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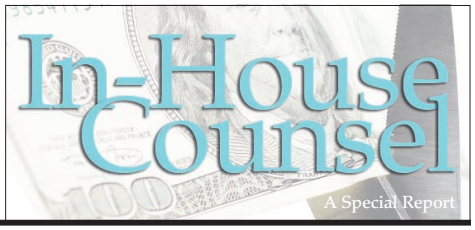
Discover New E-worlds

International arbitration can thrive despite e-discovery's challenges.



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Christopher Columbus discovered America in 1492. Since then, it seems, Americans have been crazy about discovery. Some foreign lawyers, on the other hand, have posited that American discovery was simply crazy.

Discovery costs have long been a bane of U.S. litigation. More recently, courts and counsel have struggled with discovery of electronically stored information. With the 2006 amendments to the Federal Rules of Civil Procedure in place and a majority of states enacting or considering new rules, e-discovery is now firmly established in litigation.

What has begun to send shock waves through legal communities is how electronic information will be treated in domestic and international arbitration.

Originally, arbitration was thought to provide a streamlined alternative to court. In recent years, however, arbitration has received criticism for being as costly and time-consuming as litigation. This bloating of the arbitration process, where it occurs, is usually the result of counsel and litigants importing court-style discovery into arbitration.

Fortunately, some emerging solutions for e-discovery can help preserve arbitration's benefits.

BILLIONS OF GIGABYTES

Since the mid-1990s, computers have emerged as the primary devices for information creation, storage, and communication. E-mail became ubiquitous in the late 1990s, but that is only the tip of the e-discovery iceberg. A dizzying array of technologies now create huge volumes of information. A recent study estimated that 161 billion gigabytes of digital information—said to be like 12 stacks of books that each reach from the earth to the sun—were generated in 2006 alone.

The enormous volume is not the only problem. Because this information can be copied and transferred across networks with the stroke of a key, it is now more difficult than ever to track document sources and repositories. Electronic information is smeared across a vast network of central servers, laptop computers, temporary storage devices (such as thumbdrives and removable hard drives), iPods, voicemail systems, and even cell phones. Any of these sources may contain relevant information for discovery.

By 2006, e-discovery was a major concern for in-house lawyers: High costs and risks from e-discovery often drove parties to early settlement rather than proceed with the burdens of compliance and risks of noncompliance. Can these pitfalls be avoided in arbitration?

PROMISE AND PRACTICE

As conceived, arbitration in the United States was somewhat informal, with the rules of evidence generally inapplicable. This gave parties a simple, inexpensive, and expeditious dispute resolution process. But core rules permitted the arbitrator to order the production of information. As a result of the parties' unwillingness to take the risk of limiting discovery, arbitration has become increasingly costly and time-consuming.

Since the adoption of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, international arbitration was thought to provide parties an efficient means to resolve disputes in a neutral forum, obtaining decisions that could be enforced elsewhere without the costly pitfalls of parochial national litigation.

A generation ago, U.S.-style discovery was unknown in international arbitrations. More recently, discovery requests have added costs and delays to many trans-border arbitrations, particularly those involving American counsel. This shift has been in small part a result of the 1999 promulgation of the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration, which provide for document requests before a hearing.

At present, e-discovery has not yet made a substantial landfall in that field—at least in cases between non-U.S. parties. Yet

arguments are being made for e-discovery in some international arbitrations. In one case a party sought to make a spoliation claim against a Lebanese party, but the tribunal concluded that there was no duty to preserve e-mail under Lebanese law. In another case, a tribunal spent weeks sorting out the full gamut of e-discovery issues, including a claim of privilege waiver due to less-than-comprehensive metadata review. There is also the potential to argue that an arbitrator should draw adverse inferences against a party that cannot produce material e-information.

It's Coming

The consensus among European-based arbitrators is that e-discovery has not been a serious problem in international arbitration. European experts acknowledge, however, that e-disclosure is coming—and perhaps soon. This should not be surprising for several reasons.

First, international arbitrators have long preferred contemporaneously created documentary evidence over oral testimony from party-controlled witnesses. They thus should prefer contemporaneously-created electronic information as evidence, even if some precautions may be necessary to establish authenticity.

Second, the bulk of new information is electronically-generated and stored.

Third, international arbitrators, perhaps more than American judges, are tasked with establishing the facts of the case "by all appropriate means." As a result, as two commentators note, there is a trend for the tribunal to take a role "more typical of proceedings in the civil law inquisitorial tradition than the common law adversarial approach."

Fourth, given the realities of how information is now generated, counsel must be informed and competent to address issues of electronic information.

Perfection Not Required

Arbitration-related requests for electronic information, however, need not kill a vital method of resolving disputes.

Striving for perfection (all possibly relevant information) is not required under the Federal Rules of Civil Procedure, which have had a proportionality limitation on discovery since the 1970 amendments. What is required is good faith and reasonableness.

It is becoming more apparent in U.S. e-discovery cases that this reasonableness standard requires counsel to meet early to discuss electronic information and avoid later games of "Gotcha!" The 2006 Rules amendments require this in Rule 26(f) and Rule 16. Most modern arbitration rule sets can be adapted to accomplish the same end.

Indeed, we both have experience with the arbitration rules of the International Institute for Conflict Prevention and Resolution, and CPR's rules state that an objective of its pre-hearing conference is the early identification and narrowing of issues in arbitration. What better forum to resolve e-discovery issues!

For Parties, Not Litigators

CPR has recently created a draft protocol to address the overall production of information. The protocol emphasizes that parties are expected to conduct proceedings that are expeditious, cost-effective, and fundamentally fair.

And this principle is intended to reach the parties' lawyers, too. The draft emphasizes that parties should ensure that counsel appreciate that "arbitration is not for the litigator who will 'leave no stone unturned.' " Rather, zealous advocacy "must be tempered by an appreciation for the need for speed and efficiency." Refreshingly, the protocol emphasizes that arbitration is not for the litigator, but for the parties.

The protocol directly addresses concerns about "the particularly high cost and burden" from production of electronic information. The protocol emphasizes "reasonably targeted requests" and states that e-discovery should be tailored to the information within the custody of a limited number of key entities or individuals. In addition, the protocol recognizes the importance of scrutinizing the accessibility of electronic data, thus suggesting that e-mails of key custodians may be readily discoverable, but that production from less accessible sources, such as backup tapes, should only be allowed with "extraordinary need."

Choose Your Option

To encourage efficiency, under the draft protocol, the parties and the arbitrator should consider early in the process, whether, and to what degree, electronic information will be discoverable.

The protocol suggests that the parties select the degree of e-discovery from a menu with the following options:

A. No e-discovery other than hard copy printouts of electronic documents needed by each side to present its case;

B. E-discovery allowed with limitations on the time period when documents were created, the number of custodians, and the electronic media subject to review and discovery;

C. Broader, but still limited e-discovery, including the use of forensic retrieval methods; and,

D. The broadest category, which allows e-discovery within the scope of the Federal Rules of Civil Procedure.

This upfront approach to e-discovery in arbitration is constructive, but the full benefit of the approach will also require that the parties exercise their power to hold counsel in check and that the arbitrators carefully scrutinize the scope of discoverable information.

Disclosure of electronically generated information in arbitration is imperative to get at the facts. But such disclosure can and should be made reasonably, keeping in mind the fundamental objectives and principles of arbitration.

If parties approach e-discovery intelligently, promptly, and reasonably, they may discover a new world of commercial arbitration far better than Columbus could have imagined.

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