e-Discovery in Arbitration
Leading Lawyers on Recovering Electronic Evidence, Meeting New Disclosure Guidelines, and Implementing Measures to Streamline the Process
Techniques for Obtaining Efficient and Economical e-Disclosure Despite Arbitral Resistance to U.S.-Style Discovery

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Arbitration is fundamentally different from litigation in the United States District Courts respecting electronic discovery. Under the U.S. Federal Rules of Civil Procedure, compliance with procedures for electronic discovery is mandatory. Affirmative duties are explicitly placed on counsel and client respecting preservation and disclosure of electronically stored information (ESI). By contrast, none of the major arbitral organizations have adopted similar rules that explicitly and affirmatively impose requirements respecting “e-discovery.” In the absence of explicit rules, each arbitral tribunal has wide discretion to decide whether and to what extent to permit production of ESI, and the format in which the data should be produced, including simply as a paper copy of the electronic record. For this reason, careful thought should be given at the time of contracting as to the arbitral organization selected to administer your case and the site or “seat” of the arbitration, as these choices will likely influence whether and to what extent production of ESI may be authorized. Similarly, careful selection of arbitrators is essential. Finally, inclusion of a specific provision respecting e-disclosure in your contract will reduce the uncertainty created by the broad discretion otherwise granted arbitrators, and will help ensure that production of ESI will be efficiently and economically managed.

Most arbitral organizations disfavor the use of the term “discovery” because of its association with what is disparagingly referred to by many arbitrators as “U.S.-style discovery” or “U.S.-style litigation.” Most arbitrators and arbitral organizations maintain that arbitration is, or at least should be, a faster, more private, less expensive, and less contentious method of dispute resolution. As a result, whether accurate or not, the “leave no stone unturned” image often associated with “U.S.-style discovery” is viewed by many arbitrators as a negative characteristic of litigation. The absence of broad “discovery” in arbitration is one of the important characteristics that distinguish arbitration from litigation, thereby making it an alternative form of dispute resolution.

If “discovery” was imported into arbitration, many arbitrators believe one of the essential benefits of arbitration as an alternative to litigation would be lost. Thus, there is strong opposition in the arbitral world to even the use of the term “discovery,” as it is associated with “U.S.-style litigation.” In an International Chamber of Commerce arbitration in Paris, the president of the tribunal was so opposed to the use of the term “discovery” that he
placed a glass cup on the conference table during arguments concerning
document disclosure, requiring counsel (both U.S. law firms) to deposit a
token amount of money whenever one of the lawyers inadvertently uttered
the word “discovery.” To avoid unnecessary stigma associated with this
terminology, the authors refer to the production of ESI in electronic form
as “e-disclosure,” not “e-discovery.”

There Are Burdens as Well as Benefits to E-Disclosure

Even among practitioners experienced in e-disclosure, there is concern
about the cost of the process. The ease of creating and the nominal expense
of storing information electronically mean the volume of electronic
information is exponentially larger than was the case when all “documents”
were created and stored on paper. Anyone who uses a digital camera likely
takes hundreds, if not thousands, more pictures than with a similar film
camera. The same principle applies with respect to digital “documents.”
Less than fifteen years ago, much of what now exists as e-mail was
conveyed over the telephone (or not at all) and was never reduced to
writing or saved in any permanent way. Now, not only are our servers
jammed with millions and billions of e-mails, even our phone messages are
often digitally captured and stored. As a result, the sheer volume of
information is vastly greater, and we increase that volume by making
multiple copies of the information as “back up” in the event of a computer
failure. Even this understates the volume of information, as each
electronically created memorandum, e-mail, spreadsheet, etc., comes with
invisible metadata that identifies the characteristics of the ESI, including its
author, time of creation, number of revisions, etc. This massively larger
amount of information is often dispersed more widely within an
organization because of the ease with which it can be transferred and stored
to different locations, thereby complicating the process of searching for and
retrieving the information. The cost of locating, retrieving, reviewing, and
producing such large amounts of often-duplicative information can be
substantial, to the point that the cost of the information retrieval process
outweighs the amount in controversy in smaller cases.

On the other hand, sophisticated search engines, use of key words, selection
of files of key custodians, and other techniques make it possible to target
relevant information quickly and less intrusively than paper productions, as
files can be searched remotely with limited (or no) involvement of the document’s custodian. In addition, what cannot be disputed is the benefit of having access to the electronic copies of relevant documents for purposes of preparing the case for a hearing. The ability to quickly search for key documents is obvious. Less obvious are the benefits of being able to conduct that search remotely, or giving your expert access to the documents remotely, or being able to quickly share the documents electronically with team members in remote locations. The ability to establish electronic “workrooms” to post and share electronic documents, or to transfer large numbers of documents around the world, is particularly helpful in international arbitrations where counsel, experts, and client may be located on different continents.

Recent Trends in Arbitration Respecting Disclosure of ESI

Worldwide, the volume of ESI has increased exponentially, particularly as e-mail has become ubiquitous. The United States was on the leading edge of this explosion, and the issue of production of ESI became an increasingly significant issue in the 1990s. The Advisory Committee on the Federal Rules of Civil Procedure began to investigate possible amendments to the rules to address electronic discovery in 1999. Amendments ultimately adopted by the United States Supreme Court came into effect on December 1, 2006. Many state courts in the U.S. have adopted their own rules respecting discovery of ESI, often patterned on the Federal Rules of Civil Procedure.

England and Wales have also adopted rules respecting electronic discovery. A working group of the Commercial Courts Users’ Committee recommended changes to the Civil Procedure Rules in 2004. On October 1, 2005, a new Practice Direction was adopted to Part 31 of the Civil Procedure Rules. Other common law jurisdictions, such as the Federal Court of Australia, have adopted revised rules or procedures to address electronic disclosure.

Perhaps not surprisingly, arbitral organizations have been slower than the courts in common law jurisdictions to address disclosure issues respecting ESI. In the last two or three years, however, a number of arbitral organizations have appointed task forces to study issues raised by ESI and
address whether and to what extent their rules should be amended. Some arbitral organizations have recently adopted protocols for disclosure of ESI, which parties may adopt. Below we discuss voluntary protocols published by the Chartered Institute of Arbitrators (CIArb), the International Institute for Conflict Prevention and Resolution (CPR), and the International Center for Dispute Resolution (ICDR) respecting e-disclosure. Also discussed are the task forces appointed by the International Chamber of Commerce (ICC” and the International Bar Association (IBA) on issues related to information disclosure, including ESI.

To date, no arbitral organization has modified its rules to impose mandatory obligations respecting ESI such as those reflected in the U.S. Federal Rules of Civil Procedure and applicable court decisions interpreting those Rules. For the reasons discussed below, the authors believe it is unlikely that arbitral organizations will adopt mandatory rules imposing affirmative e-disclosure requirements. In the absence of agreement of the parties, it is much more likely that e-disclosure will continue to be addressed on a case-by-case basis, and ordered only at the discretion of a tribunal after a showing of need by the party seeking disclosure.

The Chartered Institute of Arbitrators Protocol for E-Disclosure

The Chartered Institute of Arbitrators (CI Arb) is a not-for-profit, UK-registered entity which represents a global membership of approximately 12,000 individuals with professional training in private dispute resolution. In October 2008, the CIArb issued a Protocol for E-Disclosure in Arbitration (CIArb Protocol). See www.ciarb.org. The Protocol provides guidance to arbitrators and parties involved in cases in which documents that are potentially subject to disclosure are maintained in electronic form. CIArb has not, however, modified its arbitration rules, which were last revised in 2000, to incorporate any of the guidance reflected in its Protocol.

The CIArb Protocol, not unlike FED. R. CIV. P. 26(f), urges the parties to “confer at the earliest opportunity regarding preservation and disclosure of electronically stored documents” and to seek agreement on the scope and methods of production. See CIArb Protocol, ¶1. The tribunal is also encouraged to address with the parties whether e-disclosure is necessary at the “earliest opportunity and in any event no later than the preliminary
meeting.” Id. ¶ 2. Factors for the arbitrators and parties to consider early in the arbitral process include: (i) whether disclosure of electronic documents and information is likely to be requested by either party; (ii) the types of electronic documents in each party’s control and the identity of the computer systems, electronic devices, storage systems and other media on which EIS is retained; (iii) steps that should be taken to preserve electronic information; (iv) particular rules that govern disclosure and use of the ESI, such as the IBA Rules on the Taking of Evidence in International Commercial Arbitration; (v) whether agreements limiting the scope or extent of electronic disclosure are desirable; (vi) tools and techniques that would be useful to focus the electronic search and reduce its cost; (vii) whether special arrangement for data privacy or to protect privilege (i.e., claw back provisions) are appropriate; and (viii) any professional guidance that is necessary to assist the parties or tribunal with IT issues related to disclosure. Id. ¶ 3. The CIArb Protocol makes clear, however, that CIArb does not believe e-disclosure is necessary or appropriate in every case.

The CIArb Protocol suggests that requests for electronic disclosure should be in the format required by Rule 3 of the IBA Rules. In other words, the request must describe the document sought, or narrowly describe a requested category of documents, that are relevant and material to the outcome of the case, with a statement that the requesting party does have the documents but believes they are in the possession of the adverse party. Id. ¶¶ 4-5. In making any order or direction for e-disclosure, the CIArb Protocol requires the tribunal to consider (i) “reasonableness and proportionality” of the request against the cost and burden of production, particularly in light of the amount in controversy; (ii) “fairness and equality of treatment of the parties,” which may be an issue if one party has a large amount of ESI and the other little or none; and (iii) “ensuring that each party has a reasonable opportunity to present its case,” so that minimum due process requirements are satisfied. Id. ¶ 6.

A provision of the CIArb Protocol that is particularly helpful is the discussion of what ESI locations should be considered “reasonably accessible” for searches, versus back-up or archived data, which would only be searched, if at all, upon a showing that the “relevance and materiality” of the documents “outweigh the costs and burdens” of retrieval and production. CIArb considers the “primary source of disclosure of electronic
documents should be reasonably assessable data,” such as “active data, near-line data or offline data on disks.” Backup tapes, erased, damaged or fragmented data, archived data or “data routinely deleted in the normal course of business operations” need not be searched absent the showing of special need. Id. ¶ 7 (emphasis added).

The CIArb Protocol also discusses the format of disclosure for ESI. It suggests that production should “normally be made in the format in which the information is ordinarily maintained or in a reasonably usable form.” Id. ¶ 8. This is consistent with U.S. litigation practice and Sedona Principles. See Sedona Principles: Best Practices, Recommendations and Principles for Addressing Electronic Document Production (Jan. 2004). The parties may agree to produce certain ESI in its original format, such as accounting records in Excel, to facilitate review and analysis of the data, including allowing review of formulas. Other data may be maintained in a format that is proprietary or not otherwise readily usable, and thus may be produced as a TIFF or PDF file, which can be made word searchable.

With respect to the production of metadata, the CIArb Protocol states a party requesting metadata should be required to demonstrate that the relevance and materiality of the requested metadata outweigh the costs and burdens of producing the metadata, unless the documents will otherwise be produced in a form that includes the requested metadata. CIArb Protocol, ¶ 9. A good example of ESI that can readily be captured and produced with metadata is e-mail. If the e-mail is retrieved and stored as a PST file, the metadata is preserved and can be very useful, as it can facilitate automatic culling of the data by date range, author, etc., thus saving costs in larger productions.

Finally, the CIArb Protocol suggests procedures by which a tribunal can allocate costs associated with making an order for e-disclosure, or establish procedures to ensure efficient searches and disclosures, including establishing appropriate timetables for compliance with requests for e-disclosure. See id. ¶¶ 10-12. It also suggests the Tribunal may, “after discussion with the parties, obtain technical guidance on e-disclosure issues.” Id. ¶ 13.
Finally, the CIArb Protocol recommends sanctions for failure to comply with e-disclosure obligations. Paragraph 14 provides:

In the event that a party fails to provide disclosure of electronic documents ordered to be disclosed or fails to comply with this Protocol after its use has been agreed by the parties and the Tribunal or ordered by the Tribunal, the Tribunal shall be entitled to draw such inferences as it considers appropriate when determining the substance of the dispute or any award of costs or other relief.

For parties believing it is important to have greater certainty as to how electronic discovery issues will be addressed, the CIArb Protocol can be incorporated into the dispute resolution provision at the time of contracting.

The CPR Protocol for E-Disclosure

The International Institute for Conflict Prevention and Resolution (CPR), an arbitral organization founded in the United States, many of whose panel of neutrals are former U.S. federal and state court judges, has adopted a guidance document that is in some ways even more specific than the CIArb Protocol. CPR’s draft Protocol on Pre-Hearing Disclosure of Documents and Information in Arbitration was issued in final form in December 2008 as the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (CPR Protocol). See www.cpradr.org.

The Preamble to the CPR Protocol states that the Protocol has two purposes. First, to assist arbitrators addressing document disclosure issues under Rule 11 of the CPR Non-Administered Arbitration Rules “by setting out general principles for dealing with requests for the disclosure of documents and electronic information and for establishing procedures for the testimony of witnesses.” Second, to allow parties either when drafting an arbitral agreement, or after a dispute arises, to elect “certain modes of dealing with the disclosure of documents.” CPR Protocol Preamble, ¶ 1.
With respect to the CPR Protocol’s first purpose of assisting arbitrators to address document disclosure issues, it is useful to consider the text of CPR Rule 11. The 2007 editions of CPR Rule 11 for Non-Administered Arbitration and Non-Administered International Arbitration are identical, except the word “discovery” is replaced in the International Rules with the word “disclosure.” CPR International Rule 11 provides as follows:

The Tribunal may require and facilitate such disclosure as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making disclosure expeditious and cost-effective. The Tribunal may issue orders to protect the confidentiality of proprietary information, trade secrets and other sensitive information disclosed.

Obviously, this Rule provides parties with no certainty as to the scope of disclosure that might ultimately be available from the arbitral tribunal once appointed; hence the goal of the CPR Protocol to allow the parties to select in advance more specific guidance for the arbitrators concerning the scope of disclosure to be allowed during the proceeding.

In addition to its Rules for Non-Administered Arbitration, CPR has recently adopted Global Rules for Accelerated Commercial Arbitration, effective August 20, 2009 (the Accelerated Rules). Rules 11.1 and 11.2 of the Global Rules for Accelerated Commercial Arbitration generally provide that each party shall serve on the opposing party “all the documents which it may use in the arbitration,” and that “[a]ny party may request the Arbitral Tribunal to order the production of additional specific documents that are essential to a matter of import in the proceeding for which a party can demonstrate a substantial need.” Rules 11.2 and 11.4 impose numerous limitations on this general rule, but Rule 11.3 gives the Arbitration Tribunal authority on its own initiative to “direct any participant in the arbitration to produce to the Tribunal and to the other parties any documents that the Arbitral Tribunal believes to be relevant and material to the outcome of the case.”
If adopted by the parties, the “modes” of disclosure in the CPR Protocol are an overlay on whatever CPR Rules are applicable. Section 1 of the CPR Protocol suggests provisions by which the parties may adopt Schedule 1 (pertaining to disclosure of documents generally) or Schedule 2 (pertaining specifically to disclosure of electronic information) of the CPR Protocol. If parties select Schedule 1 but not Schedule 2, the Schedule 1 “mode” of disclosure applies both to ESI and non-electronic documents.

Schedule 1 to the CPR Protocol, entitled “Modes of Disclosure,” provides four “modes” of document disclosure without making reference to ESI. “Mode A” limits pre-hearing disclosure to documents each side will present in support of its case. “Mode B” incorporates the disclosures in Mode A and requires “pre-hearing disclosure of documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need.” Obviously, “Mode B” is essentially the same as CPR Accelerated Rule 11, discussed above. “Mode C” incorporates Mode B disclosure and, in addition, requires pre-hearing disclosure of “documents relating to issues in the case that are in the possession of persons who are noticed as witnesses by the party requested to provide disclosure.” Finally, “Mode D” requires pre-hearing disclosure of non-privileged documents “relevant to any party’s claim or defense, subject to limitations of reasonableness, duplication and undue burden.” See CIArb Protocol, Schedule 1.

Schedule 2 to the CPR Protocol, entitled “Modes of Disclosure of Electronic Information,” similarly provides four “modes” of disclosure for ESI. “Mode A” provides fairly minimal electronic disclosure, limited to documents a party will rely on in support of its case, produced in paper or other reasonably usable form. “Mode B” provides for disclosure, “in reasonably usable form,” by a limited number of “designated custodians” (the actual number to be selected by the parties and/or the tribunal), covering ESI created between the date of signing of the agreement in dispute and the date of the request for arbitration, to be provided only from “primary storage facilities” having “reasonably accessible active data” (i.e., not from backup servers or tapes, PDAs, or voicemails). “Mode C” is the same as Mode B, but covers a larger number of custodians, a wider time period, and allows the parties to agree upon a showing of “special need and relevance disclosure of deleted, fragmented or other information difficult to obtain other than through forensic means.” Finally, “Mode D” authorizes
disclosure essentially similar to the U.S. Federal Rules of Civil Procedure, where all non-privileged electronic information “relevant to any party’s claim or defense” is produced, subject only to limitations on “reasonableness, duplicativeness, and undue burden.” Parties selecting Modes B, C, or D must “meet and confer, prior to an initial scheduling conference with the tribunal, concerning the specific modalities and timetable for electronic information disclosure.” See CPR Protocol, Schedule 2. The CPR Protocol also provides some guidance to parties and arbitrators respecting the obligation to preserve electronic data, as discussed below respecting loss or destruction of ESI. See CPR Protocol, § 1(d)(3).

If elected by the parties either when drafting their arbitral agreement or after the dispute arises, the CPR Protocol provides a degree of certainty respecting the parties’ expectations concerning the scope of electronic disclosure. In circumstances where your client anticipates at the time of contracting that electronic disclosure will or may be important to the dispute resolution process, there are advantages to selecting one of the more expansive electronic document production modes specified in the CPR Protocol. Similarly, if your client desires to avoid costs (and the loss of privacy) associated with disclosure, selection of “Mode A” disclosure can provide certainty that dispute resolution will be limited just to those documents necessary to establish one’s own case.

The ICDR Guidelines on E-Disclosure

The American Arbitration Association (AAA) Task Force on Exchange of Documentary and Electronic Materials was organized in July 2007. In May 2008, it produced Guidelines for Information Disclosure and Exchanges in International Arbitration Proceedings for use by its international division, the ICDR, in all cases instituted after May 31, 2008 (ICDR Guidelines). The ICDR Guidelines are both a policy statement and a set of guiding principles respecting electronic disclosure. A not insignificant portion of the three-page document addresses the perceived concern that “procedural measures and devices from different court systems” have been imported to international arbitration “contributing to complexity, expense and delay in recent years.” See Introduction, ICDR Guidelines.
The ICDR Guidelines provide that they “will be reflected in amendments incorporated into the next revision of the International Arbitration Rules,” and may be applied at the discretion of tribunals in pending cases. At present, the ICDR International Arbitration Rules contain no specific provisions respecting ESI, and only very general rules respecting document disclosure. ICDR International Arbitration Article 19.2 provides that the tribunal may order a party to provide “a summary of the documents and other evidence which that party intends to present in support of its claim, counterclaim or defense.” Article 19.3 provides that “[a]t any time during the proceedings, the tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate.” This general rule is not unlike the rules of other international arbitral organizations and leaves the arbitrators with very broad discretion to decide whether and to what extent documents or other information, including ESI, will be produced. This relatively unbounded discretion in such an important stage of the arbitral process has lead to criticism, as referenced in the CPR Protocol, that arbitration can be less predictable than litigation.

The ICDR Guidelines seek to provide greater detail with respect to document production generally, and with respect to ESI specifically. Article 2 of the ICDR Guidelines makes clear that “[p]arties shall exchange, in advance of the hearing, all documents upon which each intends to rely.” Article 3 provides that the tribunal may also require a party to provide to another party documents “that are reasonably believed to exist and to be relevant and material to the outcome of the case,” at least if the requesting party can describe the “specific documents or classes of documents, along with an explanation of their relevance and materiality.” Article 4 provides with respect to electronic documents as follows:

When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the Tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a different
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form. Request 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.

Since Article 4 does not set out a separate threshold for determining whether production of electronic documents is appropriate, the applicable standard is presumably contained in Article 3. Article 4 creates a presumption, however, that the producing party may make electronic documents “available in the form (which may include paper copies) most convenient and economical for it.” Arguably, this presumption could convert “e-disclosure” into traditional paper disclosure, as the producing party’s conclusion as to the form “most convenient and economical for it” prevails “unless the Tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a different form.” See ICDR Guidelines, Article 3.

The ICDR Guidelines provide no direction to parties or arbitrators respecting the obligation to preserve ESI, or when any such obligation arises. Article 8 b. provides that if “any party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs.” As recognized by the CPR Protocol, however, most ESI relevant to a claim would be created prior to the time that a request for arbitration is filed. The absence of specific guidelines respecting document preservation obligations is a concern not only with respect to the ICDR Guidelines, but also rules of many other arbitral organizations. Because electronic document preservation directives from counsel can be disruptive of an organization’s routine practices and impose significant expenses, it would be desirable for arbitral rules to provide greater guidance in this area. Again, however, parties could agree to preserve documents upon receipt of a notice of dispute as part of the dispute resolution provision in their contract.

The ICC Has Appointed a Task Force to Study Issues Related to Electronic Documents

Following a request by the U.S. national committee of the International Chamber of Commerce (ICC), the ICC Secretary General organized a task
force in 2008 to study issues related to the disclosure of electronic documents in international arbitration. According to its co-chair, the task force’s mandate from the Secretary General “adopts a more cautious approach to the issue than that originally suggested by the U.S. national committee, to the extent that it does not mention discovery or e-discovery but, rather, disclosure or production of electronic documents, or electronically stored information (ESI).” See Loretta Malintoppi, The ICC Task Force on the Production of Electronic Documents in Arbitration - An Overview, in Written Evidence and Discovery in International Arbitration 41, 416 (Teresa Giovannini & Alexis Mourre eds., 2009).

The co-chair of the task force has stated that “the work of the task force will not depart from the generally accepted principle that U.S.-style discovery has no place in international arbitration.” Id. With respect to ESI, the task force is concerned that “the essential advantages of international arbitration need to be maintained and preserved.” Id. These advantages are summarized as follows:

- Arbitral proceedings must remain flexible, and, when it comes to document production, including the production of ESI, they cannot be constrained by national laws applying to disclosure and discovery.

- Parties must remain free to produce the documentary evidence they rely upon in support of their case. There can be no obligation to produce documents, electronic or otherwise, absent specific agreement between the parties or a ruling of the arbitral tribunal to that effect, having regard to the needs and circumstances of each case.

- Conversely, there is no right to disclosure or discovery in international arbitration. However, tribunals do have the power to request document production if the circumstances of the case so warrant.

Id. 416-17.
A report from the ICC task force is presently being drafted and reviewed. Indications from the co-chair of the task force are that it may attempt to provide practical guidance for arbitrators (and parties) about situations in which disclosure of electronic information is appropriate and in what manner such disclosure should occur. For example, the task force is considering addressing recurring issues that arise with ESI by “reference to factual scenarios, explaining how certain situations may arise and seeking to provide techniques or practical guidance for addressing them.” Id. 419.

The task force is also considering methods to reduce the burdens of producing ESI, which include, on a case-by-case basis:

- Forbidding such production altogether;
- Limiting the amount, types, or sources of e-documents to be produced;
- Requiring a greater showing of materiality or need for e-documents;
- Using search words to identify relevant ESI;
- Using sampling of electronic sources to identify relevant ESI;
- Using IT experts;
- Using a referee appointed by the tribunal to resolve ESI production disputes, if any (with the caveat that this practice adds to complexity and costs); and
- Shifting the cost of review and production of e-documents from the producing party to the requesting party.

Id. 420.

It can be disputed whether some of the items listed above are truly meaningful ways of reducing the cost of e-disclosure. For example, barring
e-disclosure does not limit the cost of e-disclosure since there is no e-disclosure cost to be reduced. Under the same rationale, one could reduce the cost of arbitration by barring it altogether. Similarly, requiring a greater showing of materiality or need for e-documents increases the cost of making the production request in the first instance and assumes, incorrectly the authors would suggest, that e-disclosure is always more expensive or burdensome than paper disclosure (particularly when the documents only exist in electronic form and the approximate cost of U.S. ten cents or more must be paid to print each page). Since many law firms have their own internal IT experts, hiring an outside expert would be an additional cost. The authors agree, however, that if the arbitrators selected by the parties or the arbitral organization are not experienced with electronic production issues, it would be advisable to hire a knowledgeable outside referee or special master to resolve disputes as there will be more predictable results, which tends to limit e-disclosure costs by encouraging cooperation and reducing gamesmanship among counsel. Indeed, even if there is additional cost associated with hiring outside IT experts and appointing referees to assist the arbitrators, if the result is a more predictable and rational disclosure order, the extra cost is worth it.

The IBA Considers Possible Amendments to Its Rules of Evidence

The International Bar Association (IBA) is also considering possible amendments to its widely used Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules) that are expected to address in some fashion electronic disclosure issues. At present, the IBA Rules define “document” to include electronic information, but otherwise make no specific provision respecting the production of ESI. Under the current IBA Rules, the extent and manner of production of electronic information is left entirely up to the parties and the arbitrators. As more arbitral authorities adopt protocols, rules, or guidance documents concerning ESI, it is desirable that the widely used IBA Rules be updated to support more directly e-disclosure.

For example, while the IBA Rules do not specifically address ESI, Article 9 (5) could be employed to address situations where ESI is lost or destroyed. Article 9 (5) provides that the arbitral tribunal “may infer that such evidence would be adverse to the interests of that Party.” The IBA Rules do not
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address, however, when a party has a duty to preserve ESI from destruction, or what types of ESI should be preserved. As a result, there is no guidance to counsel or arbitrators as to what factors should be considered in deciding whether to draw an adverse inference with respect to the destruction of ESI.

**Next Steps for Arbitral Institutions—Implementing Measures to Streamline ESI and Train Arbitrators to Manage the Process**

The task forces appointed by various arbitral organizations to study issues associated with production of ESI have solidified the position of many institutions that electronic disclosure as practiced in U.S. courts is a plague to be avoided at all costs. ESI has, if anything, caused some arbitral institutions to refocus attention on what makes arbitration different from litigation, reinforcing the concept that arbitration should provide a forum for dispute resolution without the alleged cost and delay attributed to “U.S.-style discovery.” Some experienced arbitrators have expressed the view that the sheer volume of ESI has the potential to overwhelm the arbitral process.

While these are legitimate concerns, arbitrators and arbitral institutions cannot ignore ESI or refuse to permit disclosure of electronic records. The reality is that many businesses are increasingly “paperless.” Any “document” production order in arbitration likely involves at least some electronic records, and will involve predominantly electronic records in the future. Thus, despite much hand-waving that “arbitration is not litigation” and that the time for “fishing expeditions” is over, the real issue facing arbitrators is not whether to permit disclosure of ESI, but how to manage the process. Two primary issues are: (i) how to control the scope of the search to provide disclosure necessary to ensure due process without making arbitration too expensive and intrusive; and (ii) whether the relevant data should be provided in electronic form, (e.g., in its native format, or as TIFF or PDF files), or printed out for production in paper form, and whether metadata should or must be produced.

As discussed in greater detail below, managing e-disclosure requires active supervision of arbitrators prior to the document production phase of the arbitration. Arbitrators generally request counsel to meet and attempt to
agree on a plan for the disclosure phase of the arbitration. This is the appropriate time for counsel to attempt to reach agreement on whether e-disclosure is appropriate or necessary. In many instances where some ESI, such as email, will be produced, there will not be a compelling reason for electronic as opposed to paper production, except that electronic production will facilitate the review and searching of the documents by the opposing party. Procedures, such as the ICDR Guidelines, which focus solely on the convenience to the disclosing party to the exclusion of the economy and efficiency of the reviewing party, overlook the fact that costs of both parties are relevant to the overall cost of arbitration. In a commercial dispute of any significant size, counsel for both parties will be using databases to review, organize, search, and store all documents produced by either side or any third party. If the producing party decides under the ICDR Guidelines that the most “convenient and economical” method of production is paper copies, the paper documents must be scanned by the receiving party back into an electronic format to be used in their database. The costs of this duplicative effort are just as much costs of the arbitration even though borne (initially at least) solely by the requesting party. If “convenience and economy” of one party results in greater overall costs of arbitration, the ultimate goal of economy may be frustrated.

In the absence of an agreement between the parties (and perhaps even with such agreement), the arbitrators will likely require counsel to submit their proposed document requests to the tribunal. These requests should not be drafted as broadly as document requests in U.S. civil litigation. Under the IBA Rules, for example, the party seeking document disclosure must submit a request to produce to the tribunal that (i) describes the requested document sufficiently to identify it, or describes a narrow and specific category of documents believed to exist; (ii) provides a description of how the documents requested are relevant and material to the outcome of the case; and (iii) a statement that the documents requested are not in the possession, custody, or control of the requesting party.

As noted above, the current IBA Rules provide no specific guidance to the parties or the arbitrators concerning the specific issues raised by ESI. For example, although a requesting party may seek e-mails discussing a specific topic relevant to the claims in the arbitration, the producing party may contend that a company-wide search for such e-mails is unduly
burdensome. Because the IBA Rules make no provision for identifying, for example, the custodians of relevant documents, or the offices where documents are stored, it can be difficult when arbitrating against a large multinational organization to formulate requests that are tailored narrowly. Nor is it possible when opposing counsel suggests a “compromise” search to evaluate whether the proposal reasonably targets responsive documents or leaves unsearched entire groups of likely custodians. In short, while a key to controlling the cost and inconvenience of searching for ESI is limiting the number of custodians and offices that will be searched, and using select search terms, neither the rules of the administering authorities nor the IBA Rules provide procedures that would require a party to disclose its document custodians, identify the offices where its ESI is stored, or provide details of its computer system sufficient to design appropriate but limited search terms. In the absence of voluntary cooperation among counsel, a party’s only option is to turn to the arbitral tribunal and invoke its discretionary authority to obtain information necessary to formulate a disclosure plan narrowly tailored (i.e., proportional) to the requirements of its case.

Actual Experience with E-Disclosure in Arbitration

Our experience obtaining e-disclosure in arbitration has been decidedly mixed. Every arbitration in which we have been involved since 2002 has sought production of ESI, but documents have predominately been produced as paper copies. As an initial matter, in instances where counsel have agreed to e-disclosure and other pre-hearing disclosure procedures, including depositions, the arbitral tribunals have never refused to implement the procedures requested, although one senior arbitrator at the ICC expressed disbelief that the parties exchanged document requests directly without involving him to police the scope of the requests.

In U.S. arbitrations, we have generally had more success reaching agreements with counsel for e-disclosure, and in obtaining orders directing disclosure over the objections of opposing counsel. In U.S. arbitrations, we have also had success obtaining e-disclosure from third party witnesses under the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (West 2009). In fact, some third parties have preferred e-disclosure to paper disclosure. These third parties had no potential liability, and therefore no concerns about the
content of the metadata in their ESI. They found it was quicker to search for, capture, and produce responsive documents electronically. It was also less expensive to provide the documents to multiple parties in electronic format, as the cost of burning a DVD was insignificant compared to the cost of photocopying and shipping thousands of pages. That said, our experience continues to be that if a party objects to electronic production, arbitrators are reluctant to force electronic production unless there is a demonstrated need for production in electronic format as opposed to paper format.

In international arbitrations, we have encountered much greater resistance to e-disclosure, both from opposing counsel and arbitral tribunals. In some instances, counsel’s objections have, in our judgment, been strategic. For example, in one case we requested production of e-mails, accounting records, and certain public filings in electronic form. Opposing counsel represented a client with substantial amounts of ESI that was potentially responsive, but our client had almost no electronic information. Hence, there was no strategic reason for the opposing party to agree to electronic document exchange, as that exchange would have disproportionately benefited our client. Predictably, burdensomeness objections were raised and accepted by the tribunal. Although the tribunal ordered what it considered reasonable disclosure, all the electronic information was printed and produced in hard copy.

We knew our opposing counsel had an electronic database of all the documents that were produced, as did we. In our case, we had to take paper copies of records that had been stored in electronic format, scan the documents as TIFF images, and then upload them into our database, at substantial cost. Without a doubt, the overall cost of document management for our client was increased by having to “re-digitize” documents that were originally created and stored in electronic format, and which in many instances had never existed in paper format until ordered to be produced in that format by the arbitral tribunal.

As technology progresses, it will make increasingly less sense to suggest that data which has never been created, stored, or used by a company in paper format should nevertheless be produced in that format solely for purposes of arbitration because of a perceived concern that ESI will overwhelm the
Techniques for Obtaining Efficient and Economical e-Disclosure…

arbitral process. Logically, if it is more efficient for a company to use the data in its electronic format, it ought to be more efficient to use the data in the same format for purposes of dispute resolution. While there are admittedly cost and efficiency issues associated with the production of ESI that must be addressed, those issues cannot be avoided or resolved simply by making a paper copy of the data. However tempting it might be to rely on past practice, the way forward is not to march in reverse.

Steps to Take to Reduce the Costs of E-Disclosure

The cost of e-discovery in the United States has been debated and studied extensively. In July 2008, the Sedona Conference, an organization that includes attorneys, judges, and academics, and which has created significant guidance on a number of e-discovery topics, issued the “Sedona Conference Cooperation Proclamation.” The Proclamation acknowledges the significant costs and burdens associated with electronic discovery, and encourages the view that cooperation in discovery is not inconsistent with zealous advocacy for clients. The Proclamation has been endorsed by a number of judges and has already been cited in more than a dozen U.S. cases. For instance, in *William A. Gross Construction Associates Inc. v. American Manufacturers Mutual Insurance Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009), the court wrote that it “strongly endorses” the Proclamation and stated “the best solution in the entire area of electronic discovery is cooperation among counsel.”

This view seems even more applicable in the arbitration context in which the two parties have agreed by contract to a procedure, which is intended to be more efficient and less costly than litigation. While cooperation of counsel is desirable in all events, it is simply critical to management and control of e-disclosure costs. For this reason, when the arbitrators conclude that a case requires some form of pre-hearing e-disclosure, it is essential that counsel be directed to work with their clients and opposing counsel to present a disclosure plan that is proportional to the requirements of the case.

If you have been directed by a tribunal to provide e-disclosure, you need to work closely with your client to devise a game plan. Counsel needs to conduct an early interview of an individual in the client’s information technology department who is knowledgeable about the company’s
technology infrastructure, storage practices, and the likely location of potentially discoverable electronic documents. Key topics that counsel should cover include:

- Who are the key employees knowledgeable about the issues in the arbitration, and are they likely to be custodians of relevant ESI and paper documents?

- Where do employees store e-mails? In large companies, e-mails are often archived; for instance, in PST format on an individual user’s hard drive or on a network shared space. If this is the case, it will be insufficient to collect e-mail simply from a user’s Outlook inbox. Counsel should also keep in mind that even if users are not supposed to save e-mails to their hard drives, they may do so.

- Where do employees store Word, Excel, PDF, and similar user documents? Some firms have sophisticated document management systems, but in most companies, users will store documents to their hard drive, to a personal drive on the company’s network, or onto shared network space.

- Whether databases exist that may contain relevant information. Databases can be particularly challenging, as they are constantly in use, and old data may be purged or archived after a period of time. Moreover, when databases are upgraded, old data that is no longer needed for business use may be deleted. Because of the cost associated with placing a hold on key databases or taking a “snapshot” of the database to preserve relevant evidence, counsel should engage in an early discussion to ascertain whether it is necessary to preserve and collect from databases, or whether it is possible to enter into a written stipulation or obtain an order from the tribunal excluding the database from production requirements.

- Whether there is an asset tracking database that will allow counsel to quickly identify the various electronic storage devices associated with key document custodians, such as their laptops, desktops, and any PDA or Blackberry they have been issued.
• What happens to an individual’s computer and data when an employee departs the company? Counsel should inquire whether the client has a process to ensure that when an employee who has relevant ESI departs the company, their computer assets and networked data are preserved.

• Whether the company maintains disaster recovery backup tapes that cover the period relevant to the dispute, and whether those tapes might contain unique data that is not otherwise available. If possible, counsel should seek to negotiate an agreement that backup tapes will not be searched as part of routine e-disclosure because of the cost and redundancy of such a search.

• Whether any data is stored at remote locations, and whether those locations may pose preservation, collection, or privacy challenges.

Once counsel has created a “data map” of his client’s data storage system, he will be in a position to formulate a reasonable and cost-effective search strategy.

Our experience in civil litigation suggests that the best way to limit the cost and burden of e-disclosure is to restrict the overall scope of the search across several key areas, discussed below. Because this search will not be fully comprehensive, it is important to have an agreement with opposing counsel or the approval of the tribunal before undertaking this search. If there is a relatively equal playing field for the needed e-disclosure, both parties may have an incentive to be reasonable and negotiate rational limitations on the scope of the search. This is especially true in large commercial arbitrations where both parties are likely to have significant volumes of responsive electronic material.

One key cost control measure is to limit the number of document custodians whose ESI will be searched. If counsel can limit the number of individuals that need to be collected from to a reasonable number of key players, this will significantly cut down on the volume of documents that will need to be preserved, processed, and most importantly, reviewed.
A second potential cost control measure is to negotiate limits on the timeframe of the documents subject to disclosure. If the facts relevant to the dispute covered a relatively narrow period of time, the search should be limited to just that period. This is especially helpful when working with electronic documents, because programs exist to eliminate documents dated before and after the relevant time period by employing metadata culling techniques.

A third potential cost control measure is to limit the number of locations from which documents will be collected. If there are potentially relevant documents at a number of different offices, but the documents at each location are likely to be similar in nature, counsel should consider negotiating an agreement to collect from a sample of the offices rather than all offices.

Finally, use of search terms can be used to limit the number of documents that need to be processed and reviewed. Counsel should consider seeking an agreement with the opposing side as to the search terms that will be used. In formulating the terms, it is important to understand exactly how the search engine works. For instance, does it pick up plural and possessive forms? Can you use boolean searches such as “contract w/3 negotiation,” and if so, does the search engine interpret the use of “3” as three characters, three words, or three spaces? You should not agree to or propose terms until you are sure you understand these subtleties.

Utilization of the techniques above will not identify all the relevant documents. The goal in arbitration, however, is not to let “comprehensive” be the enemy of “adequate.” It may be more cost-effective (and more palatable to the arbitrators) to reserve the right to request a limited follow-up search based on the results of the initial search, than to initially demand too broad a search and end up devoting resources to reviewing a huge number of either marginally relevant or duplicative documents.

In summary, the volume of electronic documents is such that it would be cost-prohibitive in most cases to proceed without limiting collection points and relying on search terms or some other approved filtering technique to narrow the population of documents that must be reviewed. Accordingly, before commencing the disclosure process, the parties, under the
supervision of the tribunal, should attempt to agree on a reasonable list of custodians, locations and terms that will be searched. The agreement should provide a process by which the producing party can object if the terms result in too many hits and, conversely, give the receiving party some opportunity, with significant limits, to propose additional custodians, locations, or terms be searched, based on the initial round of disclosure. While some flexibility is important, so is certainty. The process should include both, so that the document disclosure period comes to a close within an agreed and acceptable time period.

In the authors’ view, one obstacle to efficient management of ESI disclosure in arbitration is that many arbitrators (like many judges in civil litigation) are not computer savvy, do not understand the terminology, the technology, or the process used to conduct searches for ESI, and hence are not able (or perhaps willing) to exercise appropriate supervisory authority over e-disclosure to control costs and improve efficiency. There is a natural tendency to reject the unfamiliar and to require disclosure in the most familiar format, namely paper. In the authors’ view, there is a correlation between the digital literacy of your arbitrators and the likelihood of obtaining productive and efficient e-disclosure.

**Special Concerns Respecting Privacy and E-Disclosure**

ESI, and e-mail in particular, presents special concerns respecting privacy in multinational arbitration. International arbitrations frequently involve parties and documents located in different countries with widely different privacy laws. For instance, the 1995 EU Data Protection Directive and implementing laws and guidance impose a number of limitations on the “processing” of electronic documents and data that may contain “personal information.” There are significant differences between what is considered “personal information” in, for example, the United States and France. Under U.S. law, virtually all information, no matter how personal in nature, that an employee stores on his work computer is deemed to belong to his employer. In France, the rule is precisely the opposite, as the privacy of personal information stored on work computers is protected. Under the EU Data Protection Directive, “processing” and “personal information” are interpreted broadly, and there are restrictions on the export of data to countries that are not deemed to have sufficient privacy laws in place, including the United States. This presents problems respecting the search
and production of ESI in international arbitration for which there are not as yet universally recognized “best practices.”

A publication from the Sedona Conference, the Sedona Conference Framework for Analysis of Cross-Border Discovery Conflicts: A Practical Guide to Navigating the Competing Currents of International Data Privacy and eDiscovery (public comment version, August 2008) provides a useful overview of these requirements and a possible solution to the conflict between broad discovery in the United States and the privacy interests reflected in the EU Directive. Moreover, the EU Article 29 Working Party recently issued a public comment document, setting forth guidelines for parties seeking to navigate through the EU directive, Working Document 1/2009 on Pre-Trial Discovery for Cross-Border Civil Litigation, 00339/09/EN, WP 158 (Feb. 11, 2009). These guidelines suggest conducting in-country review of the documents prior to any export, and, where possible, anonymizing the documents prior to production. For the present, international counsel faced with production of documents located in the EU should consult local counsel prior to processing or exporting the documents and data in question.

**Advising Your Client Respecting E-Disclosure in Arbitration**

Clients need to be better informed at the contract drafting stage respecting the impact that selection of the administrating authority and situs of the arbitration may have on disclosure obligations generally and e-disclosure in particular. Specifically, a party should consider, if their contract is breached, whether they or the opposing party are more likely to require disclosure of documents, including electronic documents. If the relationship between the parties (e.g., owner/developer, franchisor/franchisee) is such that one party will be in the possession of most of the essential documents, the need for more extensive disclosure is apparent and should be considered in drafting the contract’s dispute resolution provision. The CPR Protocol, for example, allows clients to obtain greater certainty respecting e-disclosure, regardless of whether their goal is to limit or expand that disclosure. The recently adopted protocols, or other special agreements, should be incorporated into your client’s contract if circumstances merit.

In the absence of a specific agreement, clients need to understand that with respect to disclosure obligations generally, and e-disclosure specifically,
there are differences between the various arbitral organizations and arbitrators appointed by those organizations. The selection of the seat or situs of the arbitration is also an important factor to consider. As a general proposition, in common law jurisdictions, the lawyers who present cases, and the arbitrators who hear them, have broader exposure to (and sometimes acceptance of) e-disclosure. Thus, for example, while the actual Rules of the AAA and ICC do not on their face differ that materially concerning pre-hearing disclosure, experience suggests there can be significant differences in actual practice. In AAA arbitration sited in Washington, D.C., as compared to ICC arbitration sited in Paris, the lawyers are more likely to request, and the arbitrators are more likely to grant, broader pre-hearing disclosure, including more extensive electronic disclosure.

Because the rules of almost all administering organizations grant arbitrators plenary discretion to decide the scope and form of pre-hearing disclosure, the selection of the arbitrators can be outcome determinative insofar as e-disclosure is concerned. If proof of your client’s case requires access to the opposing party’s ESI, and you have no specific contractual provision allowing access to ESI, every effort must be made to select an arbitrator or arbitrators likely to be both knowledgeable and accepting of e-disclosure. Prior to selection, it is important to conduct due diligence on the arbitrator’s views respecting e-disclosure. It might be appropriate, for instance, to interview potential party-appointed arbitrators concerning their views on e-disclosure. Similarly, discussion of your needs and requirements with the secretariat of the arbitral authority may be advisable if the secretariat has input concerning selection of one or more of the arbitrators.

Drafting of the demand for arbitration may also be influenced by disclosure needs. While most arbitral organizations do not require a demand or request for arbitration to be pled in great detail, more rather than less specificity may be desirable in instances where disclosure is required from the opposing party and you want to show how that disclosure directly relates to a particular element of your claim.
Loss or Destruction of ESI in Arbitration

The U.S. federal courts (and many state courts) are strict in enforcing parties’ preservation obligations respecting ESI. FED. R. CIV. P. 26(f) requires that issues about preserving discoverable information be addressed by the parties before the initial scheduling conference. The government of Spain recently learned how strictly the U.S. federal courts apply spoliation rules to ESI. In *Reino de Espana v. American Bureau of Shipping*, No. 03CIV3573LTS/RLE, 2006 WL 3208579 (S.D.N.Y. Nov. 3, 2006), the government of Spain sued a U.S. entity, the American Bureau of Shipping, over an oil spill near Spain. When Spain initiated suit, it failed to simultaneously implement a litigation hold to preserve its internal e-mail records. As a result, relevant e-mails were deleted. Even though Spain is a civil law country with no equivalent “discovery” as under U.S. law, the court ruled the government was at fault for spoliation of evidence.

As noted above, the rules of most arbitral organizations do not explicitly impose an affirmative duty on counsel or client to preserve ESI from destruction prior to or after the filing of a demand for arbitration. One exception is the CPR Protocol, which addresses preservation obligations in Section 1 (d)(3). After noting the “the high cost and burden of preserving documents,” the CPR Protocol states that “issues regarding the scope of the parties’ obligation to preserve documents for potential disclosure in the arbitration should be dealt with at an early scheduling conference,” and that the “parties’ preservation obligations should comport with the Schedule 2 mode of disclosure of electronic information selected.” The Schedule 2 mode requires (if adopted) a party to preserve all ESI it will present in support of its case, and documents essential to “a matter of import in the proceeding” for which the adverse party has substantial need. Obviously, even this standard is somewhat vague. It seems likely, however, that intentional or negligent destruction of ESI, such as e-mails, on an important issue in the arbitration might lead to an adverse inference because of spoliation.

In theory, the same general principles respecting spoliation of evidence that apply in civil litigation apply in national (as opposed to international) arbitration. Further, it is much more likely that ESI will be inadvertently altered or destroyed in a manner that could result in the assertion of a claim
that information was intentionally destroyed. For example, many companies use an auto-delete or janitor feature that periodically destroys e-mail and other types of ESI. Similarly, employees may access key documents, edit them, and store over the prior version. A party that knowingly or negligently permits relevant ESI to be altered or deleted in this manner while there is a threatened or pending arbitration runs a risk that a sanction could be imposed. If the lost information is sufficiently material to the issues in the arbitration, the sanction could involve an order to undertake the expensive process of accessing backup tapes or forensic restoration of hard drives in servers or individual computers. It could also involve the tribunal drawing an adverse evidentiary inference against the party who lost or destroyed the relevant information.

To avoid this situation arising, we recommend in arbitration, as we do in civil litigation, that counsel send a notice both to its own client and to the opposing party to preserve documents. With respect to the opposing party, a notice should identify the dispute and request that documents relevant to the issues in the dispute be preserved. If relevant documents are later determined to have been altered or destroyed after the preservation letter was sent, there will be a stronger case either for more aggressive e-disclosure, such as searching backup tapes or hard drives to restore the deleted documents, or for sanctions.

With respect to the legal hold notice sent to your client, we recommend that the notice should generally:

- be issued by the company’s legal department and considered subject to attorney-client and work product privileges;
- be in writing;
- provide clear and concise direction to the recipients as to the categories of documents and information they must preserve, instructing the recipient to err on the side of preservation if they have any doubt as to whether a document is covered;
- define the documents that are covered to include all forms of electronic and paper documentation and provide specific examples;
- state that any normal records destruction periods for these categories of documents are suspended for the duration of the hold;
• specify the consequences of failing to follow the requirements of the directive;
• provide a clear contact in the legal department if the individual has any questions; and
• provide a mechanism for recipients to acknowledge that they have read, understood, and will comply with the directive.

The hold notice should be reviewed by outside counsel handling the arbitration, who should work with in-house counsel not only on the text of the notice, but to ensure that it is distributed to the proper list of custodians. This will require early assessment of the individuals most likely to possess relevant documents. Moreover, it is important that the list of hold recipients be updated as counsel develops additional information about who will be the likely witnesses and key players in the arbitration.

After an arbitration is commenced, a party concerned about possible loss of important ESI might consider seeking a procedural order or directive from the tribunal to preserve electronic data. Additionally, because the rules of most arbitral organizations place the burden on the proponent of any claim to produce documents relevant to proof of its claim, it is important that counsel consider at the outset of any dispute whether there is ESI in the possession of third parties that the client has either the duty to preserve, or may wish to have preserved to present its own case. This could include documents with subsidiaries, suppliers, accountants, vendors, or former employees. If such ESI exists, it needs to be collected from the third party or arrangements need to be made with the third party to ensure it is not destroyed or altered during the arbitration.

**Conclusion**

Increasingly, client “documents” exist only as ESI. This data presents special challenges to the dispute resolution process because of its sheer volume. The cost of collecting, searching, reviewing, and producing this data in both civil litigation and arbitration is already beyond the means of some clients, and threatens a revolt by even the most well-heeled clients if the “process” becomes disproportionate to the value of the “result.” Costs associated with ESI are particularly problematic for arbitration, which, after all, is supposed to be less expensive, faster, and less adversarial than litigation.
While there are calls for arbitration to return to its roots and force parties to rely for proof of their claims more exclusively on their own documents, that solution would deprive many parties of a full and fair opportunity to present their cases. Instead, attention should be re-focused on a significant strength of arbitration compared to civil litigation. By paying for private dispute resolution, the parties have hired an arbitrator (or perhaps three arbitrators) who should have the time to focus a degree of attention on their case that would simply be impossible for a judge in civil litigation with a docket of hundreds of cases. The same issues respecting the volume and cost of ESI present themselves in both civil litigation and arbitration, but in arbitration, the parties have a right to expect that their arbitrator will devote the time and attention necessary to ensure that e-disclosure will be designed and implemented in a manner that is proportionate and appropriate to their dispute.

As with any new technology, there are growing pains, but the tools for collecting, searching, reviewing, and producing ESI improve every year. Until those tools are perfected, it is the arbitrator’s responsibility, in conjunction with counsel, to ensure that appropriate disclosure plans are developed so that parties have fair access to ESI while preserving the cost effectiveness and efficiency of the arbitral process. The digital age is upon us, and the same tools that have created the explosion of ESI must be harnessed and utilized in the arbitral process.

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