American Bar Association
International Law Section
Issues in International Electronic Discovery

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1999 IBA Rules on the Taking of Evidence In International Commercial Arbitration

- Broad discretion to the arbitral tribunal regarding the level of document production to be ordered
- Scope may be dependent upon rules employed in the arbitrator’s home jurisdiction; wide disparity in compelled production
- Article 3 allows for the Request for Production of Document that are “relevant and material to the outcome of the case.”
Article 1 - Definition of Document - means a writing of any kind, whether recorded on paper, electronic means, audio or visual recordings or any other mechanical or electronic means of storing or recording information
Article 3 – Documents

Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all documents available to it on which it relies, including public documents and those in the public domain, except for any documents that have already been submitted by another Party.

Requests to Produce are allowed but must contain:

a) a description of a requested document or category of document sufficient to identify it;

b) A description of how the documents requested are relevant and material to the outcome of the case
Article 9 – Admissibility and Assessment of Evidence

The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any document, statement or oral testimony or inspection for any of the following:

- Lack of relevance
- Privilege
- An unreasonable burden to produce the document
- Reasonable loss or destruction of the document
- Compelling confidentiality
- Political sensitivity
- Compelling considerations of fairness or equality

**Adverse Inferences:** If a party fails without satisfactory explanation to produce any document or fails to produce any document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of the Party.
The Framework

Other Relevant Principles

- The Sedona Conference: Framework for Analysis of Cross-Border Discovery Conflicts
- The Cresswell Committee Report
- Practice Direction to Part 31 of the English Civil Procedure Rules
- U.S. Federal Rules of Civil Procedure
- Chartered Institute of Arbitrators Protocol for E-disclosure in Arbitration (October 2, 2008)
Common Threads

1. Each set of principles accept that a party need not conduct a human review of every available and potentially relevant document and that parties can rely on electronic search and sampling techniques to narrow down the datasets.

2. Parties are expected to cooperate and to agree early in the pendency of an action as to the scope of electronic discovery.

3. Arbitrators/Judges are to employ a balancing test to consider the potential importance of the requested documents, the value and importance of the dispute, and the level of difficulty involved in locating and producing the relevant electronic documents.

*“Arbitration and New Technologies: Electronic Disclosure in International Arbitration” Fulbright & Jaworski, LLP*
Using Search Terms

“A responding party may satisfy its good faith obligation to preserve and produce responsive electronically stored information by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data reasonably likely to contain relevant information.” 11th Sedona Principle

2A.5 It may be reasonable to search some or all of the parties’ electronic storage systems. In some circumstances, it may be reasonable to search for electronic documents by means of keyword searches (agreed as far as possible between the parties) even where a full review of each and every document would be unreasonable. There may be other forms of electronic search that may be appropriate in particular circumstances. Practice Direction to Part 31 of the English Civil Procedural Rules.

- Searching on active servers across a network for key words can be considered a “narrow and specific category of documents” per Article 3 of the IBA.
“Parties should confer early in discovery regarding the preservation and production of electronically stored information when these matters are at issue in the litigation, and seek to agree on the scope of each party’s rights and responsibilities. “ 3rd Sedona Principle; (see also, FRCP 126(f), and 2A.2 of the English Practice Direction.

- Areas of agreement should include custodians, manner of production (TIFF, Native), search terms, date ranges, etc.
- Early cooperation saves on costs and allows for early case consideration
“When balancing the cost, burden and need for electronically stored information, courts and parties should apply the balancing standard embodied in Fed R. Civ. P. 26(b)(2) and its state equivalents, which require consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing and producing electronically stored information as well as the nature of the litigation and the amount in controversy. “ 2nd Sedona Principle

IBA Rule 9.2 embodies the balancing test as production will not be ordered where it would unreasonably burdensome to locate and produce the requested document. Technological innovations such as clustering and email archiving mean more data is readily available and easier to sort through. What is a burden today may be easy and relatively cheap to produce tomorrow.
Rule 31.4 contains a broad definition of a document. This extends to electronic documents, including e-mail and other electronic communications, word processed documents and databases. In addition to documents that are easily accessible from computer systems and other electronic devices and media, the definition covers those documents that are stored on servers and back-up systems and electronic documents that have been “deleted” It also extends to additional information stored and associated with electronic documents known as metadata. English Practice Direction; see also 12th Sedona Principle

More likely required to show need for deleted documents since they are typically not readily available and can be expensive to restore.
Chartered Institute of Arbitrators
Protocol for E-Discovery in Arbitration

Purpose:

• intended for use only in those cases in which the time and costs of electronic disclosure my be an issue; and

• to act as a prompt to arbitrators, counselors and the parties to engage constructively with the practicalities of e-disclosure in such cases

• to achieve early consideration of disclosure in those cases where early consideration is necessary and appropriate

• to focus the parties and Tribunal on e-disclosure issues for consideration

• to address e-disclosure issues by allowing parties to adopt this Protocol as part of their agreement
Chartered Institute of Arbitrators
Protocol for E-Discovery in Arbitration

Scope:

• scope of requests for disclosure and the basis for the tribunal ordering disclosure are those reflected in Articles 3 and 9 of the IBA Rules on Evidence

• Useful electronic disclosure principles that are appropriate in an international arbitration context are adopted from the Sedona Principles
Early Consideration

1. Confer at the earliest opportunity regarding the preservation and disclosure of electronically stored documents and seek to agree on the scope.

2. The Tribunal shall raise with the parties the question of whether e-disclosure may arise for consideration in the circumstances of the dispute(s) at the earliest opportunity and in any event no later than the preliminary meeting.

3. The matters for early consideration include:
   
   (i) Whether document in electronic form are likely to be the subject of a request for disclosure during the course of the proceedings.
   
   (ii) What types of electronic documents are within the parties power or control and what is the computer system, electronic device, storage systems and media in which they are held.
   
   (iii) What steps may be appropriate for the retention and preservation of electronic documents, having regard for the parties document retention management systems, policies and practices, it is unreasonable to expect a party to take every conceivable step to preserve every potentially relevant electronic document.
Early Consideration, cont’d

3. The matters for early consideration include, cont’d:

(iv) What rules and practices apply to the scope and extent of the disclosure of electronic documents in the proceedings

(v) Whether the parties have made, or wish to make an agreement to limit the scope and extent of the electronic disclosure of documents

(vi) What tools and techniques may be usefully considered to reduce the burden and cost of e-disclosure

(a) Limiting disclosure of documents to certain categories, date ranges or custodian

(b) The use of agreed search terms

(c) The use of agreed software tools

(d) The use of agreed data sampling

(e) The use of agreed formats and methods
Early Consideration, cont’d

3. The matters for early consideration include, cont’d

(vii) Whether any special arrangements with regard to data privacy obligations, privilege or waiver in respect to electronic documents disclosed may be agreed

(viii) Whether an party and/or the Tribunal may benefit from professional guidance on IT issues relating to the e-disclosure having regard for the requirements of the case
Request for disclosure of electronic documents

4. Any request for the disclosure of electronic document shall contain

   (1) A description of the document or of a narrow and specific requested category of documents

   (2) A description of how the documents requested are relevant and material to the outcome of the case

   (3) A statement that the documents are not in the possession or control of the party requesting the documents

   (4) A statement of the reason why the documents are assumed to be in the possession or control of the other party
Order or direction for disclosure of electronic documents

5. In making any order or direction for e-disclosure, or for the retention and preservation of electronic documents, the Tribunal shall have regard to the appropriate scope and extent of disclosure of electronic documents in the proceedings, whether under the agreed arbitration rules, the applicable arbitral law, any agreed rules of evidence and this Protocol. The Tribunal shall have due regard to any agreement between the parties to limit the scope and extent of disclosure of documents.
Order or direction for disclosure of electronic documents

6. In making any order or direction for e-disclosure the Tribunal shall have regard to considerations of:

   (1) Reasonableness and proportionality;
   (2) Fairness and equality of treatment of the parties; and
   (3) Ensuring that each party has a reasonable opportunity to present its case by reference to the cost and burden of complying with the same. This shall include balancing considerations of the amount and nature the dispute and the likely relevance and materiality of the documents requested against the cost and burden of giving e-disclosure.
Order or direction for disclosure of electronic documents

7. The primary source of disclosure of electronic documents should be reasonably accessible data; namely, active data, near-line data or offline data on disk. In the absence of particular justification it will normally not be appropriate to order the restoration of back-up tapes erased, damaged or fragmented data; archived data or data routinely deleted in the normal course of business operations. A party requesting disclosure of the same shall be required to demonstrate that the relevance and materiality outweigh the costs and burden of retrieving and producing the same.
Production of electronic documents

8. Production of electronic documents ordered to be disclosed shall normally be made in the format of in which the information is ordinarily maintained or in a reasonably usable form. The requesting party can request that the electronic documents be produced in some other form. In the absence of agreement between the parties the Tribunal shall decide whether production of the electronic documents ordered to be disclosed should be in native format or otherwise.

9. A party requesting disclosure of metadata in respect of electronic documents shall be required to demonstrate that the relevance and materiality of the requested metadata outweigh the costs and burdens of producing the same, unless the documents will otherwise be produced in a form that includes the requested metadata.
Chartered Institute of Arbitrators
Protocol for E-Discovery in Arbitration

Procedure and Costs

10. The Tribunal shall consider the appropriate allocation of costs in making an order or direction for e-disclosure.

11. The Tribunal shall establish a clear and efficient procedure for the disclosure of electronic documents, including an appropriate timetable for the submission of and compliance with requests for e-disclosure.

12. The Tribunal shall require that a producing party give advance notice to the requesting party of the electronic tools and processes that it intends to use in complying with any order for disclosure of electronic document.

13. The Tribunal may, after discussion with the parties, obtain technical guidance on e-disclosure issues. Such discussion shall include the question of who is to be instructed to provide technical guidance and the costs expected to be incurred. The costs of this shall be included in the costs of the arbitration.

14. In the event that a party fails to provide the disclosure of electronic documents ordered to be disclosed or fails to comply with this Protocol after its use has been agreed to 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.
Other Legal Considerations

• Corporate Relationships
• International Evidence Collection
• Blocking Statutes
• Data Protection and Privacy Laws
Corporate Relationships

- An order for discovery to a parent company will often involve their subsidiaries
- Rule 34, FRCP
  - Discovery of documents or ESI “in the responding party’s possession, custody or control”
Hague Convention on Taking Evidence Abroad

- Used in obtaining Party may request Court to send a Letter of Request (Letts Rogatory) to the Central Authority within a participating foreign country to compel production of evidence.

- Article 23 of the Hague Evidence Convention states that at the time of signature a state can declare that it will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents known in common law countries. France, Germany, Italy and Spain have filed reservations under Article 23.

- From United States to Americas
  - Inter-American Convention on Letters Rogatory

- Within European Union (except Denmark)
  - EC Regulation No. 1206/2001

- Last Resort – Letters Rogatory
  - Very slow and cumbersome, via Consular or Diplomatic channels
• From United States to World (or World to World)
  • Hague Convention is not an exclusive and/or mandatory avenue to obtain discovery: Societe
  • If the Court has personal jurisdiction over a foreign party, request discovery under local civil
    procedure rules prior to relying upon Hague Convention: Aerospatiale

• United Kingdom
  • Order upheld for a foreign party to comply with discovery obligations under local civil procedure
    rules. Conditionally justified on the basis that the Court has a "legitimate interest in the conduct of
    its own judicial proceedings":
Title 28

- The person from whom discovery is sought must reside (or be found) in the district of the district court to which the application is made;
- The discovery must be for use in the proceedings before a foreign court or tribunal; and
- The application must be made by a foreign court, tribunal or any interested person


- Complaint filed by AMD against Intel before Directorate-General for Competition of the European Commission
- AMD recommend that the Commission request discovery of documents previously produced by Intel in a private antitrust lawsuit in the United States
- Court upheld request
• Select countries have blocking statutes which make it a criminal offense to comply with a foreign for discovery

• Offensive use of blocking statutes

• Discovery obligations and blocking statutes
  • Notwithstanding, Court must balance the production of documents from a foreign party with their good faith efforts, e.g.: *Restatement (Third) of Foreign Relations Law § 442 (1)(c)*; *per Societe Internationale v Rogers*, 357 US 197 (1958)
Data Protection and Privacy Laws

• In many civil law jurisdictions, particularly the EU, protection of personal data is perceived as a fundamental human right

• Almost all data protection and privacy laws have a general prohibition on cross-border data transfer
United Kingdom Proportionality

• Scope of disclosure obligations qualified by proportionality
• balance between evidentiary value and cost
• “Less is more” technology
  • enables searches across entire network
  • enables targeted searches of employee data
  • collects only electronic records responsive to specific search criteria
  • leaves the bulk of employees’ emails and electronic files uncollected
United Kingdom
Revised Civil Procedure

• Civil Procedure Rules (CPR) removed relevence as the test
• Replaced by Standard Disclosure – a party’s obligation is to disclose only
  • the documents on which he relies; and
  • those which adversely affect his own case or which
  • adversely affect or support another party’s case
• Court may order specific disclosure of other documents
• Court can widen or narrow the ambit of disclosures and direct the method
• As with everything else, disclosure must be proportionate
• Number of documents involved and nature and complexity of the case

• Ease and expense of retrieval of particular document, including”
  • Accessibility of electronic documents, “taking into account alterations or developments in hardware of software systems used by the disclosing party and/or available to enable access to such documents
  • Location of relevant electronic documents, data, computer systems, servers, back-up systems and other electronic devices or media, and the likelihood of location relevant data.
  • Cost of recovering, disclosing and providing inspection, and the likelihood that document will be materially altered in the process.

• Significance of any document likely to be located during the search

• A disclosure statement is required to verify these facts – who will give this in your company?
United Kingdom
Practical Challenges

• Strong emphasis on pre-trial preparation
• Front-loading of costs
• Court-driven push towards settlement
• Neglect of stream-lined route to a hearing
• Wide discretion of judges of variable quality
• No experience of or training in electronic disclosure
• Major law firms already deeply engaged in eDisclosure on their client’s behalf
• Companies increasingly thinking of taking the first level of the problem in house
• Recent Commercial Court recommendations refer to the need for a more “surgical” approach, that is, imposing even greater refinements on parties at early stages.
• As in the US, companies are having to abandon or settle claims because of the costs of document-handling
• Those who have their house in order are therefore at commercial advantage
Conventional wisdom: There is no discovery in German courts
- Parties produce their own documents that they intend to use themselves in the case

In fact, limited discovery is provided for under s 142 of the German Civil Procedure Act (Zivilprozessordnung, ZPO):
- Litigant must first obtain court approval to engage in discovery
- Court will permit taking of evidence ONLY if the discovery sought is:
  - Relevant to the outcome of the case, and
  - Necessary to clarify disputed facts.
- Precondition for an order under s 142 ZPO is
  - Plaintiff, defendant or third party exerts factual control (possession) over the document
  - A party must refer to the document in one of its pleadings (not enough to plead that such a document “usually exists”)

Electronic documents – including e-mail – must be authenticated (e.g. creation date, where it was stored, and establish chain-of-custody)
- NEW! Electronic documents issued by a public authority must bear an ‘authentication mark” or an electronic signature/
France

- Civil Law
  - Codes of laws

- Basic principle
  - Each party can freely decide what evidence it wants to produce
  - Contradictory: Each party should be given the opportunity to address every fact and argument in dispute
  - Each party shall disclose evidence it intends to rely upon
  - Closely supervised by the court
  - Much more limited than in the United States
• **Common Law vs Civil Law**
  - Positive obligations to produce all potentially relevant documents
  - Quebec: Mixed approach between France and USA

• **Common Law**
  - Preservation
  - Affidavit of documents

• **Civil Law**
  - Documents party intends to use
  - Examination on discovery with undertakings
  - “Preservation”
Asia-Pacific Key Trends

- Asia Pacific countries comprise 40% of the United States’ top trade partners
- Diverse economic and political landscape
- Combination of common and civil law jurisdictions
- Inconsistent legislative reform in relation to data protection
- Rise of shareholder and investor class actions
- Continued shift towards alternative dispute resolution (ADR)
China (PRC)

- Based on German Civil Law
- Civil Procedure Law (ARTS 63-74)
  - Each party produces documents in support of their claim only
  - NEW! Court may order a party to produce documents to assist the Court’s understanding
  - NEW! Court may threaten “unfavorable consequences” and draw adverse inference for non-compliance
  - “Original evidence” rule applies: (ART 1989)
Hong Kong SAR

• Based on English common law
• “One country, two systems” (1997 – 2047)
• Rules of High Court
  • Transitional English discovery procedure with recent shift from the *Peruvian Guano relevance test*
    O 24
• NEW! Practice Direction 5.2 (April 2009)
  • “The parties should proceed with discovery without the need to wait for an order of the Court and try to agree on the directions for modifying discovery obligations (e.g. limiting discovery to specified issues) or on the manner of their implementation (e.g. exchanging copy documents without the need to prepare lists of documents) with a view to achieving economies in respect of discovery.”
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