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An Arbitrator's Guide to Successfully Resolving eDiscovery Disputes

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Disputes related to the preservation, collection, review, production and use of electronically stored information (ESI) can significantly increase the costs and time of an arbitration. Effective management of eDiscovery is crucial to ensure that the benefits of arbitration—cost savings and efficiency—are realized.

Guiding Principles

An arbitrator's successful management of eDiscovery requires an understanding of the technical and practical implications of any decision. Below are guiding principles for effectively managing the eDiscovery process.

Guideline 1: Engage the parties early and often on eDiscovery issues, even if they are not focused on them.

Arbitrations have many moving pieces, and parties tend to focus on substantive issues and delay or short-change meaningful decisions about eDiscovery. An arbitrator can

> *See "An Arbitrator's Guide..." on Page 6*

ADR Sanctions

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All players in the alternative dispute resolution process—whether they are disputants, counsel, arbitrators or mediators—ought to focus on their respective obligations and standards of conduct, and should beware of the prospect of coercive sanctions for failing to do so. Here are some examples of participants having to account for their behavior or positions taken in hearings.

> *See "ADR Sanctions" on Page 10*

Ethics in International Arbitration: They're Not Just for Lawyers

BY TROY L. HARRIS, FCIArb

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Ethical issues in international arbitration are a hot topic. The approaching 10th anniversary of the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration has already generated discussion concerning potential revisions to the source of the now-familiar "Red," "Orange" and "Green" lists of conflict situations that may confront arbitrators. In addition, one of the most vigorously debated issues at present is what law should govern the conduct of counsel in international arbitration. The practical situation that invariably provides the focus for that question is the extent to which counsel may prepare witnesses for giving testimony in international arbitration proceedings. This is a problem because extensive "woodshedding" is prohibited in some jurisdictions, yet permitted (if not *de rigueur*) in others. For example, under their respective codes of conduct, English barristers and solicitors are strictly limited in their ability to prepare witnesses before a hearing, while lawyers in the United States are not so limited and, indeed, generally assume that failure to thoroughly prepare their witnesses is flirting with malpractice. So which rule controls when an American lawyer is representing a client in an arbitration hearing being conducted in London? There is no clear answer at present, although the draft IBA Guidelines on Party Representation in International Arbitration promises to provide some guidance.

The attention to ethical issues confronted by counsel and arbitrators is altogether understandable. But what about the ethical obligations of the witnesses themselves, particularly expert witnesses? The current focus upon conflicting ethical norms applicable to counsel has obscured somewhat another dimension to the witness-prep debate: the ethical norms that apply to expert witnesses. Construction cases are notoriously expert-driven, often requiring expert testimony of various professionals, including engineers and accountants.

At one level, the ethical rules applicable to engineers and accountants are no different from those that apply to lawyers (or, indeed, to civilized people generally): tell the truth, keep client secrets secret, etc.[1] And yet there are also litigation-specific ethical rules with which engineers and accountants must comply. In the U.S., the National Society of Professional Engineers, for example, has promulgated a Code of Ethics for Engineers ("Code of Ethics"), under which its members have various duties when serving as expert witnesses:

> *Engineers shall be objective and truthful in professional reports, statements or testimony. They shall include all relevant and pertinent information in such reports, statements or testimony, which should bear the date indicating when it was current.*[2]
>
> * * *
>
> *Engineers shall not, without the consent of all interested parties, participate in or represent an adversary interest in connection with a specific project or proceeding in which the engineer has gained particular specialized knowledge on behalf of a former client or employer.*[3]
>
> * * *
>
> *Engineers shall not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice or employment of other engineers.*[4]

It takes little imagination to conceive of situations in which an engineer's expert testimony might be something less than "objective" or fail to include "all relevant and pertinent information." Although perhaps less common, it is likewise easy to foresee circumstances in which an engineer is proffered as an expert witness precisely because he or she has "gained particular specialized knowledge on behalf of a former client or employer," without the engineer having first obtained "the consent of all interested parties." This may be especially problematic when the dispute involves highly specialized knowledge possessed by relatively few individuals in the world. Finally, human nature being what it is, it is not unheard of for experts to take great exception to criticism of their opinions and conclusions by opposing experts, thereby creating a risk that each may be tempted to "injure, maliciously or falsely, directly or indirectly, the professional reputation" of the other.

Like the National Society of Professional Engineers, the American Institute of Certified Public Accountants ("AICPA") has promulgated a Code of Professional Conduct containing numerous ethical standards. Indeed, the AICPA has published a number of guides for its members who serve as testifying experts, including Consulting Services Special Report 03-1, "Litigation Services and Applicable Professional Standards," and Practice Aid 10-1, "Serving as an Expert Witness or Consultant." The Practice Aid provides CPAs guidance to the relevant provisions of the Code of Conduct and cautions thus:

> *The roles of expert witness and consultant practitioner differ from the role of the attorneys in the litigation process. Because litigation is an adversarial proceeding, each party presents his or her case to a trier of fact. Attorneys must advocate for their clients. The practitioner, on the other hand, must serve his or her client (the attorney) with integrity and objectivity, as required by the [Code of Conduct]. Accordingly, forensic accountants should have objective neutrality with regard to their professional opinions and not advocate for the position of the attorneys or the attorneys' clients.*[5]

In addition, CPAs are subject to Rule 101: "Independence. A member in public practice shall be independent in the performance of professional services as required by standards promulgated by bodies designated by council."[6] Under Interpretation 101-3 ("Nonattest Services"), the independence of CPAs serving as expert witnesses is deemed impaired:

> *Expert witness services create the appearance that a member is advocating or promoting a client's position. Accordingly, if a member conditionally or unconditionally agrees to provide expert witness testimony for a client, independence would be considered to be impaired.*[7]

The practical effect of Interpretation 101-3 is that a CPA cannot act both as a client's auditor (an "attest" service requiring independence) and expert witness (which impairs independence). Such a situation might easily arise where an owner's CPA, in the course of auditing a contractor's pay applications, uncovers evidence of fraud by the contractor. Interpretation 101-3 would appear to prohibit the CPA from continuing to provide auditing services to that client if the CPA also agrees to provide expert testimony regarding the alleged fraud.

Not only are the ethical obligations of engineers and accountants somewhat different from those applicable to counsel and arbitrators, the breach—real or imagined—of those obligations creates a different dynamic in international arbitration proceedings than such a breach by counsel or an arbitrator. In the case of a potential conflict of interest between counsel and arbitrator, the arbitrator may be obliged to decline appointment or even withdraw from serving.[8] Conflicted counsel may be required to withdraw from the representation.[9] In either event, the objective is the same: removal of the conflict so that the integrity of the proceedings—and enforceability of the resulting award—are protected. But the discovery of an ethical breach by an expert witness goes not to the integrity of the process so much as the credibility of the witness, which can devastate a party's case. Indeed, it is no exaggeration to say that, where expert witnesses are concerned, Credibility is King. One time-honored way of attacking an expert's credibility is to identify inconsistencies between his or her current testimony and previous positions the expert has taken in litigation or published writings. An allegation that an expert witness has violated some ethical obligation adds fuel to the fire. The witness is not merely bought and paid for—which is routinely assumed to be the case—but actually a bad person. Indeed, far from seeking to cure the ethical breach, opposing counsel may seek to exploit it by keeping the witness on the stand as long as possible in order to make the expert himself or herself, rather than his or her opinions, the focus of the tribunal's attention. One can easily imagine cross-examination going into witness prep, not to show that counsel has done something improper, but to show that the witness has acted unethically according to the witness's own ethical rules.

Nor are arbitral tribunals lacking in authority to discount expert testimony they find incredible. For example, the IBA Rules on the Taking of Evidence in International Arbitration give tribunals great discretion to "determine the admissibility, relevance, materiality and weight of evidence,"[10] including the evidence of expert witnesses. Significantly, the IBA Rules also require party-appointed experts to submit reports including, *inter alia,* "a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal" and "an affirmation of his or her genuine belief in the opinions expressed in the Expert Report."[11] To be sure, the IBA Rules' requirements that an expert be independent and have a genuine belief in his or her opinions are not expressed in precisely the same terms as the above-quoted provisions of the Code of Ethics for Engineers or the AICPA's Code of Professional Conduct. Nonetheless, those requirements are at least consistent with the ethical obligations of engineers and accountants, and a violation of those obligations could easily call into question the veracity of the expert's statement of independence and/or affirmation of genuine belief in his or her opinion. In such a case, the tribunal would have ample authority under the IBA Rules to discount the expert's opinions.

The ethical obligations of arbitrators and counsel have attracted a great deal of attention in the international arbitration community, and rightly so. But construction disputes frequently involve the services of other professionals as expert witnesses who often have ethical obligations of their own. All participants in international construction arbitrations—arbitrators, counsel and expert witnesses—should be mindful of those obligations to help ensure the credibility of international arbitration as a dispute resolution process. And if concern for the credibility of the process were not reason enough for counsel to be interested in these issues, avoiding the catastrophe of having a key expert's credibility destroyed because of the witness's ethical lapse provides additional incentive. ■

1 *See, e.g.,* National Society of Professional Engineers, Code of Ethics for Engineers, Professional Obligations, ¶3(a) ("Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact.") and ¶4 ("Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve."); American Institute of Certified Public Accountants, Code of Professional Conduct, Rule 102 ("Integrity and objectivity. In the performance of any professional service, a member shall maintain objectivity and integrity, shall be free of conflicts of interest and shall not knowingly misrepresent facts or subordinate his or her judgment to others.") and Rule 301 ("Confidential client information. A member in public practice shall not disclose any confidential client information without the specific consent of the client.").

2 Code of Ethics, Rules of Practice, ¶ 3(a).

3 Code of Ethics, Professional Obligations, ¶ 4(b).

4 Code of Ethics, Professional Obligations, ¶ 7.

5 Practice Aid 10-1, ¶ 27.

6 Code of Conduct, Rule 101.

7 Code of Conduct, Interpretation 101-3 (footnotes omitted).

8 IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 2(a) ("An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or her ability to be impartial or independent.").

9 *Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia,* ICSID Case No. ARB/05/24 (6 May 2008).

10 IBA Rules, Art. 9(1).

11 IBA Rules, Art. 5(2)(c), (g).

The 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process

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In October 2012, the School of International Arbitration at Queen Mary, University of London, and White & Case LLP released the results of a global survey titled "2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process." The survey examines the extent to which harmonized practices are emerging in international arbitration and whether they reflect the preferred practices of the international arbitration community. It contains responses of 710 private practitioners, arbitrators and corporate counsel to a written questionnaire, plus 104 interviews to contextualize the quantitative findings. The pool of questionnaire respondents and interviewees was diverse, consisting of participants from a wide range of industry sectors, roles, legal backgrounds and locations. The unprecedented number and diversity of participants makes this survey the most comprehensive empirical study ever conducted in the field of international arbitration.

In a departure from previous International Arbitration Surveys, views were sought not only from in-house counsel, but also from private practitioners and arbitrators. This provided a pool of respondents that was both highly knowledgeable of international arbitration and dramatically larger than earlier surveys. This critical mass of participants provided authoritative empirical evidence as to what actually occurs in international arbitration, and it also enabled the results to be broken down by categories of respondents, whether by different geographic regions, legal backgrounds or roles.

The results of the survey are set out under seven thematic sections that broadly follow the life of an arbitration. This article provides a summary of each section's key findings:

1. Selection of arbitrators

- A significant majority of respondents (76%) prefer selection of the two co-arbitrators in a three-member tribunal by each party unilaterally. This shows that the arbitration community generally disapproves of the recent proposal calling for an end to unilateral party appointments.
- There has been a longstanding debate about whether pre-appointment interviews with arbitrators are appropriate. The survey reveals that two-thirds of respondents have been involved in them and only 12% find them inappropriate. The chief disagreement is not about whether such interviews are appropriate, but rather the topics that may properly be discussed.
- Almost three-quarters of respondents (74%) believe that party-appointed arbitrators should be allowed to exchange views with their appointing party regarding the selection of the chair.

2. Organizing arbitral proceedings

- The IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") are used in 60% of arbitrations: in 53% as guidelines and in 7% as binding rules. In addition, a significant majority of respondents (85%) confirm that they find the IBA Rules useful.
- Tribunal secretaries are appointed in 35% of cases. Only 10% of arbitrators said that tribunal secretaries appointed in their cases prepared drafts of substantive parts of awards, and only 4% said tribunal secretaries discussed the merits of the dispute with them.
- The most effective methods of expediting arbitral proceedings are (in order): identification by the tribunal of the issues to be determined as soon as possible after constitution, appointment of a sole arbitrator and limiting or excluding document production.

- Even though fast-track arbitration is regularly cited as a prime method of cost control, the survey reveals that it is not commonly used in practice. The vast majority of respondents (95%) either had no experience with fast-track arbitration (54%) or were involved in only 15 fast-track arbitrations (41%). However, 65% of respondents are either willing to use fast-track clauses for future contracts (5%) or willing to do so depending on the contract (60%).

3. Interim measures and court assistance

- Despite being the subject of significant legal commentary, requests for interim measures to arbitral tribunals are relatively infrequent: 77% of respondents said they had experience with such requests in only one-quarter or less of their arbitrations. Even rarer are requests to courts for interim measures in aid of arbitration: 89% of respondents had experience with them in only one-quarter or less of their arbitrations.
- Survey respondents report that 35% of all interim measures applications addressed to the arbitral tribunal are granted. Of those applications that are granted, the majority are complied with voluntarily (62%), and parties seek their enforcement by a court in only 10% of cases.
- There is no consensus on whether arbitrators should have the power to order interim measures ex parte in certain circumstances. Just over half of respondents (51%) believe that arbitrators should have such a power, while 43% believe they should not (6% were unsure).

4. Document production

- Requests for document production are common in international arbitration: 62% of respondents said that more than half of their arbitrations involved such requests.
- The survey confirms the widely held view that requests for document production are more frequent in the common law world: 74% of common lawyers, compared to only 21% of civil lawyers, said that 75-100% of their arbitrations involved such requests.
- Notwithstanding the differing traditional approaches to document production in civil and common law systems, the survey reveals that 70% of respondents believe that Article 3 of the IBA Rules ("relevant to the case and material to its outcome") should be the applicable standard for document production in international arbitration.
- How important are disclosed documents to the outcome of the case? The survey reveals that they are crucial in a statistically significant percentage of arbitrations: A majority of respondents (59%) stated that documents obtained through document production materially affected the outcome of at least one-quarter of their arbitrations.

5. Fact and expert witnesses

- In a significant majority of arbitrations (87%), fact witness evidence is offered by exchange of witness statements, together with either direct examination at the hearing (48%) or limited or no direct examination at the hearing (39%). 59% of respondents believe that the use of fact witness statements as a substitute for direct examination at the hearing is generally effective.
- The vast majority of respondents believe that cross-examination is either always or usually an effective form of testing fact (90%) and expert witness evidence (86%).
- While mock cross-examination of witnesses prior to their appearance at a hearing is considered unethical in some legal cultures, the survey shows that it is commonly done and often considered acceptable in international arbitration. 55% of respondents reported that there was mock cross-examination of witnesses in their arbitrations, and 62% of them (civil and common lawyers alike) find it appropriate.
- In the vast majority of arbitrations, expert witnesses are appointed by the parties (90%) rather than by the tribunal (10%). However, survey respondents' preferences are less stark: Only 43% find expert witnesses more effective when they are appointed by the parties, while 31% find tribunal-appointed experts more effective.

> *Continued on Page 6*

6. Pleadings and hearings

- Not only does sequential exchange of substantive written submissions occur much more regularly (82%) than simultaneous exchange (18%), but there is also a strong preference for this type of exchange (79%).
- The survey reveals that only a small minority (15%) of merits hearings are held outside the seat of arbitration.
- The most common duration of a final merits hearing is 3-5 days (53%), followed by 6-10 days (23%), 1-2 days (19%) and 10+ days (5%).
- Civil lawyers have traditionally claimed that their hearings are shorter than those of common lawyers. The survey confirms this to be true. 31% of civil lawyers said the average duration of their merits hearings was 1-2 days, with only 9% of common lawyers reporting that the average duration of their hearings was only 1-2 days.
- Time limits are imposed for oral submissions and/or examination of witnesses in two-thirds of arbitration hearings. Most respondents prefer some form of time limits (57%), while only 6% prefer no time limits at all (34% said it depends on the case).

7. The arbitral award and costs

- How long should a tribunal take to render an award? For sole arbitrators, two-thirds of respondents believe that the award should be rendered within 3 months after the close of proceedings. For three-member tribunals, 78% of respondents believe that the award should be rendered either within 3 months (37%) or within 3 to 6 months (41%).
- A common criticism of arbitration is that tribunals unnecessarily "split the baby." Overall, respondents believe this has happened in 17% of their arbitrations, while those actually making the rulings—the arbitrators—said this occurs in only 5% of their arbitrations.
- Tribunals allocate costs according to the result in 80% of arbitrations, and they leave parties to bear their own costs and half the arbitration costs in 20% of arbitrations. However, only 5% prefer this latter approach, which shows there is a desire for tribunals to allocate costs according to the result more frequently than they are currently doing.
- An overwhelming majority of respondents (96%) believe that improper conduct by a party or its counsel during the proceedings should be taken into account by the tribunal when allocating costs. This sends a strong message to arbitrators that they are expected to penalize improper conduct when allocating costs.

Despite the dominance of international arbitration as the dispute resolution method for international business, little empirical evidence exists about what goes on in this inherently private process. The 2012 International Arbitration Survey closes this gap, providing empirical evidence of a quality not seen before. We now know which practices in the arbitral process are most common around the world and which are preferred. We hope that the survey acts as a reference point for the international arbitration community for years to come, not least when arguing points of procedure before arbitrators.

The survey can be found at http://arbitrationpractices.whitecase.com. ■

An Arbitrator's Guide to Successfully Resolving eDiscovery Disputes *continued from Page 1*

"help them help themselves" by proactively engaging the parties on eDiscovery issues related to preservation, timing, scope, protective orders, clawback agreements and production format.

Guideline 2: Ensure that the right people are engaged in the process.

Many eDiscovery disputes can be avoided or resolved if the right people are brought into the discussion. The range of sophistication on ESI issues varies greatly—both among parties and their counsel. Some issues, such as format of production, may require the involvement of technologists from both sides. An informed arbitrator can help by educating the parties on eDiscovery issues that need to be considered.

Guideline 3: Require disclosure and exchange of information related to ESI.

Many eDiscovery issues can be resolved by agreement between the parties. However, meaningful discussions of ESI issues require disclosure of information sufficient for the parties to understand the implications of their agreements. To facilitate a productive discussion and resolution of these

issues, an arbitrator may need to require the parties to disclose information related to their computer systems and data management practices.

Guideline 4: Strive to keep costs and burdens of eDiscovery proportional to the nature of the dispute.

eDiscovery disputes are most common in asymmetrical cases, where one party has more ESI than the other. Not all parties are similarly situated with regard to ESI. Some parties have more data than others, and other parties have limited information and require discovery to learn the necessary facts.

A good way to balance these interests is to view any dispute through a lens of proportionality, and where the costs and burdens of eDiscovery are disproportionate to the nature of the dispute or to the amount in controversy, an arbitrator should consider either limiting a request for eDiscovery or shifting the cost of production.

Top Five eDiscovery Disputes and Resolution Strategies

The most common eDiscovery disputes—scope, format of production, preservation, privilege and costs—should be addressed early in the arbitration process. Requiring parties to develop an ESI protocol that addresses these five issues is critical in avoiding or minimizing eDiscovery disputes.

Dispute 1: Scope of Production

The scope of production of ESI is the most common eDiscovery dispute. Common disputed scope issues include the appropriate sources, custodians, topics and filters for discovery. Commonly used filters for identifying potentially relevant information include search terms, dates, custodians and file types. Disputes regarding scope and filters can materially impact the cost and time required to complete the arbitration process. There is no one way to resolve these issues, and each matter must be handled individually based on the needs of the case.

Arbitrators can resolve scope and filter disputes by considering the appropriate solution for the matter, including, but not limited to, the following:

- phasing discovery and requiring the early production of documents from key custodians;
- limiting the number of custodians for production;
- requiring a review of statistical sampling to determine which filters are useful;
- applying different filters to different sources based on relevance and facts of case;
- using hit reports to set an arbitrary cutoff for search term hits;
- allowing broad filters, but reducing sources to which they are applied or the date ranges;
- ordering use of narrow filters, but applying to broader sources;
- selecting search terms based on hit rates;
- modifying search terms to narrow them through proximity searching;
- discussing the use of predictive coding;
- determining additional custodial requests after information is known from document productions or depositions;
- establishing a "safety value" to ensure key custodians are not missed;
- sanctioning parties who fail to properly disclose or identify key custodians;
- phasing production of undisputed ESI and use productions as basis to assess utility of future expansion of filters; and
- ordering cost shifting as appropriate.

a. ESI Sources and Types

The appropriate sources for ESI discovery will vary by the systems and business practices of the parties. Potential sources/types of ESI vary but may include email servers, email archives, email journaling systems, Web-based email, file servers, databases, locally stored ESI (laptops/desktops), text messages, instant messages, external hard drives, backup media and voice mail.

An arbitrator can resolve disputes regarding appropriate ESI sources by requiring that the party requesting the source provide

- information regarding why the source is relevant and necessary; and
- justification for why the requested source is not duplicative or cumulative of other sources.

Similarly, the arbitrator may require the party objecting to the source to provide

- specific information regarding why the source is not relevant or why its relevance is outweighed by the costs or burdens;
- a sample of the ESI from the disputed source; and
- information regarding the volume of data contained in the disputed source.

As with all eDiscovery disputes, the arbitrator should consider cost shifting as a means to balance the requesting party's desire for a specific ESI source against the producing party's burden to provide it.

b. ESI Filtering

Another common ESI scope dispute is the appropriate way to filter ESI from sources identified as potentially relevant. Un-

derstanding the appropriate way to filter ESI sources requires information regarding how parties maintain their ESI. Some parties may have centrally stored databases or shared drives for storing project-specific documents. Others may have documents disbursed on local machines, external drives or third-party-hosted sites.

If parties reach an impasse on search terms, an arbitrator can move the issue toward resolution by requiring the parties to provide

- information regarding the search tools used, including any limitations;
- search term "hit reports" proving details on the volume of unique hits by document type and source; and
- information regarding how the sources were identified for search.

Limiting the scope of ESI to certain custodians is an effective way to reduce costs and burdens. Parties frequently disagree regarding the number and identity of custodians and the types of ESI required to be produced from each custodian.

Arbitrators can require the parties to provide information such as

- lists of custodians with organizational charts and billing/timekeeping records that show work assignments;
- names of former employees for whom the party no longer has ESI; and
- information regarding ESI that would be stored by individual custodians rather than central sources.

Dispute 2: Format of Production

Although the format of production can be a very technical issue, it has material cost and time implications on the efficient management of the arbitration. Parties may use format to hide relevant data or shift costs to the other party. Other parties may not understand the technical issues and avoid any discussion of format, leading to disputes after the ESI has been produced.

A summary of the most common production format options is helpful in assessing which format is appropriate in any given matter.

a. Native format

The "native" format of a document is the file structure created by the original application creating the document. In order to view a native file, the recipient typically needs the original software (Word, Excel, etc.) that allows for the viewing of the file. Production in native format allows the native files to be altered. Accordingly, a pure native file production will require that the receiving party process the native files to ensure that they are not inadvertently altered.

b. Image format

An alternative to native format is to convert the documents to a static image format such as TIFF or PDF. These formats provide an image of the document as it would appear in the original application, but they do not allow the documents to be manipulated. Image format allows the documents to be branded with a Bates number and confidentiality designations. Not all documents are easily converted into image format.

c. Hybrid format

Due to the limitations of both pure native and pure image productions, a hybrid approach is the most common format. This format allows the parties to designate the specific file types that are better suited to native productions and are more appropriately converted to image format.

Regardless of whether a native, image or hybrid format is used, the production of load files with designated metadata should be considered. Such files allow the data to be loaded into review databases for more efficient use in the litigation.

An arbitrator can resolve format disputes by requiring that the parties and their technical representatives provide information regarding why their proposed format is preferred, including information regarding costs.

Dispute 3: Privilege Issues

Disputes related to waiver, privilege logs, privilege filters and review techniques are a frequent source of eDiscovery disputes. The large volume of ESI created and produced by parties often makes it impossible to avoid the inadvertent production of privileged ESI.

The costs associated with the manual review of documents for privilege, and the generation of a related privilege log, can be enormous. Encouraging parties to reach agreement on the detail required in logs and agreeable criteria to exclude certain ESI from manual review can help reduce costs. The key to dealing with disputes related to privilege issues is to balance protecting privilege against abuses of the protection while also considering costs and burdens.

Arbitrators can balance costs and risks when ruling on disputes regarding privilege by

- being flexible in the methodology permitted to identify privileged documents (manual review, key word searching, predictive coding), but having a mechanism to audit the process if challenged by opposing parties;
- advising the parties that challenged documents will be reviewed in camera and that abuses on the privilege issue will lead to expanded discovery or other sanctions;
- building in time for challenges to privilege to ensure such issues do not derail the arbitration schedule;

- considering whether traditional privilege logs are required and, if so, considering options for modifying the contents of the logs to balance the interests of the parties;
- considering an initial review of a randomly generated sample of challenged documents to determine whether further inquiry is required;
- considering requiring the parties to categorize documents into groups and then making an up-or-down decision at the group level; and
- submitting disputed documents to an agreed-upon neutral outside of the tribunal.

Dispute 4: Preservation Planning

Parties frequently dispute the nature of preservation obligations, including the scope and method of preservation. These issues are best addressed early in the matter before information is lost. Preservation methods include the following:

a. Preservation in place

This method of preservation basically relies on individual users' compliance with a litigation hold. No external collection efforts are made for preservation purposes. The risk of this method is that users may delete relevant information that is not collected.

b. Collection for preservation

This preservation option involves physically copying or collecting ESI for purposes of preservation. This is more time-consuming and expensive, but it avoids the risk that the user will delete relevant ESI.

c. Imaging

Lawyers frequently, and incorrectly, interchange the term "copy" with "image" when discussing preservation and collection of ESI. Imaging is a distinct process that involves taking an identical copy of all of the contents of a hard drive, including deleted files, slack space, system files, etc. It is far more expansive than merely copying active files, it requires special software and it preserves a broader range of ESI.

An arbitrator can facilitate agreement or resolve disputes regarding preservation by requiring that the parties provide information related to

- who received the preservation notice and when;
- if there are any auto-delete features that would cause the automatic loss of ESI due to time or space limitations;
- if there are certain custodians for whom collection is required for preservation;
- if there is any need to preserve backup or disaster recovery media;
- if imaging is necessary for preservation of any particular user's data;
- what the retention schedule is for relevant sources;
- if ESI that is created after the date of the initiation of the arbitration needs to be preserved; and
- what the relevant date range is for preservation.

With information related to the parties' systems and the specific issues of the arbitration, an arbitrator can assist the parties with a plan that balances the need to preserve with the costs and risks.

Dispute 5: Cost Shifting

Disputes over who should be required to pay for the costs associated with collection and production of ESI are common. The general rule is that each party pays for its own eDiscovery costs, but cost sharing and cost shifting are appropriate tools in an arbitration setting.

Understanding the various costs involved is essential to assisting with the resolution of such disputes. The key costs associated with eDiscovery include costs associated with the following tasks:

- collecting ESI;
- processing ESI;
- hosting ESI in a review database;
- converting ESI to image format;
- reviewing ESI; and
- producing ESI.

Of these costs, the single most expensive item is usually the costs of reviewing ESI for responsiveness/privilege. Costs incurred in other areas (such as processing/filtering) can reduce the costs of review by reducing the volume. All costs are tied to volume: the larger the volume, the higher the costs.

Disputes regarding costs may be resolved by

- setting a clear threshold for the scope of discovery, after which any additional discovery will be taxed to the requesting party;
- reserving the right to shifts costs depending on the actual costs and nature of the discovery produced; and
- shifting costs associated with certain disputed areas, such as the costs of retaining a neutral expert to image a laptop.

An arbitrator's knowledge about the unique technical aspects of ESI will aid in the prompt resolution of any eDiscovery disputes that may arise, and parties will appreciate an educated arbitrator's guidance. If properly managed, the benefits of arbitration over litigation can be seen very clearly in this area. Alternatively, the benefits can quickly erode if such issues are not efficiently managed with appropriate knowledge and expertise. ■

ADR Sanctions *continued from Page 1*

A Disclosure Sanction

After writing to the governor of Kansas to complain that a storage shed owned by his sailing club did not comply with the Americans with Disabilities Act, Michael Hand found that his membership had been revoked. In his ensuing lawsuit against the club, the federal court ordered the parties to mediation. After an unsuccessful session, Hand contacted 44 members of the sailing club, informing them about the result. The district court subsequently dismissed his suit "with prejudice" as a sanction for violating confidentiality, and the sanction was upheld by the appellate court. (See *Hand v. Walnut Valley Sailing Club,* 475 Fed. Appx. 277; 2012 U.S. App. LEXIS 6703, of the U.S. Court of Appeals, Tenth Circuit, April 4, 2012.)

A Behavioral Sanction

An American arbitrator reported that the parties and their attorneys were not acting civilly toward one another and toward him during the arbitration hearing. He therefore imposed the sanction of having them pay for retaining a court reporter, who might record their comments during the hearing, and found that their "behavior IQ" tripled overnight.

A Discovery Sanction

Two Massachusetts radio production companies took their dispute over sharing advertising revenue to arbitration. One of them, the claimant Superadio, was not complying with its discovery requests. The arbitration panel directed Superadio either to comply or to pay $1,000 a day until the date of compliance or the hearing, whichever occurred first. The Supreme Judicial Court of Massachusetts upheld the arbitration order, including the significant monetary sanctions imposed upon Superadio for violation of the discovery order. (See *Superadio Limited Partnership v. Winstar Radio Productions, LLC.* 446 Mass. 330; 844 N.E.2d 246; 2006 Mass. LEXIS 53.)

A Mediator's Sanction

In Australia, two sisters, Regina Tapoohi and Halina Lewenberg, were involved in an estate dispute regarding the division of their mother's assets following her death, and they appointed senior solicitor George Golvan as mediator. Although there was an issue as to whether the transfer of property would trigger a capital gain, a mediated settlement agreement was achieved, and Tapoohi paid Lewenberg $1.4 million in exchange for land. One year later, when Tapoohi determined that taxes were owing, she claimed damages against her own solicitors for their negligent failure to secure tax advice or to include such a condition in the terms of settlement. The solicitors sought contribution from the mediator, Golvan. On a motion for summary judgment on the third-party statement of claim, Justice David Habersberger of the Supreme Court of Victoria declined to strike out the pleading. He stated that "it cannot be said that it is not arguable that duties similar to those implied in the contract are owed in tort by the mediator [to the parties]." (See *Tapoohi v. Lewenberg* (No. 2) [2003] VSC 410.)

A Civility Sanction

An Ontario, Canada, lawyer was charged with professional misconduct relating to his incivility and his use of sexually explicit, abusive and profane language at a mediation. In defense, he argued that a mediation session was closed and confidential, that nothing said or done there (other than criminal behavior) could be disclosed and that the confidentiality provision in the mediation agreement shielded him from any contravention of the Rules of Professional Conduct. However, the Law Society hearing panel held that the confidentiality clause does not shield the lawyer from his obligations under those rules and that it had a duty to ensure that they are respected by all lawyers, even during a closed confidential mediation session. The Society formally reprimanded the lawyer and directed that he be monitored by senior counsel for two years and that he submit an unqualified written apology to opposing counsel. (See *Law Society of Upper Canada v. Guiste*, 2011 ONLSHP 0024, March 8, 2011.)

The War Is Over, with Costs

In the arbitration of a commercial dispute between two German parties, the losing party conducted an Internet search after the award was issued that revealed the arbitrator was Jewish and had lost family and property in Nazi Germany. The dispute had nothing to do with the Holocaust or the Second World War. Nonetheless, the losing party challenged the award, informing the court that, if he had known about "his religious affiliation, his cultural affiliation and the dedication to keeping the memory of the Holocaust alive, I would never have allowed him to be the arbitrator in my case." The losing party noted that his own father was in the German Army during the war and that his wife's father had served in the Schutzstaffel (or SS), and he argued that the arbitrator was trying to punish the losing party for the harm that had befallen his own family. The appeal court unanimously concluded, though, that the losing party's arguments were without merit, and it dismissed the appeal with costs. (See *Rebmann, et al. v. Rohde, et al.,* 196 Cal. App. 4th 1283 (2011)). ■

JAMS GEC NEUTRALS RESOLVE AN ARRAY OF CONSTRUCTION DISPUTES

KENNETH C. GIBBS, ESQ. has been selected as an arbitrator to resolve disputes arising from the reconstruction and renovation of a five-star hotel in Los Angeles.

PHILIP L. BRUNER, ESQ. has been appointed Chair of an international arbitration tribunal hearing claims and disputes arising out of U.S. construction projects in Afghanistan.

HARVEY J. KIRSH, ESQ. has been appointed to mediate an international dispute relating to the development of a Panamanian mining project which is expected to become one of the world's largest copper mines.

ARTICLES AND SPEAKING ENGAGEMENTS

While in Eastern Europe at the invitation of the American Bar Association in March 2013, **PHILIP L. BRUNER, ESQ.** addressed Poland's National Council for Legal Advisors on "Mediation of Complex Disputes" and also engaged in an exchange on developments in international arbitration with representatives of the Vienna International Arbitral Centre. Phil is also scheduled to address Britain's Society of Construction Arbitrators on "Arbitrating Construction Disputes in the United States" at the Society's May meeting in Istanbul.

On May 15, 2013, **LINDA DEBENE, ESQ.** moderated a panel discussion in Walnut Creek, California, on ESI (electronically stored information)—what it is, where it is, what it can be used for, preservation, production and whether the client's insurance will cover its growing costs.

On May 22, 2013, **HARVEY J. KIRSH, ESQ.** chaired a program in Toronto sponsored by The Advocates' Society, titled "The 10-Minute Construction Lawyer." He spoke on "The Ins and Outs of Dispute Review Boards." Harvey will be making a presentation on "Where DRBs Did Not Work" at the September 19-21, 2013, Annual Meeting of the Dispute Review Board Foundation in Miami. Additionally, he was featured in a construction arbitration article in the *Engineering News-Record* (March 25, 2013 issue) titled "Resolving the Risk of Concurrent/Consecutive Disputes."

DOUGLAS S. OLES, ESQ., JAMES F. NAGLE, ESQ., JOHN W. HINCHEY, ESQ., ROY MITCHELL, ESQ. and **PHILIP L. BRUNER, ESQ.** are contributing chapters to a new book on Alternative Dispute Resolution that is being published by the ABA Forum on the Construction Industry. Their chapters will cover "International Arbitration," "Governing Law and Venue," and "Alternative Dispute Resolution in Government Contracting." Phil has also contributed the book's introductory chapter, in which he comprehensively surveys ADR in the construction industry. Additionally, Phil's article titled "Mediating Public Sector Construction Disputes in the United States: 'Square Corners,' 'No Free Lunch' and 'Principles of Fairness,'" has been published in *The International Construction Law Review* (April 2013).

LARRY LEIBY, ESQ. recently participated in a two-day program sponsored by the Seminar Group, in Miami and Orlando, where he made a presentation on "Mediators, Arbitrators and Special Masters."

RECENT HONORS AND APPOINTMENTS

DOUGLAS S. OLES, ESQ. has been elected as an Honorary Fellow of the Canadian College of Construction Lawyers and will be inducted into the College at its Annual Meeting in Montreal from May 30-June 2, 2013.

The International Who's Who of Construction Lawyers 2013 has included listings for the following JAMS GEC neutrals: **PHILIP L. BRUNER, ESQ., KENNETH C. GIBBS, ESQ., KATHERINE HOPE GURUN, ESQ., JOHN W. HINCHEY, ESQ., HARVEY J. KIRSH, ESQ., LARRY LEIBY, ESQ., HH. HUMPHREY LLOYD, Q.C., JAMES F. NAGLE, ESQ.** and **DOUGLAS S. OLES, ESQ.**

HARVEY J. KIRSH, ESQ. has been elected as a Fellow of the College of Commercial Arbitrators. Additionally, he has also been included in the Chambers Global 2013 list of Canada's top arbitrators. Harvey has also been prominently listed in the 2013 *Canadian Legal Lexpert Directory* (both construction and international commercial arbitration) and the 2013 edition of *Best Lawyers in Canada*, and he was also selected as one of the 2013 Top Rated Lawyers in Canada by American Lawyer Media and Martindale-Hubbell.

CRAIG S. MEREDITH, ESQ. has been nominated for the 2013 West Coast Casualty Jerrold S. Oliver Award of Excellence. The award will be presented during the 20th Annual West Coast Casualty Construction Defect Seminar in Anaheim, California.

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