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Discovering New Ways to Make Arbitration More Attractive

International ADR groups are proposing new rules for streamlining the discovery process

By Richard Chernick

Most international commercial arbitrations avoid U.S.-style discovery. Depositions are rare and document discovery generally is limited by comparison to domestic arbitration proceedings.

Typically, parties produce documents they believe will support their claims or defenses. Document requests must be supported by a showing of need, together with a narrow description of the document and a statement that it is actually in the possession of the other party. In ruling on the scope of compelled document production, arbitrators are expected to balance the likely benefits of production against cost, delay and the burden to the party who must produce.

International Bar Association rules do not mention e-discovery or refer to electronically stored information, but a number of commentators have argued that the governing principles of the IBA rules ought to apply not only to paper documents but also to electronically stored information. Currently, an IBA arbitration subcommittee is addressing potential changes to the 1999 Rules, and those changes could include e-discovery.

The International Centre for Dispute Resolution, the international arm of the American Arbitration Association, issued its "Guidelines for Information Exchanges in International Arbitration" in May 2008. The provision regarding electronic documents states: "Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The Tribunal may direct testing or other means of focusing and limiting any search."

This provision applies to all international arbitration proceedings administered by the International Centre for Dispute Resolution after May 31, 2008, unless the parties expressly agree to opt out of its application.

The Chartered Institute of Arbitrators issued its "Protocol for E-Disclosure in Arbitration" in October 2008. The protocol's purpose is to focus early consideration upon disclosure of electronically stored information where appropriate and necessary; to alert the parties and arbitrators to these issues at an early stage, particularly as to the scope of production and conduct of disclosure; and to allow parties to adopt the protocol as part of a pre-dispute agreement or a pending proceeding.

The protocol identifies tools and techniques for reducing the burdens of e-discovery, including limiting disclosure to specific categories of documents, specific date ranges, custodians, etc.; the use of agreed search terms; the use of agreed software tools; the use of data sampling; and formats and methods of e-discovery.

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In December 2008, the International Institute for Conflict Resolution and Prevention issued its protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration. It is intended to operate in conjunction with its domestic and international non-administered arbitration rules. The institute articulates the general principle of e-discovery as follows:

In making rulings on disclosure, the tribunal should bear in mind the high cost and burdens associated with compliance with requests for the disclosure of electronic information. ... E-mail and other electronically created documents found in the active or archived files of key witnesses or in shared drives used in connection with the matter at issue are more readily accessible and less burdensome to produce when sought pursuant to reasonably specific requests. Production of

electronic materials from a wide range of users or custodians tends to be costly and burdensome and should be granted only upon a showing of extraordinary need. Requests for back-up tapes, or fragmented or deleted files should only be granted if the requesting party can demonstrate a reasonable likelihood that files were deliberately destroyed or altered by a party in anticipation of litigation or arbitration and outside of that party's document-retention policies operated in good faith.

The term "extraordinary need" is not defined in the institute's protocol.

The protocol does address various "modes" of electronic disclosure, ranging from minimal to extensive, and directs the parties to meet and confer as to an agreed "mode" prior to the first scheduling conference, and to take up the matter with the panel at that conference.

In August 2008, the International Chamber of Commerce's Task Force on Production of Electronic Documents in Arbitration began its work. It was tasked to study the effects of e-discovery in international arbitration and to make recommendations on the subject of production of electronically stored information in such proceedings. A recently issued draft report suggests addressing e-discovery in arbitration as early as possible. Among other questions, the report suggests parties ask whether there will be e-discovery, how electronic documents will be preserved, where they will be pursued and what procedures parties will follow in requesting and responding to discovery requests. In addition, parties should determine in what form the documents will be produced and whether any privilege and waiver agreements will apply during the process.

The draft report identifies techniques for managing ESI production, including limiting the scope and source of production, excluding metadata or data embedded in documents, restricting dates, using specific search terms and data sampling, and disclosing and inspecting electronic sources. In addition, it suggests using independent electronic document experts. It also suggests shifting costs, so that discovery is shared more equally by the parties.

On Oct. 4, 2009, members of the International Chamber of Commerce met in Madrid to discuss the draft report. Comments from various international committees highlighted the international arbitration community's aversion to U.S. style discovery in general, including e-discovery. Some questioned whether the draft report would, by its very existence, act as an endorsement of e-discovery — something that a number of national committees oppose.

In the end, it is expected that the task force will modify the draft report to clearly state that e-discovery is in principle no different from traditional paper discovery and may be generally governed by the same rules requiring specificity in the requests for exchange of information. Although the report provides a primer on electronic documents, the revised report may also warn arbitration tribunals to be very careful to weigh the potential burden of such discovery against the value of the potential evidence in the arbitration before ordering e-discovery. It may also suggest that tribunals should consider the potential for cost shifting, even during the course of the arbitration, so that the burdens of e-discovery are appropriately allocated among the parties.

JAMS recently issued its "Recommended Arbitration Discovery Protocols for Domestic Commercial Cases." Despite its domestic focus, these protocols are also relevant to international arbitrations. Specifically, JAMS encourages their use in international cases, particularly those with U.S. counsel and a panel composed solely of arbitrators from common law countries. In addition, these protocols reflect a growing concern about the cost of arbitration generally, and how excessive discovery and delay may be the principal causes of those increasing costs. The JAMS protocols are adapted from a report of the New York State Bar Association Arbitration Committee articulating guidelines for the management of large, complex arbitrations. That report is subtitled "Guidance for Arbitrators in finding the Balance between Fairness and Efficiency."

The key element in reducing costs and delay is identified by the report as the "good judgment of the arbitrator," and, like the other reports and protocols, the first instruction indicates that arbitrators should pay early attention to discovery.

The JAMS protocol notes the substantial increase in the use of electronic media for the creation, storage and transmission of information has substantially increased the volume of available document discovery. It has also substantially increased the cost of the discovery process.

JAMS arbitrators are trained to deal with the technological issues that arise in connection with electronic data. While there can be no objective standard for the appropriate scope of e-discovery in all cases, JAMS arbitrators recognize that an early order containing language along the following lines can be an important first step in limiting such discovery in a large number of cases.

For instance, "there shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from back-up servers, tapes or other media."

Further, "absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata with the exception of header fields for e-mail correspondence."

Where the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to the amount in controversy, or to the relevance of the materials requested, the arbitrator will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award.

The key problem in commercial arbitration, whether done domestically or internationally, is that it has become as costly and almost as slow as litigation. The main culprit has been identified as discovery cost and abuse. E-discovery is the poster child for the "litigization" of arbitration as well as for the source of rapidly increasing costs. It is no coincidence that every arbitration provider and many other key arbitration organizations are focusing on this problem. These developments will affect how arbitration is perceived by the business community and will drive important rules and procedure changes in every arbitration proceeding. Whatever protocol applies, however, there is no substitute for an arbitrator's sound judgment. ■