Electronic Discovery in International Arbitration:

Where Neither the IBA Rules Nor U.S. Litigation Principles Are Enough

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The extraordinary challenges posed by electronic discovery are well-known to U.S. litigators. But electronic discovery is already happening also—to a limited extent—in international arbitration. This article discusses whether international rules or guidelines are needed to control the process.

Will the tide of "e-discovery" swamp international arbitration? This is an important developing issue in international arbitration and deserves considerably more attention than it has received thus far. Without compromising its effectiveness, international arbitration must recognize that business information is no longer stored principally on paper, in filing cabinets or warehouses.

Electronically-stored information (ESI) is located on computer networks and hardware drives, removable disks and back-up tapes. The transformation in the means of information storage is galvanized by the ever-increasing speed and storage capacity of computers, which are roughly 10,000 times faster than 20 years ago and in the last decade have enjoyed approximately a 100-fold increase in storage capacity. This trend is not likely to stop in the foreseeable future.

For the better part of a decade, in which there were no specific rules dealing with e-discovery, U.S. courts devised *ad-hoc* mechanisms to manage the production of ESI and allocate its costs, by applying general principles that have traditionally informed document discovery in federal courts.[1] Eventually, the issue of e-discovery induced reform. In December 2006, the U.S. Supreme Court amended the Federal Rules of Civil Procedure (Federal Rules or FRCP) to include rules that specifically address e-discovery.[2] Many state court systems have since adopted their own e-discovery rules.[3]

By contrast, in the international arbitration arena, interest in the topic of e-discovery is more recent.[4] This article summarizes some of the lessons learned from e-discovery in U.S. litigation, which might prove useful in international arbitration. It further discusses whether guidelines are needed to help international arbitrators and practitioners address e-discovery issues, particularly the scope of required production. Finally, this article offers suggestions for further discussion as to how to make discovery of ESI in arbitration fair and efficient. First, however, it looks at the differences between electronic documents and paper documents, because their differences bear on discovery.

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I. Differences Between Electronic and Paper Discovery

The Sedona Conference, a U.S. non-profit law and policy think-tank based in Sedona, Ariz., identified six ways in which electronic documents differ significantly from paper documents for purposes of discovery in U.S. litigation.[5]

1. Electronic data is difficult to dispose of. When a computer file is deleted, its index in the directory is eliminated, but the information remains stored on the hard drive. Thus, the data continues to exist until the particular block on which it is stored is written over with other data. Furthermore, even if overwritten, the data may be recovered at least to some degree.

2. Electronic data can be continuously edited. Data also can be changed automatically without human intervention through automatic back-up systems or web sites that are continuously fed information from external sources. Simply opening or moving a file can change its modification time, thus raising issues as to when a document was created or exactly what changes were last made.

3. Electronic documents contain hidden data, called "metadata," which is not visible when the document is printed. Metadata indicates, among other things, when a file was created, when it was last modified or accessed, and who created it. Metadata can be expensive to retrieve. In addition, deciphering it can be subjective and contextual.

Metadata has been sought in document requests in U.S. litigation, although its production is by no means certain in any given case.

4. Appropriate hardware and software is necessary to access electronic information. Files created on one operating system may not be readable on a different operating system. Obsolescence is a problem. For example, the hardware on which data was created and stored years ago may no longer be readily available because it has become obsolete, or the data may not be understood because few people are familiar with the obsolete technology.

5. Electronic information is often shared through e-mail, intranets and the Internet. Consequently, it may reside in a variety of locations, including desktop hard drives, laptop hard drives, network servers, or back-up tapes. It may also easily end up in the hands of third parties.

6. Electronic information can sometimes be more efficiently searched and retrieved than paper documents because computers can perform key word searches. It may also be possible to filter out multiple copies of the same document using pre-determined fields of information, such as author, date, and topic.

Perhaps as critical as the differences identified at the Sedona Conference, electronic information is less costly and easier to duplicate and store. Elemental economics tells us that when things become cheaper we get more of them—much more in this case. This has dramatic consequences for discovery, sometimes requiring production of multiple versions of the same electronic information (including metadata and

deleted data), which could be housed in multiple locations. Producing this information can be quite burdensome.

A further complication is the chain of custody. When ESI is to be used as evidence, proof of the chain of custody may be required to disprove tampering or alteration.[6] As described below, these remarkable developments gave rise to collateral litigation and ultimately rules reform.

II. Discovery in U.S. Litigation

A. The Principle of Proportionality under FRCP 26(b)(2)(C)

Under FRCP 26(b), parties to litigation may seek discovery "regarding any matter, not privileged, that is relevant to the claim or defense of any party." Thus, document retention is of critical importance in U.S. discovery. Once a litigation is filed, parties generally become subject to a duty to preserve all potentially relevant information. This has been construed to mean that they are obligated to stop the routine destruction of documents that would otherwise take place in the normal course of business.

Notwithstanding the general discovery rule, FRCP 26(b)(2)(C) empowers judges to limit discovery where its costs do not justify its benefits. This rule allows the court to take this action if "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."

This provision, adopted in 1980, recites an important principle, but its utility has been limited in view of the broad standard for discovery in federal litigation. Thus, broad discovery is the cornerstone of the U.S. litigation process, despite the efforts of courts to balance the competing need for broad discovery and manageable costs.[7]

Rule 26(b)(2)(C) could have taken center stage with the advent of e-discovery and its capacity to inflict enormous costs on litigants, but it did not. In fact, the debate about e-discovery in U.S. litigation has focused more on the allocation of its costs than on its scope.[8]

B. U.S. Case Law on E-Discovery

Disagreements concerning e-discovery in U.S. litigation have centered on whether the large costs involved of producing ESI should be borne, as is the usual practice in the United States, by the producing party or, under the exception to that practice, by the requesting one. Recognizing the burden on the producing party and the opportunity for tactical abuse in seeking discovery of ESI, some U.S. courts have ruled that, in some circumstances, the party requesting ESI must pay for it.[9] There are two seminal cases on this issue.

In *Zubulake v. UBS Warburg*,[10] a federal district court in New York addressed the issue of e-discovery in light of the factors cited in FRCP 26(b)(2)(C)(iii), which requires the court to take into account such factors as "the amount in controversy, the parties' resources, the importance of the issues at stake ... and the importance of the proposed discovery in resolving the issues."

Zubulake, the first case to comprehensively tackle discovery of ESI, has become the basis for much analysis of the subject in the United States. It identified seven factors courts should consider when determining whether the requesting party should pay the cost of producing electronic information during discovery:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.[11]

Building on *Zubulake*, a federal court in Illinois, in *Wiginton v. CB Richard Ellis, Inc.*, added to this list another factor: "the importance of the requested discovery in resolving the issues of the litigation."[12]

The *Zubulake* court also found that the cost of production often depends on the accessibility of the electronic data, which in turn depends highly on the media on which it is stored. The court enumerated five categories of storage, listed in order of decreasing accessibility:

1. Active, online data, such as hard drives (access is both frequent and fast);
2. Near-line data such as robotic storage devices that house and access removable media, such as optical disks;
3. Offline storage and archives, such as optical disks or magnetic tapes that are labeled and organized in shelves or racks and accessed manually;

4. Back-up tapes utilizing data compression, which typically require restoration of the entire contents, making access to a specific datum more difficult; and

5. Erased, fragmented or corrupted data (which can be accessed only after significant processing).[13]

Thus, the burden of producing back-up tapes and erased or fragmented information generally is significantly greater than producing documents in hard drives and nearby storage devices.

While the seven factors listed above were used by courts to deal with the allocation of cost of producing ESI,[14] they could be also used to determine the scope of appropriate e-discovery.

C. The FRCP Amendments

The increasing frequency of e-discovery issues in litigation prompted legislative amendments to the Federal Rules addressing this type of discovery. On Dec. 1, 2006, these amendments became effective.[15] The new amendments—to Rules 16, 26, 33, 34, 37 and 45, with conforming revisions to Form 35—are the outcome of a five-year review project to consolidate the rules and reflect developing case law.

The amendments encourage parties and the court to discuss any ESI-discovery issues early in the litigation. Specifically, Rule 26(a)(1) requires the parties to "include a copy of, or a description by category and location of ... electronically stored information" in their initial disclosures. Rule 26(f)(4) requires discussion, at the Rule 26(f) discovery conference (typically held at the outset of a case), of issues related to the discovery of ESI, including the form of production, preservation issues, and a protocol for handling the inadvertent production of privileged information.

The amendments to the Federal Rules make clear that ESI is subject to production, inspection, copying, testing and sampling in the same way that "documents and things are."[16] Nevertheless, under Rule 26(b)(2), a party responding to a discovery request may withhold relevant electronic information if it "is not reasonably accessible because of undue burden or cost." In response to that position, the requesting party may then ask the court to compel production, leading the responding party to ask for a protective order. The court may order production if the requesting party shows "good cause" and may place conditions, including shifting the cost of discovery, on the requesting party.

A similar balancing approach is reflected in FRCP 33(d), which, as amended, provides that a party may respond to an interrogatory that would otherwise require a review of business records by providing the electronic records in question to the requesting party, provided that the burden of conducting the review would be the same for either party. The rule requires information to be produced as it is ordinarily maintained or in a form that is "reasonably usable."

The burden of producing back-up tapes and erased or fragmented information generally is significantly greater than producing documents in hard drives and nearby storage devices.

In recognition of how computer systems actually work—i.e., changing data every time they are accessed or used—new FRCP 37(f) suggests that sanctions should not be imposed if ESI is lost due to "the routine, good faith operation of an electronic information system," absent exceptional circumstances.

Discovery of ESI increases the risk of inadvertent production of privileged documents. In recognition of this enhanced risk, new FRCP 26(b)(5)(B) establishes a procedure for demanding their return. It works as follows: The party who inadvertently produced privileged information (i.e., the responding party) serves a notice on the the party who received that information (i.e., the requesting party) demanding the return of the electronic information for which a privilege is claimed. The requesting party must "promptly return, sequester or destroy" the information, or turn it over to the court under seal for a determination of the privilege claim.

The recent FRCP amendments also reinforce the concept that diligent preservation of ESI is central to the discovery process.[17] Failure to retain ESI can result in the imposition of drastic sanctions.

While not free from controversy, the FRCP amendments came about after extensive consultation with U.S. judges, lawyers, litigants and academics. The question we now address is whether similar issues could arise in international arbitration and whether a similar or different set of guidelines or rules on that subject may be useful.

III. Discovery in International Arbitration

A. How It Differs from Litigation

There are many differences between arbitration and litigation. Here we focus only on discovery-related differences.

As is well known, discovery is considerably more limited in international arbitration than in U.S. court practice. Court rules of procedure do not apply to arbitration unless the parties so provide in their agreement. Typically, the scope of discovery will be determined by agreement of the parties during the arbitration, or by the arbitral tribunal based on submissions made by the parties.

The expectations of the parties and the sensitivities of the arbitrators with regard to discovery may be quite different. This is particularly true of arbitration participants from civil and common law jurisdictions.

Broadly speaking, in civil law jurisdictions, parties are relatively immune from orders to produce documents. Instead, disputes are adjudicated on the basis of documents voluntarily submitted by the parties.[18] Thus, civil law attorneys and arbitrators tend to dislike U.S. discovery practices, which they believe can be abusive and wasteful.[19] As a result, they are not easily swayed by arguments that discovery, even less extensive discovery, is vital or indispensable to the proper adjudication in international arbitration. Furthermore, even attorneys and arbitrators from common law jurisdictions such as England and Canada will often distance themselves from U.S.-style discovery.

Because broad discovery is less available in arbitration, parties to an arbitration proceeding may not feel the need (even if they have the means) to "freeze" the routine destruction of documents and ESI.

Another fundamental difference between U.S. litigation and international arbitration lies in the allocation of costs. In U.S. litigation, each party traditionally bears its own costs (the American Rule). But as the *Zubulake* and *Wiginton* cases demonstrate, a court may order cost-shifting for discovery of ESI based on the analysis of a variety of factors.

In international arbitration, the rule is not "each party bears its own costs." The arbitral tribunal generally will make a discretionary determination of the allocation of arbitration costs. It could allow the winning party to recover, and require the losing party to bear the costs of arbitration in whole or in part, including discovery costs. This may explain in part why the scope of discovery, and not its cost allocation, tends to be more of an issue in international arbitration.

Whether increasing discovery expenses should follow the general allocation of costs at the end of an arbitration proceeding, or be subject to a separate analysis in which preliminary (or partial) decisions compensate the producing party on an ongoing basis, is an open question.

In short, U.S. and non-U.S. companies come to international arbitration with different assumptions and expectations. U.S. companies (and some international companies exposed to the U.S. legal system) may expect more discovery will be allowed. Accordingly, they may have diligently preserved more documents, even those detrimental to their case. On the other hand, parties from other jurisdictions may not expect to have to share adverse documents with the other party or the arbitral tribunal.

The IBA Rules on the Taking of Evidence in International Commercial Arbitration could be used to help arbitrators and parties address issues related to the scope of e-discovery.

B. E-Discovery in International Arbitration

Little or no information exists about the current practices with respect to discovery of ESI in international arbitration. But it is inaccurate to say that e-discovery "is not happening" in international arbitration. To support this we have our own experience and anecdotal evidence to go by. But since these sources are insufficient to draw inferences of general applicability, we will only describe what we know or hear from colleagues.

It appears that parties are producing e-mail and electronic word processing documents in international arbitration, not only where discovery is part of the process, but also when they disclose documents they are relying on to support their submissions to the arbitral tribunal. In other words, parties are disclosing electronic information both voluntarily and when compelled to do so during discovery.

In our experience, parties who extensively use word processing do search for documents saved on their network or hard drives that could sup-

port their case or be responsive to a discovery request. But we do not know if they are producing drafts (and if so, how many) or only final documents. We also do not know if they are being required to search for electronic information on multiple computers.

Thus, the most that can be said is that parties to international arbitration are probably treating e-mail and other electronic information like paper documents, with no attention to the implications that the electronic nature of this information may have on discovery.

Accordingly, one vexing issue to be tackled is the extent to which searches for ESI should be conducted in an international arbitration case. In practical terms, this translates into questions such as: how many "custodian" files need to be reviewed for relevant documents? For which time period? What search terms should be used?

Because we anticipate that international arbitrators and practitioners will confront these issues with increasing frequency, we next look at the standards for discovery in institutional arbitration rules to see if they provide any guidance, and then at the IBA Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules). We explain below why institutional arbitration rules may be of little help but the IBA Rules could aid arbitrators and parties address issues related to the scope of e-discovery.[20]

IV. Institutional Arbitration Rules and Discovery

In arbitral proceedings, the parties are generally free to specify the procedures that will govern their arbitral proceedings, including the type and scope of discovery permitted. Yet parties to a commercial agreement are often unwilling to seriously contemplate, let alone negotiate, detailed discovery procedures that would apply in the event a dispute arises. Furthermore, parties frequently cannot anticipate their discovery needs—expansive or restrictive—until the dispute materializes, making prior consideration of arbitral discovery even more difficult.

In practice, therefore, parties rarely detail the arbitral procedure, instead designating the rules of one of the major international arbitral organizations, such as the International Chamber of Commerce (ICC), the International Center for Dispute Resolution (ICDR, a division of the American Arbitration Association), or the London Court of International Arbitration (LCIA).[21] The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules are also frequently chosen for unadministered (also called *ad hoc*) arbitration.

But the rules just mentioned do not provide any guidance on the scope of appropriate discovery. The rules simply require arbitrators to accord the parties due process. Thus, in the absence of specific direction in the parties' arbitration agreement, arbitrators generally have discretion to determine the procedures to be followed. This discretion is expressly recognized in Article 16(1) of the ICDR Rules, which provides: "Subject to these rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case." Article 15(1) of the UNCITRAL Rules is substantially similar.

LCIA Article 14 also provides for an arbitrator's discretion. It provides that "consistent with the Arbitral Tribunal's general duties at all times," the tribunal has the obligation "(i) to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case ... and (ii) to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute," and "shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable...."

The ICC Article 15(2) emphasizes due process without referring to the arbitrator's discretion to manage the proceedings. It provides, "In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."

Given their generality, institutional arbitration rules are not likely to assist with resolving ESI-discovery issues, except to the extent due process issues arise.

V. IBA Rules on the Taking of Evidence

The IBA Rules are another story.[22] Hailed as a breakthrough in international arbitration and criticized as unduly favoring one side or the other, [23] these rules were prepared in 1999 to fill the perceived lack of guidance in the institutional arbitration rules. The IBA Rules explicitly contemplate that there will be pre-hearing document discovery, albeit within a scope considerably narrower than that provided in U.S. litigation. The drafters considered "expansive American or English-style discovery" to be inappropriate in international arbitration. They were very concerned not to open the door to "fishing expeditions."

Accordingly, the IBA Rules require requests

for document production to be carefully tailored to issues that are relevant to the determination of the merits of the case. But they do not deal with e-discovery because they were written before that issue arose in U.S. litigation. Nevertheless, the principles embodied in these rules could help the parties to arbitration and international arbitrators resolve ESI discovery disputes, especially those involving the scope of ESI production. Because these principles bear some noteworthy similarities to the factors that the *Zubulake* and *Wiginton* courts considered important to determine which party should bear the cost of e-discovery requests, they should be useful on the cost allocation issue as well. We look at each principle in turn.

Nevertheless, the principles embodied in [the IBA] rules could help the parties to arbitration and international arbitrators resolve ESI discovery disputes, especially those involving the scope of ESI production.

1. Specificity. The IBA Rules require a specific description of the document sufficient to identify it, or a narrow and specific description of a particular category of documents. The purpose of this rule appears to be to facilitate finding the requested document. If the description is too vague, a search for the document may be fruitless. The specificity requirement may curb any effort to embark on a "fishing expedition."

The specificity requirement could help arbitrators and practitioners determine the appropriate scope of discovery of e-mail, word processing documents, back up tapes and the like.

Specificity could also be considered to address the cost allocation issue. In *Zubulake*, the court considered relevant "the extent to which the request is specifically tailored to discover relevant information." The IBA Rules, however, necessarily draw from an arbitration context in which "narrow" and "specific" may take on very different meanings than they would in U.S. litigation. What may be sufficiently narrow in the view of a U.S. court may be quite different from the view of an international arbitrator.

2. Materiality. The IBA Rules require a description of how the requested documents are "material to the outcome of the case." This is a high threshold because it relates to the outcome of the arbitration as opposed to the issues in the case. Thus, under the IBA Rules, a party might be denied discovery of information that would routinely be considered discoverable in U.S. litigation—such as documents persuasive only on lesser issues. This might explain the anecdotal reluctance of U.S. litigators to invoke the IBA Rules when they feel that they would be aided by extensive discovery in the presentation of their case.

Materiality analysis may be helpful to arbitrators in evaluating the proper scope of ESI-discovery requests. The *Zubulake* court took a similar factor ("the importance of the issues at stake in the litigation" and "the relative benefits to the parties of obtaining the information") into account on the allocation of costs issue. The *Wiginton* court did as well, citing "the importance of the requested discovery in resolving the issues at stake in the litigation."

3. Lack of Availability to the Requesting Party. The IBA Rules require that the requested documents be "not in the possession, custody or control of the requesting party." This requirement avoids abusive discovery, since if the party seeking the information already has it, there is no reason to burden the adversary with an obligation to produce it. That being said, most bitter discovery disputes involve information not in the requesting party's control.

The "unavailability" requirement has obvious application to determining the proper scope of ESI discovery requests where the information is not available except through e-discovery from the other party. Bear in mind, however, that what an arbitral tribunal considers "available" may be entirely different from what a U.S. court would consider to be available for purposes of discovery.

The "unavailability" requirement may also be useful to determine cost allocation. The *Wiginton* court applied a similar factor to determining the cost issue—i.e., "the availability of such information from other sources." If the requested information were available from another source, the court could reasonably require the requesting party to pay for the cost of the adversary's production.

4. Basis for Belief that the Responding Party Has the Requested Information. The IBA Rules also require the requesting party to explain why it

believes the requested information is in the possession of the responding party. If there is a reasonable basis for the belief that the responding party has the information, it follows that there is a reasonable likelihood the discovery request will uncover relevant information. On the other hand, if there is no reasonable basis for the belief, it is likely that the requesting party is on a fishing expedition, a process inconsistent with notions of discovery in arbitration.

This factor may also be relevant to determining who should pay for the discovery effort. Indeed, the *Wiginton* court specifically took into account "the likelihood of discovering critical information" in deciding the cost issue.

5. Relative Financial Burden to the Parties. The IBA Rules provide that "considerations of fairness or equality of the parties" is another factor the arbitral tribunal should use to determine whether a discovery request should be granted. An arbitral tribunal could consider this factor in determining whether to grant an ESI discovery request and who should pay for the effort. But international arbitrators who draw from a tradition in which cost-shifting is the rule may apply these concepts in a rather different fashion from U.S. courts.

We can see how two courts considered this factor in the context of costs. In *Zubulake*, the court found that the "relative ability of each party to control costs and its ability to do so" was to be considered in deciding who is financially responsible for the electronic production. The court in *Wiginton* was more specific, saying that a court should compare "the parties' resources" to the total costs of production in deciding who should pay. When the amount in controversy is large, U.S. courts are likely to find that fairness dictates that both parties deserve every reasonable opportunity to gather the evidence needed to support their claims or defenses. But this analysis may have little relevance where cost shifting is the norm and the prevailing party may recover the cost of production. So *Zubulake* and *Wiginton* may not be that helpful to international arbitrators, even if they apply related concepts.

6. Unreasonable Burden on the Responding Party. The IBA Rules provide that a discovery request should not be granted if production would place an "unreasonable burden" on the responding party. This standard could apply as well to a request for e-discovery. A narrow, targeted request for electronic information stored in one of the more accessible data formats (e.g., active data, near-line data or offline data on disks in the possession of relevant witnesses) arguably might not impose an unreasonable burden on the responding party.

In U.S. litigation, whether production would impose an "undue burden or expense" is the central question in determining the cost allocation for e-discovery.[24] The court in *Zubulake* found that the cost of production was heavily dependent on the accessibility of the data, and enumerated five categories of electronic storage to help with the analysis. This analysis could be equally helpful to arbitral tribunals whether they are considering whether to grant an ESI discovery request or deciding who should pay for it if the request is granted.

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The above comparison of the IBA Rules and the factors developed in U.S. case law dealing with e-discovery provides a starting point in assessing whether guidelines exist for arbitrators and practitioners when e-discovery issues arise. The next question to be asked is whether specific e-discovery guidelines should be drafted.

VI. Would E-Discovery Guidelines Be Useful?

Should arbitral institutions or arbitration organizations prepare rules or guidelines on the exchange of ESI for discovery purposes? If so, how could we ensure that these rules or guidelines address the variety of expectations and needs of all potential international arbitration participants?[25]

Some people would argue that drafting specific e-discovery rules or guidelines would have the benefit of providing some uniformity. Further, rules or guidelines that impose clear limits on discovery of ESI could address the concerns of parties fearful that US-style rules could be applied. Alternatively, e-discovery amendments to the IBA Rules could be proposed.

In either situation, e-discovery rules or amendments could allow for the granting of specific, targeted requests for ESI stored in one of the more accessible data formats (e.g., active data, near-line data or offline data on disks in the possession of relevant witnesses) in the possession or control of the responding party, if production does not impose an unfair burden. Conversely, it would be reasonable to assume that, except under extraordinary circumstances, international arbitrators would not allow discovery of back-up tapes or erased, fragmented or damaged data, which would be very costly and burdensome to produce.

A different approach would have arbitral institutions prepare a "menu" of discovery and e-discovery options—extensive, moderate or limited—that

the parties could select at the time of contracting. A moderate or limited discovery option could be designated the default mechanism in the event that the parties make no selection from the menu.

Yet another approach would have arbitral institutions prepare e-discovery rules that the parties could "opt-into" or "out of" at the time of contracting. This approach would also require a default mechanism if the parties fail to exercise either of these options.

E-discovery will no doubt become an increasingly important aspect of international arbitration.

One problem with the last two approaches is that contracting parties rarely can predict the kind of discovery best suited to resolve a future dispute requiring arbitration.

On the other hand, it may be better if arbitrators were not hampered by specific rules. They could analyze the e-discovery issue using rules or case law authorities from any relevant jurisdiction they consider persuasive, and then issue a procedural order.

But any e-discovery amendments could be drafted to ensure that tribunals would control the cost and time associated with e-discovery.

VII. Proposed Suggestions for Future Discussion

Whatever approach is taken, we suggest the following principles for further discussion.

1. One issue is whether an arbitral tribunal should establish an electronic data retention requirement at the beginning of the arbitration. If a retention order is imposed at that time, the further issue arises: Is it advisable or feasible to restrict it to electronic data specifically identified as material to the outcome of the case? If any ESI discovery is directed, the retention requirement could be reviewed periodically as the case progresses.

2. Consistent with the practice concerning paper documents, an arbitral tribunal could require requests for the production of electronic information to satisfy relatively high standards of specificity and materiality. These could be agreed upon by the parties, but if not, the standards should be determined by the tribunal.

In addition, the tribunal could balance the advantages of production against the burden to the producing party, the amount in controversy and other relevant factors.

3. E-mails are the modern functional equivalent of traditional paper correspondence. To the extent that e-mails are easily retrievable and meet the threshold of materiality adopted by the parties and the arbitral tribunal, the tribunal generally could allow them to be produced.

4. Arbitral tribunals could distinguish between searching on-site computer drives containing active, online or near-line data, since this information is more readily subject to production, and searching for offline electronic data stored in archives or on back-up tapes, or erased, fragmented or damaged data, which is not so easy to produce. For example, absent a showing of particular need for a narrow and precisely drawn request (and subject further to making suitable arrangements for the payment of production costs), arbitral tribunals may want to discourage requests for back-up information, archived data or routinely deleted materials.

5. Also reflecting the restrained approach to discovery that normally prevails in international arbitration, arbitrators could consider instituting a presumption against disclosure of metadata. Of course, even with such a presumption, the issue may arise whether arbitrators could, under certain circumstances, order the production of electronic information in native format.

6. When a potential spoliation issue arises with regard to ESI, the tribunal could inquire into the alleged spoliating party's policy for routine destruction or removal of electronic data from local drives and restrict further destruction until the appropriate scope of discovery is determined. The tribunal also could instruct the parties about the negative inferences that could be drawn from the destruction of electronic evidence. This would be consistent with the way arbitrators generally deal with missing evidence.

7. When a party claims undue hardship arising from a request to produce electronic information, the tribunal could require the complaining party to preserve the information until it decides the hardship issue. In other words, "hardship" as a ground to resist e-discovery could be treated independently from the question of preservation of electronic evidence, pending a decision on discoverability (and cost allocation) by the tribunal.

8. The arbitral tribunal may act within its authority to make necessary exceptions to discovery rules and guidelines for electronic information. This includes the authority to decide whether a party is subject to an undue burden from an e-discovery request.

Guidelines or rules encompassing these or other suggestions could serve goals common to arbitration practitioners and participants alike: that is, having a flexible arbitration process, along

with a degree of comfort concerning the risks and costs involved.

Conclusion

E-discovery will no doubt become an increasingly important aspect of international arbitration. Different legal cultures—all of which usefully nurture international arbitration—may approach discovery of ESI very differently. Although the IBA Rules provide useful guidance to arbitrators and litigants, it may be difficult to rely heavily on them since they were written before e-discovery became an issue. While U.S. case law deals with e-discovery, it does so primarily in the context of allocating costs and against a backdrop of broad discovery rights that are alien to international arbitration. Thus, the cases may not be all that helpful to arbitrators who must decide the scope of alowable e-discovery. Further analysis of e-discovery issues must be undertaken in order to uncover useful principles that arbitrators could apply. In this connection, we invite practitioners and arbitrators to discuss the issues identified in this article. In any event, practitioners should anticipate the necessity for compromise with respect to discovery procedures and look to their shared experience in assessing the risks and costs involved. ■

ENDNOTES

[1] *Rowe Entertainment v. William Morris Agency*, 205 F.R.D. 421, 425 (S.D.N.Y. 2002) (estimating cost of up to $9.75 million to produce e-mails on back-up tapes); *Medtronic Sofamor Dane v. Michelson*, No. 01-2373- M1V, 2003 U.S. Lexis 8587, at 24-28 (W.D. Tenn. May 13, 2003) (suggesting e-discovery costs would range into the millions); *Murphy Oil USA v. Fluor Daniel, Inc.*, No. Civ.. A. 99-3564, 2002 WL 246439, at 3 (E.D. La. Feb. 19, 2002) (estimating that digital discovery would cost $ 6.2 million and require six months to retrieve, produce, and present e-mail stored in a back-up database.). See also, Goldie Blumenstyk, "U. of California Patent Suit Puts Biotech Powerhouse Under Microscope," *Chron. of Higher Educ.*, Aug. 6, 1999, at A45 (discussing the three-decade fight over the rights to the human-growth hormone product, which has cost the university "some $20 million on pre-trial discovery costs, expert testimony, and legal fees"); Ralph Streza, "Discovery Unplugged: Should Internal E-Mails be Privileged Confidential Communications?" 70 *Def. Couns. J.* 1, 36-41 (Jan. 2003) ("Chief of Staff John Podesta estimated the cost of the effort to reconstruct, retrieve and analyze e-mail related to the Monica Lewinsky case to be $11.7 million.").

[2] These changes to the Federal Rules are discussed on page 66.

[3] Sheri Qualters, "States Launching E-Discovery Rules," *Nat'l L.J.* (Oct. 9, 2007). According to this article, Idaho, New Jersey, Indiana, Minnesota, Montana and New Hampshire have implemented e-discovery rules and Arizona will implement such rules in 2008. Qualters also reported that e-discovery rules are being considered in Maryland, Nebraska and Ohio.

[4] See John M. Barkett, "E-Discovery for Arbitrators," (Forthcoming in the IBA's *Disp. Resol. Int'l* (reviewing differences between paper and electronic documents and stating that the production of metadata and back-up tapes will constitute an unreasonable burden in many cases).

[5] The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 5 *Sedona Conf. J.* 151 (2004).

[6] Christy Burke, "Examining E-Discovery Chain of Custody," *N.Y.L.J.* (Oct. 23, 2007).

[7] Understand, however, that even this formulation has been the subject of heated debate and amendments in the United States, most recently in 1993, in an attempt to curtail the perceived excessiveness of U.S. discovery practice. A review of how and why U.S. discovery has come to be as expansive is beyond the scope of this article. Suffice it to say that the "base line" for U.S. discovery is broad discovery controlled principally by the parties, and each party bears its own costs during and after litigation (i.e., the general rule is that the prevailing party does not recover costs from the losing side).

[8] See William R. Maguire, "Current Developments in Federal Civil Discovery Practice: Setting Reasonable Limits in the Digital Era," in *Current Developments in Federal Civil Practice 2007*, 169-216 (PLI Litig. & Admin. Practice, Course HB Series No. H-754).

[9] See *Rowe Entertainment, supra* n. 1, at 428 (citing FRCP 26(c)).

[10] 217 F.R.D. 309 (S.D.N.Y. 2003).

[11] *Id.* at 322.

[12] 229 F.R.D. 568, 571-72 (N.D. Ill. 2004) (this consideration was required by FRCP 26(b)(2)(C)(iii)).

[13] *Zubulake, supra* n. 10, at 318-20. This listing, while arguably correct at the time the opinion was issued, will necessarily become obsolete as new storage media become available and the old ones fall in disfavor or disappear. The question remains how "accessible" is the relevant data, a factor likely to be affected principally by the age and vintage of the discoverable data.

[14] For further analysis of this issue and the *Rowe, Zubulake,* and *Wiginton* opinions, see Jay E. Grenig & W.C. Gleisner III, *eDiscovery and Digital Evidence* §§ 9:3-9:6 (Thomson West 2005); see also Sonia Salinas, "Electronic Discovery and Cost Shifting: Who Foots the Bill?" 38 *Loy L.A. L. Rev.* 1639 (2005). Whether the model of individualized review, typically by counsel, of each of the records slated for production remains the best model for production in a world where possibly millions of records need to be canvassed, is an open question beyond the scope of this article.

[15] See Maguire, *supra* n. 8 (discussing the special issues that arise with respect to disclosure of ESI; the principle of proportionality incorporated into FRCP 26(b)(2)(iii); the recent amendments to the Federal Rules and accompanying case law; and the mandatory initial disclosure of Rule 26(a)(1)).

[16] FRCP 34.

[17] See Maguire, *supra* n.8, at 182-86.

[18] See, e.g., Giorgio Bernini, "The Civil Law Approach to Discovery: A Comparative Overview of the Taking of Evidence in the Anglo-American and Continental Arbitration Systems," in *The Leading Arbitrator's Guide to International Arbitration* 270-71 (Lawrence A. Newman & Richard D. Hill eds., Juris 2004). See also W. Lawrence Craig *et al.*, *International Chamber of Commerce Arbitration: International Commercial Arbitration* 23.03 (3d ed. Oceana 2000).

[19] Oscar G. Chase, "American 'Exceptionalism' and Comparative Procedure," 50 *Am. J. Comp. L.* 277, 294 (Spring 2002) ("it was in America that [discovery] was transformed into an 'exceptional' practice—a set of mandatory investigation tools available to private litigants not found in the United Kingdom or elsewhere. As a result, 'American discovery practice sometimes appears 'exorbitant'—'fishing expeditions'—even to lawyers in other common law countries.'"); Howard M. Erichson, Symposium: "Secrecy in Litigation: Article: Court-Ordered Confidentiality in Discovery," 81 *Chi.-Kent. L. Rev.* 357, 364 (2006) ("Even in other common law countries, such as the United Kingdom and Canada, U.S.-style discovery is largely unknown."). Paul Matthews & Hodge Malek, *Disclosure* 14 (2007) (noting that the general ambit of discovery is a great deal wider in the United States than in England). Thus, the discovery chasm we discuss here is not accurately described as one between civil and common law, but as between the U.S. "forensic" procedure and discovery elsewhere (or in arbitration).

[20] International Bar Ass'n, Rules on the Taking of Evidence in International Commercial Arbitration (June 1, 1999) available at www.ibanet.org/aboutiba/IBA_Resolutions.cfm.

[21] Arthur W. Rovine, "The Scope of Discovery in International Arbitral Proceedings," 5 *Tul. J. Int'l & Comp. L.* 401, 402 (1997).

[22] IBA Working Party, Commentary on the New IBA Rules of Evidence in International Commercial Arbitration (1999), reprinted in 2 *Bus. L. Int'l* 14 (2000).

[23] See, e.g., Nathan D. O'Malley & Shawn C. Conway, "Document Discovery in International Arbitration– Getting the Documents You Need," 18 *Transnat'l L.* 371, 373 (2005); *Global Reflections on International Law, Commerce and Dispute Resolution* 347 (Gerald Aksen *et al.*, eds., ICC Pub, 2005).

[24] *Zubulake*, *supra* n. 10, 217 F.R.D. at 322.

[25] George A. Lehner, "The Discovery Process in International Arbitration," 16 *Mealey's Int'l Arbitration Rpt.* 1, 42 (Jan. 2001) (noting that "arbitration's advantages of expedient and relatively inexpensive resolution of disputes ... may be nullified" if "the institutional rules used to conduct international arbitral proceedings fail to provide detailed procedures for the discovery process").