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Commentary

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Introduction

The proliferation of data, like the sun rising, is a given. Without effective rules and arbitral oversight, the introduction of such data into cross-border arbitrations could undermine the very reason why parties selected it as the means of resolving their disputes in the first place. This article briefly explores the rise of data and its impact on international commercial arbitration, highlighting some tools available to arbitrators and counsel to keep e-disclosure in check, ensuring that this dispute resolution tool remains a more efficient and cost-effective alternative to litigation.

Data: You Can't Stop It. You Can Only Hope To Contain It.

As a whole, the Internet population has grown by 7.5 percent since 2016 and now includes over 3.7 billion humans.[1] On average, the United State alone spits out 2,657,700 gigabytes of Internet data *every minute*.[2] Ninety percent of the data in the world today has been created in the last two years alone.[3] In fact, the world's current output of data is roughly 2.5 *quintillion bytes a day*.[4] That should come as no surprise as electronically stored information ("ESI") is not only found on computers, servers, and storage devices, but also on PDAs, smart phones, MP3 players and other wearable technology. As the world steadily becomes more connected as a result of increased innovation and what seems to be an ever-increasing number of electronic devices, one would have to assume that the amount of data will only continue to balloon in the coming years. As such, the move from paper to electronic documentation has been accompanied by an exponential increase in the volume of material that is recorded in a permanent fashion.[5] Unsurprisingly, the ever-expanding universe of data is fertile ground for disclosure of documents in electronic form in international arbitrations.

Battling Rising Costs Associated With E-Disclosure

In a recent survey of international arbitration users, respondents provided what they perceived as the worst characteristics of international arbitration.[6] "Cost" was far and away the most complained of characteristic. [7] Respondents believed that arbitration counsel could be better at working together with opposing counsel to narrow several issues including limiting document production.[8] In light of these concerns, it should come as no surprise that the arbitral community[9] has promulgated various rules and/or guidelines that provide guidance for the parties and arbitrators with respect to the production of ESI, providing arbitrators with a great deal of discretion and control over the amount of e-disclosure to be produced and

controlling costs/shifting the burden of costs onto the party who is being unreasonable in its requests for such information.

According to the ICC Task Force, "[t]ypical practice in international arbitration, and a widely-shared concern of users, is that requests for the production of documents by an opponent, when available at all, *should be limited* to specifically identified documents or to narrow and specific categories of relevant and material documents."[10] Moreover, an arbitral tribunal should also consider the proportionality of ordering any requested production: it should weigh the relevance and materiality of a document or category of documents against the likely burden of searching for, retrieving, reviewing and producing it.[11]

Rules Available To Combat Rising E-Disclosure Costs

One of the major benefits of international arbitration is that the parties may specify that particular institutional rules will apply to arbitral proceedings, such as those produced by the International Chamber of Commerce ("ICC").

The ICC, mindful of the need constantly to monitor the effectiveness of international arbitration in delivering fair and efficient dispute resolution, constituted a Task Force on the Production of Electronic Documents in International Arbitration (the "ICC Task Force").[12] The Task Force found that under the ICC Rules of Arbitration (the "ICC Rules") arbitral tribunals have the power to decide whether or not to order the production of documentary evidence, including electronic documents, and to manage any such process in a fair and efficient way.[13] Indeed, Article 25(1) provides that the arbitral tribunal "shall proceed within as short a time as possible to establish the facts of the case by all appropriate means."[14] More importantly, under the ICC Rules, the Task Force explained that there is no general duty on a party to disclose paper or electronic documents to its opponent; nor is there any automatic right for a party to request the same.[15] Even so, the ICC has provided suggestions to its arbitrators on how they might limit the cost associated with e-disclosure (discussed below).[16]

In addition to some of the arbitral rules, the framework for the production of documents set out in the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Evidence Rules") is a valuable resource to help parties and arbitrators deal with the issues that stem from the production of electronic documents should the parties choose to adopt them.[17] Indeed, the very first sentence of the first paragraph of the Preamble to the IBA Evidence Rules succinctly outlines the intent to simplify and streamline discovery and evidentiary hearings: "to provide an efficient, economical and fair process for the taking of evidence1D;[18] So they "are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration."[19]

Under the IBA Evidence Rules, parties are to produce all documents on which each party intends to rely to support its case.[20] In addition, a party has a right to request, and the tribunal has the authority to order, the production of either a discretely identified document or a "narrow and specific requested category of documents that are reasonably believed to exist" provided they are not in the possession, custody, and control of the requesting party, are "relevant to the case and material to its outcome," and the production is not objectionable under Article 9(2).[21] Also documents lacking relevance or materiality, or which are confidential, or privileged, or militate against fairness, need not be produced under the rules.[22]

What is "relevant and material" and what constitutes a "narrow and specific" category of documents is left to the parties and the arbitrators to determine. Regarding electronic materials, the IBA Evidence Rules state that the "requesting party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such documents in an efficient and economical manner."[23] To control sharp and unethical discovery practices, the IBA Evidence Rules allow for an arbitral tribunal to draw an adverse inference from a document that a party has been ordered to produce but fails to do so without providing a satisfactory explanation.[24]

Arbitrator Case Management Techniques

IBA Evidence Rules

To realize arbitration's promises of economy and efficiency, it must avoid the pitfalls that accompany ESI discovery in court litigation. There are a number

of strategies that parties and arbitrators can utilize to control time and costs that litigants seek to truncate in choosing arbitration. At the outset, the parties can choose to adopt the IBA Evidence Rules to govern the production of documents in their dispute, which may be applicable already through an arbitration agreement or through a tribunal's order early in the hearings.[25]

Early in arbitration, a case management conference may be convened to hash out any foreboding document production issues; an early agreement among parties and tribunal can help control cost, time and resources.[26] Such issues to be decided at a management conference can include the format by which electronic documents will be produced and timing of production, as well as the number of document requests to be served or if any will be permitted; some disputes may not lend themselves to the additional expense of document demands.[27] Generally, the more specific requests are (for example, by reference to what is sought, such as an email, a report, or minutes, and/or specific as to a custodian or department, by terms, by date, and/or by source) the less burdensome disclosure will be.[28] That leads the parties to agree upon the scope of the e-disclosure early on in the proceedings.

Related to scope of discovery is the accessibility of the documents to be produced. For that reason, tribunals may weigh the materiality of a document or set of documents against the burden of searching for and retrieving those documents.[29] One pertinent consideration is whether the documents are maintained in the ordinary course of the party's business and are easily accessible. Data contained or housed at the party's office, network servers, office computers, and other active databases are likely less burdensome to collect than those documents on removable storage media, back up tape, devices no longer in use, or off-site internet storage.[30] Some tribunals will therefore suggest that the parties initially only search those active depositories that are readily accessible. Also, arbitrators typically will encourage the parties to avoiding searching in what are determined to be duplicative databases and will generally discourage the unnecessary production of metadata to the extent it has no bearing on the outcome of the resolution of the case. Otherwise, tribunals consider proportionality, materiality, and efficiency in setting the outer bounds of e-disclosure and ensuring that the proceedings are not unnecessarily delayed.[31]

Once there is agreement on what will be searched, arbitrators can seek to influence the process of the search (locating and identifying responsive documents) to control the cost associated with e-disclosure.[32] Algorithmic and probabilistic search technologies should be explored as a time and resource saver. In an effort to avoid duplicating discovery efforts, arbitrators can require parties to agree on key word searches (including using privileged or confidential search terms to reduce the risk of producing protected documents) that will be deemed sufficiently responsive to a party's demands. Further, effective application of data sampling and/or predictive coding for example can make an otherwise overwhelming discovery review manageable.[33] And in many instances, parties from different countries, represented by lawyers from different countries, are accustomed to varying amounts of discovery. The playing field can be leveled in that regard by alerting the tribunal to such concerns, and raising issues of process, proportionality, scope, and reasonableness to ensure fairness to both sides.[34]

Finally, the IBA Evidence Rules encourage arbitrators to agree upon the form in which ESI is produced to limit costs. The parties should agree on producing electronic documents in the most expeditious and cost-effective form. For example, requiring certain documents to be converted to a different form can increase costs that may not be necessary. The IBA Evidence Rules recommends ESI be produced "in the form most convenient or economical to it that is reasonably usable by the recipients," which requires the parties to discuss the format of the documents prior to producing to avoid, again, any duplication of efforts.[35]

Management Techniques Under CIArb

The Chartered Institute of Arbitrators is a learned society that works in the public interest to promote and facilitate the use of Alternative Dispute Resolution mechanisms.[36] Having been founded over a hundred years ago, and currently with a membership of over fourteen thousand, CIArb is regularly consulted and respected in its views about ADR[37] and too provides guidelines on e-disclosure titled Protocol for E-Disclosure in International Arbitration (the "CIArb Protocol").[38]

The CIArb Protocol encourages early consideration of the scope and conduct of e-disclosure and related issues.[39] Apart from establishing why a document is relevant and material to the outcome and that the party itself

does not possess the requested document, parties seeking production of electronic documents under the CIArb protocol must include "search terms indicating, for example, the file location, date range, individuals and key words designed to identify specific categories of relevant documents in a cost-effective manner."[40] Moreover, parties are presumed to produce ESI in the format in which the information is ordinarily maintained or in a reasonably usable form and will only be required to produce metadata if a party can prove its relevance, and its materiality outweighs the cost and burden of its production.[41] Like the IBA Evidence Rules, the CIArb Protocol encourages limiting disclosure of documents or certain categories of documents to particular date ranges or to particular custodians of documents, the use of agreed search terms, software tools, and data sampling, and encouraging the parties to agree upon the format and methods of e-disclosure[42] to realize the economy and efficiency inherently promised in international arbitrations.

Conclusion

With the rise and mega-proliferation of data, the cost of collecting, culling, and producing all potentially relevant ESI could be significant. As such, there are rules and case management techniques to ensure that international arbitration's promise of efficient and cost-effective resolution of disputes is achieved.

Endnotes

1. Data Never Sleeps 5.0, available at https://www.domo.com/learn/data-never-sleeps-5 (last checked Apr. 4, 2018).
2. *Id.*
3. *Id.*
4. *Id.*
5. Report of the ICC Commission on Arbitration and ADR Task Force on the Production of Electronic Documents in International Arbitration ("ICC Report"), available at https://cdn.iccwbo.org/content/uploads/sites/3/2016/10/ICC-Arbitration-Commission-Report-on-Managing-E-Document-Production-2012.pdf (last checked Apr. 4, 2018).
6. 2015 International Arbitration Survey: Improvement and Innovation in International Arbitration ("IA Survey"), available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf (last checked Apr. 4, 2018).
7. *Id.*
8. *Id.*.
9. "[I]t is essential not to discourage businesses from having recourse to arbitration by proposing approaches that are likely to increase the expense of the proceedings and the disruption to their business activities." ICC Report, available at https://cdn.iccwbo.org/content/uploads/sites/3/2016/10/ICC-Arbitration-Commission-Report-on-Managing-E-Document-Production-2012.pdf (last checked Apr. 4, 2018)
10. ICC Report, available at https://cdn.iccwbo.org/content/uploads/sites/3/2016/10/ICC-Arbitration-Commission-Report-on-Managing-E-Document-Production-2012.pdf (last checked Apr. 4, 2018).
11. *Id.*
12. ICC Report, available at https://cdn.iccwbo.org/content/uploads/sites/3/2016/10/ICC-Arbitration-Commission-Report-on-Managing-E-Document-Production-2012.pdf (last checked Apr. 4, 2018).
13. *Id.*
14. ICC Rules of Arbitration (the "ICC Rules"), Article 25, available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_25 (last checked Apr. 4, 2018).
15. ICC Report, available at https://cdn.iccwbo.org/content/uploads/sites/3/2016/10/ICC-Arbitration-Commission-Report-on-Managing-E-Document-Production-2012.pdf (last checked Apr. 4, 2018).
16. ICC Rules of Arbitration, Appendix IV, available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#casemngtech (last checked Apr. 2, 2018).
17. IBA Evidence Rules, available at https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC (last checked

Apr. 4, 2018) ("Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures.")

18. IBA Evidence Rules, Preamble 1.

19. IBA Evidence Rules, Preamble 2.

20. IBA Evidence Rules, Article 3(1).

21. IBA Evidence Rules, Article 3(3) and 3(7).

22. IBA Evidence Rules, Article 9(2).

23. IBA Evidence Rules, Article 3(3) (2010 revisions to the rules)

24. IBA Evidence Rules, Article 9(5).

25. IBA Evidence Rules, available at https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC (last checked Apr. 4, 2018)

26. IBA Evidence Rules, Article 2.

27. IBA Evidence Rules, Article 3.

28. ICC Report, available at https://cdn.iccwbo.org/content/uploads/sites/3/2016/10/ICC-Arbitration-Commission-Report-on-Managing-E-Document-Production-2012.pdf (last checked Apr. 4, 2018).

29. IBA Evidence Rules, Article 3.

30. ICC Report, available at https://cdn.iccwbo.org/content/uploads/sites/3/2016/10/ICC-Arbitration-Commission-Report-on-Managing-E-Document-Production-2012.pdf (last checked Apr. 4, 2018).

31. IBA Evidence Rules, available at https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC (last checked Apr. 4, 2018); ICC Rules of Arbitration, Appendix IV, available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#casemngtech (last checked Apr. 4, 2018).

32. IBA Evidence Rules, Article 3(12).

33. A helpful article on predictive coding can be found at: https://www.exterro.com/basics-of-e-discovery/predictive-coding/

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35. IBA Evidence Rules, Article 3(12)(b).

36. The Chartered Institute of Arbitrators, Managing Arbitrations and Procedural Orders, available at http://www.ciarb.org/docs/default-source/ciarbdocuments/guidance-and-ethics/practice-guidelines-protocols-and-rules/international-arbitration-guidelines-2015/managing-arbitrations-and-procedural-orders.pdf?sfvrsn=2 (last checked Apr. 4, 2018).

37. The history of the Chartered Institute of Arbitrators, available at http://www.ciarb.org/about/history (last checked Apr. 4, 2018).

38. Preamble, CIArb Protocol for E-Disclosure in International Arbitration ("CIArb Protocol"), available at https://www.ciarb.org/docs/default-source/practice-guidelines-protocols-and-rules/e-discolusure-in-arbitration.pdf?sfvrsn=2 (last checked Apr. 4, 2018).

39. CIArb Protocol, Preamble.

40. CIArb Protocol, Article 2(i).

41. CIArb Protocol, Article 4.

42. CIArb Protocol, Article 1.3(vii). ■

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