of what happened to cause the delays and cost overruns. So, what type of high-impact demonstrative exhibits could be used to help assure a favorable decision for the defense?



### *Demonstrative Options*

In this scenario, the defense might elect to use a series of demonstrative exhibits including document enlargements of pile driving logs/daily reports, contract drawings, photographs, construction schedules along with the expert's testimony. Using these types of exhibits, the expert would be able to familiarize the arbitration panel with the stadium layout, the location of the piles, planned and actual sequence of work and highlight and enlarge passages in key documents. At first glance, this assortment of exhibits would appear to be an acceptable answer to the demonstrative exhibit question, including.

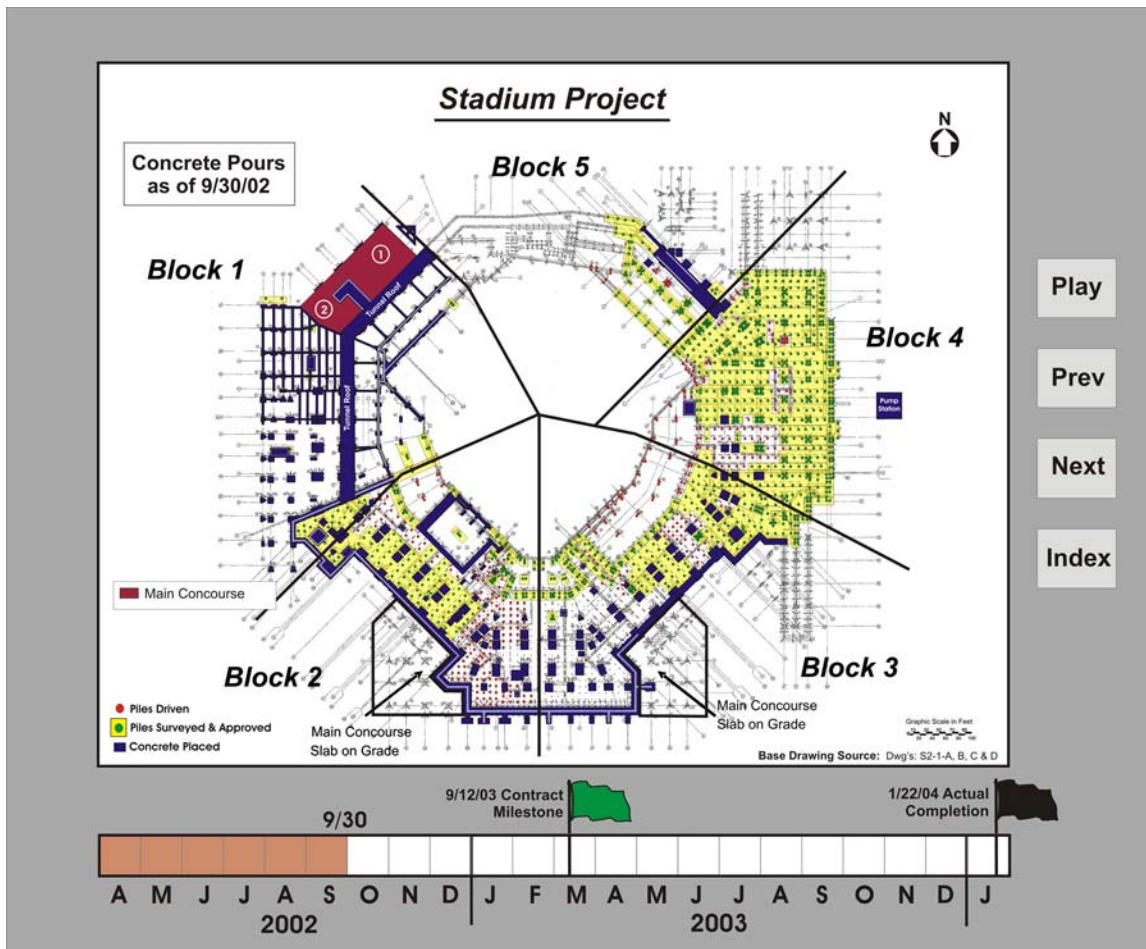
- Document enlargements
- Site Plans
- Photographs
- Planned/As-Built Construction Schedules
- Planned/As-built manpower charts

However, there is one critical problem with this strategy and the exclusive use of these exhibits. There is no focus on the most important issue. Did the concrete contractor really delay himself and were there areas for the contractor to work in that he did not take advantage of?

The arbitration panel's clear understanding of this issue will ultimately be the deciding factor in this proceeding. It is important to remember that this will be the owner and GC's best opportunity to defend against this claim and, depending on the circumstances, the arbitration panel's decision could be binding. Based on the potential liability, it would be worthwhile to explore other demonstrative options.

While time-phased 3-D models (a.k.a.4-D modeling) can be useful when demonstrating complex processes or special relationships, the best and most cost effective option in this case would be to prepare an interactive time-phased two-dimensional site plan which would show the actual progression of work, as completed by the pile driving contractor, the surveyor and the concrete contractor (see inset). These slides could be prepared on a

bi-weekly or monthly basis, depending on the quality and level of detail of the available records.



Each of these diagrams represents a snap-shot, of the status of the project at regular frequent increments. Using this type of exhibit the presenter would be able to run the presentation as a video-clip, or movie, pausing, re-winding, and resuming the presentation as desired to highlight important events and trends which can be concluded from the visual display of historic records. These series of interactive slides would start with a site plan showing the location of all piles and blocks or quadrants, but indicating no work progress. This slide or frame is to familiarize the Arbitration or DRB panel with the site. As time and the slides move forward, the piles would be color coordinated to show piles driven (red), piles cut, surveyed and approved (green and highlighted in

yellow) and concrete placed (blue). Once a pile is approved it is available for the concrete contractor to work on. As the slides progress, so does the bar on the timeline. The time line indicates the contract completion milestone date and the actual completion date while the moving bar shows how far along on the schedule the contractors are. Each slide has an aerial photograph, taken on the corresponding date, imbedded behind it with grid lines drawn for ease in locating blocks and areas (see inset photo). Clicking anywhere on the site plan will bring up each respective photo. This will act to reinforce what the site plan is depicting and enhance the overall theme being presented. Once the color coding and sequence in the image is clear, a cursory view clearly indicates that the concrete work lagged behind the pile driving and approval work (green piles highlighted with yellow) by a large margin, thus disproving the concrete contractor's claim that he had no available areas to work from time to time.

A combination of the interactive exhibits, and electronic document enlargements with text highlighted, animated and pulled out provide the defense with a cost effective, clear and convincing presentation which focuses on the important issues with the maximum impact. Each case will ultimately be determined by the relevant facts, but the use of simple time phased images such as these can allow an Arbitration panel to quickly see and comprehend the argument, whether it is accepted or not.

### ***Admissibility***

Generally speaking, the rules of admissibility are some what more relaxed in arbitration, but care must be taken when contemplating the use of exhibits. The rules governing the use of the use of demonstrative exhibits state that "demonstrative exhibits shall be permitted, providing that no new evidence is contained herein. A hard copy of any such exhibit shall be provided by the Party producing the exhibit to the other Party and to each member of the Arbitral Tribunal". It has been my experience that as long as both parties have a chance to comment on the other's presentation and received a copy in advance, the demonstrative exhibits are usually accepted.

Additionally, it must be demonstrated to the arbitration panel that the exhibits are accurate, and based on factual evidence. In this case, the contract drawings were used as the base site plan and pile logs used as the basis for all of the visual information depicted. The photographs were authenticated as to the date taken, and verified that no alterations had been made. This was done by the photographer and project manager who testified that the photos were a fair and accurate representation of the conditions on that date and time. All exhibits were exchanged between the parties and submitted to the arbitration panel 30 days prior to the start of the proceeding.



The difference between winning and losing in international arbitration is oftentimes the ability to transpose complexity into simplicity. One must remember to “Keep it Simple”. Addressing this problem successfully will contribute significantly to the most persuasive presentation in any proceeding. When the exhibits come together to tell a story in a compelling way, the arbitration panel has a well-marked and logical path to follow. These images support and enhance understanding of the oral testimony presented by witnesses or experts. In short, demonstrative exhibits are an extraordinary means of simplifying complex issues and, therefore, should be considered an integral part of any proceeding.