Electronic Discovery and Arbitration: A Shortcut Through E-Discovery

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The use of discovery in international arbitration is much more limited than its extensive use in U.S. litigation or growing use in U.S.-based arbitration, as litigators try to import litigation discovery practices into arbitration.

INTRODUCTION

As much communication occurs electronically, production and exchange of documents and data in electronic form, e-discovery, is a component of many arbitrations. The amount of electronic interaction results in an exponential increase in the amount of material that is retained. The cost of storage of electronic documents, while expensive, is much lower than the storage of paper records. This has resulted in the retention of a massive amount of electronic data, because there is no need to discard it. Data retention magnifies the amount of material that is potentially subject to a discovery request. For example, an initial e-mail may be sent to ten people, all of whom forward it to ten others, perhaps adding comments, resulting in 100 e-mails. Much of the retained data is on back-up tapes created for emergency uploading to replace lost data. Back-up tapes are not generally retained by subject matter and usually are not easily searchable.

ELECTRONIC DOCUMENTS ARE DISCOVERABLE

Discovery requests for documents in whatever form, however maintained, whether electronic or otherwise, are common and arguably include not only records stored on computers, hard drives, back-up tapes, servers, CDs, work and personal e-mails, but also voice-mail messages and files, PDAs, BlackBerrys, Palms, cell phones, iPods and other portable devices.

There are disputes between parties to an arbitration over the amount of discovery needed for a fair hearing. These range from objections to discovery as “this is arbitration” by those seeking to limit discovery and
protestations that even in arbitration “trial by ambush” is not fair from those seeking discovery. Counsel’s positions often change, even in the same arbitration, when the party trying to limit discovery of itself, seeks discovery from its adversary. The appropriate amount of discovery in an international arbitration will vary with the size and complexity of the arbitration, as well as the practices of the forum.

RULES RELATING TO ELECTRONIC DISCOVERY IN INTERNATIONAL ARBITRATION

Arbitration rules, including those of provider organizations, give some guidance for parties and arbitrators. Efforts by various providers and users of arbitration to keep arbitration as a dispute resolution alternative that provides efficient and cost-effective resolution of disputes include emphasis on the limited discovery traditional in arbitration as well as fairness in the result.

Not all of the rules reference e-discovery and, if they do, it may be in a very limited manner.

International Centre for Dispute Resolution

The International Centre for Dispute Resolution (ICDR), the international arm of the American Arbitration Association, has guidelines for electronic discovery in international arbitrations. The guidelines will apply to all ICDR cases commenced after May 31, 2008, and reflect ICDR’s commitment “to the principle that commercial arbitration, and particularly international commercial arbitration, should provide a simpler, less expensive and more expeditious form of dispute resolution than resort to national courts.”

The ICDR Guidelines for Arbitrators Concerning Exchanges of Information provision for electronic discovery states as follows:

4. Electronic Documents.

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

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1 See http://www.adr.org/si.asp?id=5288.