Managing the Costs of Exchanging Electronically Stored Information (ESI) in Construction Arbitration
December 10, 2013 – 2:00 p.m. ET

PROGRAM SUMMARY

Speakers: Albee Bates Jr., Esq. and Pamela Tobin, Esq.
This program will discuss the gathering, exchange, and review of electronically stored information within the context of construction arbitration from two different perspectives: 1) the perspective of counsel, and 2) the perspective of the arbitrator. Key issues to be addressed include the cost of electronic discovery and various methods that can be implemented to limit the cost, including limitations on the scope of electronic document exchange, culling of duplicative and irrelevant documents (including search terms and predictive coding), limitations on number of email custodians, date restrictions, production of certain files in native format (e.g., Excel, Primavera or other scheduling software, Access databases, project databases, CAD files, etc.), method of production and preservation of metadata, and related issues. The program will also discuss disputes that arise between the parties concerning production of ESI, and suggestions on cost effective methods for resolving those disputes.

AGENDA

2:00 p.m. Welcome and Introduction of Speakers (5 minutes)

2:05 p.m.

a. Overview of the elements of cost in gathering, exchanging, and reviewing ESI
b. Methods of “hosting” ESI, and related costs
c. Agreeing on the Scope of ESI exchange (custodians, file locations, date restrictions)
d. Methods to cull duplicates and irrelevant documents from production (including search terms and predictive coding)
e. Methods of production (paper, native, .tiff with load files, .pst files, other methods)
f. Claw-back agreements
g. Obtaining Arbitrator buy-in on scope of ESI exchange
h. Unique issues with Excel, Primavera, Access, CAD, Outlook .pst files, and “project” databases
i. Disputes that frequently arise with ESI production
   i. Scope
   ii. Completeness
   iii. Native files
   iv. Redaction
   v. Privilege questions
   vi. Inability to use proprietary software
j. Warning on New Frontiers: Texts, Social Media (Facebook, Instagram, Snapchat, others), and non-employer devices used for employment and non-employment purposes.

2:55 p.m. Conclusion and Questions (5 minutes)

3:00 p.m. Evaluation (5 minutes)

3:05 p.m. Adjourn
Albert Bates, Jr. is vice chair of Duane Morris’ Construction Group. While Mr. Bates focuses his practice on construction litigation and domestic and international arbitration matters, he also advises clients on project planning and execution strategies, project management and project controls strategies, change management and claims resolution on large construction projects. He has significant experience with megaprojects and EPC delivery systems. He has acted as counsel on supercritical coal, combined cycle, single cycle, biomass and hydroelectric power generation projects, chemical plants, pharmaceutical plants, steel mills, coke and coal by-product plants, mass transit and highway projects, airports, mixed-use facilities, and sports and entertainment venues. Mr. Bates also has experience representing clients in commercial contract matters and other complex technical, environmental and business disputes. He has represented multinational corporations, domestic and international owners, EPC contractors, general contractors, subcontractors, engineers, equipment manufacturers and lending institutions in construction, contractual and other business disputes.

Mr. Bates is a Fellow in the American College of Construction Lawyers, and is listed in The Best Lawyers in America in the areas of Arbitration, Mediation, Construction Law and Litigation—Construction. He also has been consistently recognized as a Pennsylvania Super Lawyer by Philadelphia Magazine in the field of construction litigation. Mr. Bates was selected as Best Lawyers’ 2010 Pittsburgh Construction Lawyer of the Year.

In addition to acting as counsel, Mr. Bates also regularly serves as an arbitrator and mediator on domestic and international construction, commercial, and environmental disputes, having served as a neutral on more than 150 occasions, including multiple matters in which the amounts in controversy exceeded $100 million USD. He is a Fellow in the College of Commercial Arbitrators, a Certified Mediator by the International Mediation Institute, and a Charter Member of the National Academy of Distinguished Neutrals. He serves as a neutral for the American Arbitration Association, the International Centre for Dispute Resolution, and the CPR Institute, and on a non-administered basis.

Mr. Bates serves as a member of the Board of Directors of the American Arbitration Association. He also served as the immediate past Chairman of the National Construction Dispute Resolution Committee, a group of representatives from more than thirty prominent constructions industry professional organizations that advise and consult with the American Arbitration Association on conflict management and dispute resolution practices, processes and procedures for the construction industry.

Mr. Bates is a 1987 graduate of Vanderbilt University School of Law, where he was an associate editor of the Vanderbilt Journal of Transnational Law, a 1987 graduate of Vanderbilt University, Owen Graduate School of Management (M.B.A., Finance), and a 1983 graduate of Washington & Jefferson College (B.A., Economics and Political Science, cum laude).

Areas of Practice

- Arbitration and Mediation
- Construction Litigation
- Commercial Litigation
Representative Matters

Construction Projects

- **Oil Pipeline Project** - Counsel to Bechtel, the program manager (engineering management, procurement and construction management), on matters related to the Keystone Pipeline Project.

- **Power Generation: Hydroelectric - Capital Projects** - Construction counsel to Oglethorpe Power in connection with certain capital projects at its Rocky Mountain Hydroelectric Plant.


- **Power Project: Supercritical Coal - Prudency Counsel** - Prudency counsel to Kansas City Power & Light with respect to a series of rate cases in Kansas and Missouri arising from the construction of Iatan 2, an 850-megawatt supercritical coal-fire power-generating facility in Iatan, Missouri.

- **Power Project: Supercritical Coal** - Arbitration and litigation counsel to Aker Kvaerner Songer, Inc., in a series of cases arising from engineering, procurement and construction of Council Bluffs Energy Center Unit 4, a 790-megawatt supercritical coal-fired electric generating facility in Council Bluffs, Iowa.

- **Power Project: Combined Cycle** - Litigation counsel to Aker Kvaerner Songer, Inc., in a series of disputes arising from the engineering, procurement and construction of a 310-megawatt combined-cycle power plant in Burbank, California.

- **Power Project: Combined Cycle** - Litigation counsel to Aker Kvaerner Songer, Inc. in two cases arising from the construction of the 580-megawatt combined-cycle Ontelaunee Energy Center near Reading, Pennsylvania.

- **Power Project: Nuclear Remediation** - Represented Southern California Edison in defense of claims by its demolition contractor on certain demolition and disposal work at a decommissioned nuclear power facility in California.

- **Steel Mill: Greenfield Construction** - Represented Mannesmann Demag, the EPC contractor for the construction of a greenfield steel plant in Davenport, Iowa, against nearly $300 million in claims asserted by IPSCO Steel, Inc.

- **Air Separation Plant** - Represented Kvaerner Industrial Constructors, Inc. arbitration proceedings arising from the construction of an air separation plant in Freeport, Texas.

- **Assel Mill: Bankruptcy Matter** - Represented SMS Demag, Inc. and SMS Meer GMBH in two related cases arising from the supply and installation of an assel and stretch-reducing mill in Rosenberg, Texas.

- **Sinter Plant: AQCS Project** - Represented United States Steel Corp. in a breach of contract, breach of warranty and engineering negligence action involving deficiencies in the design and construction of a sinter plant emissions-control system at its Gary Works.

- **Steel Mill Dismantling** - Represented a dismantling contractor in a $70 million loss-of-productivity and lost-profits claim arising from the owner's alleged actions and/or inactions on 10 large dismantling projects throughout the eastern United States.

- **Pharmaceutical Plant: Greenfield Construction** - Represented PPG Industries in a series of arbitration proceedings related to the engineering, procurement and construction of a pharmaceutical intermediate plant in LaPorte, Texas.

- **Norwegian Naval Vessels** - Counsel to the controls, packaging and ancillary-functions subcontractor in a delay, disruption and inefficiency claim against Pratt Whitney for the propulsion systems for Skjold Class Missile Fast Patrol Boats for the Norwegian Navy.

- **Universal Studios Florida: CitiWalk Project** - Represented Baker Mellon Stuart Construction Inc., the general contractor, in a series of related cases in federal and state court in Florida arising from the construction of the Universal Studios Florida “CitiWalk” project.

- **Pennsylvania Capital Addition** - Represented the Commonwealth of Pennsylvania in a series of disputes arising from the construction of a $125 million addition to the State Capitol Building.

- **Mixed-Use Complex: Greenfield Construction** - Represented an architectural joint venture and its consulting engineers in a multimillion-dollar loss of productivity and additional services claim against the owner/developer of a convention center hotel, office and retail complex in Pittsburgh.

- **Highway and Bridge Project** - Prosecution of claim for engineering additional fees for Michael Baker Jr., Inc., and defense of breach of contract and engineering negligence action by PennDOT relating to the Market Street Bridge in Williamsport, Pennsylvania.

- **Subway Tunnel** - Represented the Port Authority of Allegheny County in a multimillion-dollar delay, impact and differing-site-condition claim by the general contractor and its tunneling subcontractor on the Mt. Lebanon Tunnel for the Light Rail Transit System.

- **Public Transit Authority** - Represented the Port Authority of Allegheny County in a series of construction matters and commercial arbitration matters administered by the American Arbitration Association. Examples include bid
protests, delay, impact, differing site conditions, loss of productivity, extra work and inefficiency claims, error-and-omission claims, design-deficiency claims, and a variety of other types of disputes.

Commercial, Environmental and Other Business Disputes

- **Supply Contract** - Representation of a large U.S. producer of alumina in a breach of contract action against a United Arab Emirates metals trading company and its Indian parent for refusing to accept delivery of contracted quantities of alumina.
- **Asset Sale** - Representation of Beazer East, Inc. in litigation involving the indemnification obligations of the parties for certain environmental remediation costs pursuant to a 1974 asset-purchase agreement.
- **Asset Sale** - Representation of Beazer East, Inc., in an arbitration arising from the leveraged buyout of the Commercial Roofing Division of Koppers Company, Inc. This arbitration involved whether the purchaser had agreed to assume and indemnify the seller against certain commercial roofing warranty and product liability claims.
- **Asset Sale** - Representation of Beazer East, Inc. in litigation involving the indemnification obligations of the parties for certain environmental remediation costs pursuant to a 1978 asset-purchase agreement.
- **Asset Sale** - Representation of Baker Heavy & Highway and its parent, Michael Baker, Inc. in a breach of contract, breach of warranty and indemnification action arising from the sale of certain assets of Baker Heavy & Highway, Inc.
- **Asset Sale** - Defense of potential purchaser of a collection of businesses involved in the manufacture, sale, service and maintenance of sport fishing vessels in North Carolina.
- **Environmental Cost Recovery** - Representation of Beazer East, Inc., a former owner of a coke and coal chemical by-product recovery and refining plant, in a lengthy CERCLA cost-recovery action involving the Woodward Coke plant in Birmingham, Alabama.
- **Environmental Cost Recovery** - Representation of Beazer East, Inc., a former owner of a coke and chemical by-product recovery and refining plant, in a lengthy CERCLA and RCRA cost-recovery action involving the Toledo Coke plant in Toledo, Ohio.
- **Environmental Cost Recovery** - Representation of Beazer East, Inc., a former owner of a number coal chemical by-product recovery, refining, and disposal facilities, in a number of mediations and other alternative dispute resolution procedures involving the allocation of responsibility among various potentially responsible parties for environmental remediation and removal costs.
- **Insurance Coverage** - Representation of North River Insurance Co. in a $20 million insurance coverage matter involving whether current owner had any interest in, or is otherwise afforded coverage by, umbrella and excess-umbrella policy issues to former owner prior to the divestiture of certain business units when former owner remained in business and sought to apply coverage to other potential losses.
- **Insurance Coverage** - Representation of general contractor in an insurance coverage dispute arising under a “wrap-up” insurance policy as a result of the failure of structural members during the construction of the Greater Pittsburgh International Airport.
- **Bankruptcy Matter** - Representation of the Official Committee of Unsecured Creditors in connection with the investigation and assessment of the validity and avoidability of certain security interests of the secured lenders, and assessment of potential claims against the directors and officers of the debtor, in the chapter 11 reorganization of Birch Telecom, Inc.
- **Bankruptcy Matter** - Representation of PNC Bank, the secured lender, in adversary proceedings to recover for deterioration of cash collateral as a result of the alleged failure of Visteon Corp. and Delphi Automotive Systems, LLC, to adequately provide post-petition debtor-in-possession financing to a tier-2 automotive supplier.
- **Trade Secrets** - Representation of Danieli Corp. and Danieli & C. SpA in a case involving the procurement and construction of two cut-to-length sheet-steel lines for a Swedish steel manufacturer. Plaintiff was a disappointed bidder that alleged, among other things, that the Danieli entities misappropriated their trade secrets during the bidding process.

Professional Activities

- Fellow of the American College of Construction Lawyers, 2012-present
- Fellow of the College of Commercial Arbitrators, 2009-present
- Certified Mediator by the International Mediation Institute
- Charter Member, National Academy of Distinguished Neutrals
- American Arbitration Association/International Centre for Dispute Resolution
  - Member, Board of Directors
  - Immediate Past Chair, National Construction Dispute Resolution Committee
- Panel of Master Construction Arbitrators
- ICDR International Arbitrator
- Construction and Commercial Arbitrator and Mediator
- AAA Arbitration Advocacy Trainer
- AAA Arbitration Ethics and Disclosure Trainer
- Program Faculty at various AAA and ICDR national and regional programs
- CPR Institute for Dispute Resolution
  - International Arbitrator and Mediator
  - Construction Arbitrator
  - CPR Construction Advisory Committee
  - CPR International Arbitration Committee
  - CPR Arbitration Rules Revision Committee
- International Bar Association
  - Arbitration Committee
  - International Construction Projects Committee
- American Bar Association
  - ABA Construction Litigation Committee Delegate to National Construction Dispute Resolution Committee
  - Forum on the Construction Industry
  - Litigation Section, Committee on Construction Litigation
- Allegheny County Bar Association
  - Chair, Construction Law Section, 2010-2011
  - Member, Construction Law and Civil Litigation Sections
- Fellow, Allegheny County Bar Foundation

Admissions
- Pennsylvania
- District of Columbia
- U.S. Court of Appeals for the Third Circuit
- U.S. Court of Appeals for the Fifth Circuit
- U.S. Court of Appeals for the Sixth Circuit
- U.S. Court of Appeals for the Eighth Circuit
- U.S. Court of Appeals for the Eleventh Circuit
- U.S. Court of Appeals for the District of Columbia Circuit
- U.S. Court of Federal Claims
- U.S. District Court for the Western District of Pennsylvania
- Supreme Court of the United States

Education
- Vanderbilt University, Owen Graduate School of Management, M.B.A., Finance, 1987
  - Beta Gamma Sigma
- Vanderbilt University Law School, J.D., 1987
  - Associate Editor, Vanderbilt Journal of Transnational Law
  - James C. McGregor Scholar in Political Science

Experience
- Duane Morris LLP
  - Partner, 2007-present
- Reed Smith LLP
  - Partner, 2000-2007
- Babst Calland Clements & Zomnir, P.C.
  - Associate, 1993-1994
  - Shareholder, 1995-2000
- Eckert Seaman Cherin & Mellott, LLC
  - Associate, 1987-1993

Honors and Awards
- Listed in Pennsylvania Super Lawyers’ "Top 50—Pittsburgh,” 2013
- The Best Lawyers In America- Arbitration, Construction Law, Litigation- Construction and Mediation
- Selected as Best Lawyers’ 2010 Pittsburgh Construction Lawyer of the Year
- Pennsylvania Super Lawyers, 2004-present - Construction Law
Selected Publications

- "Audit Provisions in Private Construction Contracts: Which Costs Are Subject to Audit, Who Bears the Expense of the Audit, and Who Has the Burden of Proof on Audit Claims?" Journal of the American College of Construction Lawyers (Summer 2012)
- Featured in "Choosing Arbitration over Litigation" by Ann Belser, Pittsburgh Post-Gazette, (February 28, 2011)
- 2008 Update to "Non-signatories and International Arbitration: Understanding the Paradox," presented at CILS 5th Biennial Symposium on International Arbitration, Salzburg, Austria (June 2008)
- "Still the Arbitrator's Call: U. S. Supreme Court Rules that Arbitrators, Not Courts, Should Decide the Validity of an Allegedly Void or 'Illegal' Contract," IBA Arbitration Newsletter (September 2006).
- "U. S. Supreme Court Rules that Arbitrators, Not Courts, Should Decide the Validity of an Allegedly Void or 'Illegal' Contract," PBA Civil Litigation Update (Spring 2006).
- "Non-Party Discovery in Commercial Arbitration: Legal Hurdles and Practical Suggestions," Pennsylvania Bar Association Civil Litigation Section Newsletter (Fall 2005)

Selected Speaking Engagements

- Faculty, Building Better Construction Contracts 2012, Practicing Law Institute, New York City, September 18, 2012
- Faculty Member, ABA Construction Forum Inaugural Trial Academy, U.S. District Courthouse, Washington, DC, June 27-30, 2012
• Panel Chair, "Mediation - An Important Tool in Resolving International Commercial Disputes," CILS 7th Biennial Symposium on International Arbitration and Dispute Resolution, Salzburg, Austria, May 24-26, 2012
• Faculty, "Building the Construction Arbitration Process to Optimize its Advantages," American Arbitration Association University Neutrals Conference, Scottsdale, Arizona, March 5-8, 2012
• "Large, Complex Construction Disputes: The Dynamics of Multi Party Mediation," American Arbitration Association University Webinar, December 8, 2011
• "Making the Multi-Party Mediation Work," Spring 2011 American Arbitration Association Construction Conference, Santa Monica, California, April 1, 2011
• "Construction Dispute Resolution in the U.S.: International Techniques That can be Used Domestically," American Arbitration Association University Webinar, May 10, 2010
• "Significant Recent Developments in Construction: Law, Ethics, and Practice," Allegheny County Bar Association Construction Law Section, Pittsburgh, December 7, 2009
• "Ethical Considerations for Advocates in Construction Arbitration," AAA 2009 Fall Construction Conference, Los Angeles, California, November 13, 2009
• "Ethical Considerations for Advocates in Construction Arbitration," AAA 2009 Spring Construction Conference, New York City, March 30, 2009
• "Large, Complex Construction Disputes: The Dynamics of Multi-Member Mediation Teams," 2009 AAA/ICDR Neutrals Conference, Coronado, California, February 27-28, 2009
• "What You Can't Not Know," The AAA Construction Mediation Conference, Marina del Rey, California, November 9, 2007
• "Developments in International Arbitration in Europe," International Centre for Dispute Resolution, Philadelphia, Pennsylvania, December 6, 2006
• "Making the Multi-Party Mediation Work," Spring 2011 American Arbitration Association Construction Conference, Santa Monica, California, April 1, 2011
• Speaker, "Large, Complex Construction Disputes: The Dynamics of Multi Party Mediation," American Arbitration Association University Webinar, December 8, 2011
• "A Dialogue with the Leading Arbitral Institutions," Showcase Program, ABA Section of International Law, New York, April 6, 2006
• "Effective Presentation of Delay Claims to Construction Arbitrators," ABA Section of Litigation Joint Meeting, Alternative Dispute Resolution and Construction Litigation Committees, Law Vegas, Nevada, November 10, 2005
• "Update on Construction Arbitration Developments," Pennsylvania Bar Institute, Pittsburgh, Pennsylvania, November 1, 2005
• "Dispute Resolution in the International Arena," American Corporate Counsel Association, Pittsburgh, Pennsylvania, April 21, 2005
• "U.S. Perspectives on International Dispute Resolution," International Centre for Dispute Resolution Forum on Arbitration of International Commercial Disputes, Pittsburgh, Pennsylvania, December 12, 2002
• "Pennsylvania Mechanics' Lien, Payment and Surety Bond Law," Lorman Educational Services, Pittsburgh, Pennsylvania, March 1, 2002
• "ADR in the Construction Industry," Lorman Educational Services, East Brunswick, New Jersey, July 27, 2000
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Pamela Tobin is a member of the Commercial Litigation and Land Use & Zoning Departments. Ms. Tobin handles complex commercial litigation on behalf of businesses and individuals in both state and federal court. She has handled cases involving breach of contract, breach of fiduciary duty, real estate disputes, land development disputes, constitutional property right claims and claims against municipal authorities and agencies.

Ms. Tobin is a lecturer and has published articles on various topics, including electronic discovery, social media and defamation. Ms. Tobin is a director of the Montgomery Bar Association and chair of the MBA's Women in the Law Committee.

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**Practice Areas**  
Business & Commercial Litigation  
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**Bar Admissions:**  
Pennsylvania, 1988  
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U.S. District Court Eastern District of Pennsylvania, 1988  
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**Education:**  
Temple University School of Law, Philadelphia, Pennsylvania, 1988, J.D.  
Honors: Cum Laude  
Bryn Mawr College, Bryn Mawr, Pennsylvania, 1979 B.A.  
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**Published Works:**

Professional Associations and Memberships:
Pennsylvania Bar Association Member
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MANAGING EXCHANGES OF ELECTRONICALLY STORED INFORMATION (ESI) IN CONSTRUCTION ARBITRATION

BY JOHN E. BULMAN AND R. THOMAS DUNN

The authors are partners at Little Medeiros Kinder Bulman & Whitney, P.C. in Providence, and they concentrate their practice in New England. John Bulman is also an arbitrator and an International Mediation Institute-certified mediator. He serves on the American Arbitration Association Board of Directors, its Executive Committee, and the AAA roster of neutrals for commercial, construction and large, complex cases. Tom Dunn focuses on construction law and business dispute resolution. The authors are members of the Forum Committee on the Construction Industry. Mr. Dunn is also a co-editor of The Dispute Resolver.
Managing ESI is vital to achieving a cost-effective arbitration. There is a legal duty to preserve relevant ESI in anticipation of arbitration and if requested, to produce it. The authors urge arbitrators and counsel to learn the technology of ESI—arbitrators so that they can better manage ESI exchanges, and counsel so that they can cooperate in producing relevant, non-privileged ESI. The authors suggest helpful practices that counsel can employ to facilitate the ESI exchange.

It is generally agreed that the primary matter that has derailed arbitration from its foundational promise of a “just, speedy and economical” dispute resolution process has been the adoption of extensive discovery and related motion practice. There seems to be a slowly increasing recognition that discovery in arbitration should be limited for very good reasons.

continued
However, the ubiquity of electronically stored information (ESI), which has been characterized as “a nightmare and a morass,”¹ presents arbitrators, attorneys and the parties with a significant challenge: how to make sure that discovery of relevant ESI does not threaten the economics and efficiency of the arbitration process.

The Proliferation of ESI

Potentially relevant ESI proliferates rapidly. It begins by being produced on computer workstations or other electronic communications devices (e.g., smart phones and voice-over-internet-protocol (VOIP) telephones). ESI can be quickly sent to a host of other devices inside and outside the company, where it is also stored, and possibly amended, and then further distributed through the practice of forwarding electronic communications with and without attachments to employees, vendors, customers, clients, suppliers, contractors, and professional consultants. (Much ESI is made up of one-line e-mails acknowledging receipt with a brief “thanks.”) ESI can also be uploaded onto the Internet, or transmitted via a listserv, both of which significantly expand the potential pool of recipients.

The result is an enormous amount of electronic data, much of it duplicative and/or irrelevant.² But if all ESI were required to be produced in arbitration, the time and cost involved in locating and producing it would be enormous, completely eviscerating many efficiency benefits from using arbitration.

Arbitration, simply put, cannot afford broad ESI discovery. On the other hand, an order to “just produce your project file” is not enough either and could end up causing more disputes than it resolves.

ESI Amendments to the FRCP

The Federal Rules of Civil Procedure were modified in 2006 to deal with ESI.³ As amended, FRCP 26 requires the production of ESI that is relevant and not privileged.⁴ Implicit in this rule is the requirement that parties preserve ESI when they become aware of a potential claim against them. This awareness triggers putting a “litigation hold” on all relevant documents and ESI. There is an exception for ESI “from sources that the party identifies as not reasonably accessible because of undue burden or cost.”⁵ Another rule requires the parties to develop a discovery plan that deals with ESI issues, including the form of production.⁶ However, commentators have found that the 2006 amendment of Rule 26(b) has been “inadequate” in that it has created “legal tests” that are “not self-explanatory.” Instead, they “are difficult to execute” and are ultimately “traps” for even the litigant with the best of intentions.⁷

Since the ESI amendments were adopted, ESI has generated a fair amount of collateral litigation. In a number of cases, federal district courts have imposed draconian sanctions for failure to preserve, gather, or produce ESI. A 2009 trial lawyer study observed that courts are imposing obligations on counsel of “enormous scope and practical unworkability” that “are often impossible to meet despite extensive (and expensive) good-faith efforts.”⁸

These intimidating rulings are a strong reason to use arbitration, which takes a more limited view of discovery in the service of efficiency and keeping costs lower than litigation. The arbitration process is better suited to deal with issues that arise concerning the exchange of ESI because it is more flexible and allows for creativity in fashioning discovery remedies. The absence of specific rules on ESI in arbitration is a plus because the arbitrator can manage these issues and make sound judgments based on the particular circumstances of each case. Thus, when arbitration is well managed, the parties should be able to exchange ESI that is relevant to the project (e.g., the “we messed up” e-mail) without depleting their budget for the dispute. A properly managed arbitration is one in which the arbitrator, all counsel and party representatives are knowledgeable about the ESI issues and work collaboratively⁹ to share the most relevant ESI in the most efficient manner.

The balance of this article discusses the major ESI issues and offers some suggestions related to the ESI exchange that could help ensure that arbitration remains a simpler, less expensive, and more expeditious venue for dispute resolution.

Learn About the Technology of ESI

Whether you are an arbitrator, advocate, or businessperson, you cannot put your “head in the sand” like an ostrich when it comes to ESI. The effectiveness of the ignorance approach to e-discovery is diminishing in most legal markets. Becoming aware that you have to find a better strategy is the first step. The next step is to become educated about the technical aspects of...
ESI. For advocates this is required for competent representation.

Learn to Cooperate in the Discovery of ESI

One federal district court described “the overriding theme” of the FRCP e-discovery rule amendments as the “open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable.”10 The Sedona Conference11 has published best practices that emphasize the importance of cooperation in connection with e-discovery. It has also adopted a Cooperation Proclamation “to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery.”12 The Cooperation Proclamation recognizes that achieving cooperation will be an uphill battle:

It is unrealistic to expect a *sua sponte* outbreak of pre-trial discovery cooperation. Lawyers frequently treat discovery conferences as perfunctory obligations. They may fail to recognize or act on opportunities to make discovery easier, less costly, and more productive. New lawyers may not yet have developed cooperative advocacy skills, and senior lawyers may cling to a long-held “hide the ball” mentality. Lawyers who recognize the value of resources such as ADR and special masters may nevertheless overlook their application to discovery. And, there remain obstreperous counsel with no interest in cooperation, leaving even the best intentioned to wonder if “playing fair” is worth it.

The Cooperation Proclamation calls for a paradigm shift by lawyers.13 We believe that neutrals tasked with efficiently managing the arbitration process, the parties who agree by contract to submit disputes to arbitration, and their counsel must be at the forefront of this paradigm shift towards greater cooperation regarding the exchange of ESI.

Address ESI Issues in the Arbitration Agreement

ESI is not likely to become an issue in arbitration if the parties agree to reasonable ESI princi-
is going to be needed on any given construction dispute, parties may have some difficulty coming to an early agreement on an ESI exchange mode.

CPR also has developed “Economical Litigation Agreements (ELA) for Commercial Contracts as a Means of Reducing Civil Litigation Costs,” also known as the “Model Civil Litigation Prenup.” These agreements could be modified for use in arbitration provisions.21 Section 12 of one ELA contains detailed provisions that touch on the following: the scope of ESI, presumptions regarding ESI-search requirements and/or limitations (rebuttable upon a showing of “good cause”), preservation of ESI, and limits based on the monetary amount of the dispute.22 Using the ELA, however, may not always make sense because adopting stringent limitations on the production of ESI diminishes the role of the arbitrator and therefore deprives the parties of the value of the arbitrator’s good judgment and management skill.

Another type of provision the parties could consider would limit the ESI exchange to files located on the parties’ servers (i.e., the primary storage center) and require a showing of good cause to obtain additional ESI located on back-up tapes, laptops and cell phones (i.e., secondary storage centers).

The arbitrator, counsel and the parties should recognize that the dollar value of a construction dispute does not necessarily mean that more ESI should be exchanged. Determining ESI exchanges based upon the dollar value of the dispute may have unintended consequences: it could inflate claims or require e-discovery simply because one has the right to it. Nevertheless, the ELA could be a helpful resource for arbitrators to consult when parties have agreed to broad e-discovery and they insist upon proceeding with that agreement.

At a minimum, we recommend putting the exchange of ESI on your contract negotiation checklist as an item for consideration. When the time comes to negotiate the contract, you should weigh the benefits of having a reasonable ESI provision in the contract, versus having none.

Whether or not you agree to include an ESI clause in the contract, it is a good idea to designate in the contract one or two ESI custodian(s) for each party. If you both decide to include an ESI provision, you could agree that the designated ESI custodians for each party will produce to the other party the most relevant e-mail and computerized work files. This agreement will help each party to better articulate the need, if any, for additional ESI.

Finally, as a reminder, you could agree to include a “litigation hold policy” for relevant documents and ESI in your agreement. The litigation hold requires the suspension of a company’s document destruction policy for documents and ESI. The agreement could provide that the litigation hold is triggered whenever you anticipate that a claim will be filed.

The Litigation Hold Policy and the Data Map

After arbitration counsel is retained, she should ask the client if it has implemented the litigation hold policy. If not, the client should be advised to do so immediately.

Next, counsel should ask the client to prepare a “data map” listing all of the client’s devices that store electronic information concerning the project or dispute, the location of any off-premises storage devices, the type of ESI on each device, the person who created the ESI, if known, and the custodians of the ESI. The purpose of the data map is to locate the universe of potentially relevant ESI before deciding on the specifics of the ESI search or exchange. The amount of detail on the data map will vary based on the clients’ technology, number of employees, and the nature of the dispute.

Then, counsel should work with the client to understand: (1) the databases and software programs the client used on the project; (2) the client’s document/data retention policy; (3) which employees worked on the project; (4) the work each employee did on the project (if not readily apparent by the job title); and (5) the locations where each employee stored ESI.

Next, counsel should interview the three most active employees who represented the client on the disputed issues.24 The purpose of the interviews is to test the data map information and to confirm whether or not there is an unidentified source of ESI. For example, there are some employees who, despite company protocols and

Arbitration, simply put, cannot afford broad ESI discovery. On the other hand, an order to “just produce your project file” is not enough either and could end up causing more disputes than it resolves.
practices, constantly use non-company devices, e-mail addresses, cameras, and/or backup thumb drives during the course of their duties on a project. If counsel does not inquire about these “outliers” early on during the information exchange, there is a risk that such practices and non-produced ESI could become a troublesome issue during evidentiary hearings. If that were to happen, the arbitrator could exclude the non-produced ESI from evidence or she could draw a negative inference as a sanction for the failure to produce the records.

With a comprehensive data map and information gleaned from employee interviews, counsel will not only be thoroughly prepared to discuss the exchange of ESI at the preliminary hearing,25 she will be in a position to cooperate with the arbitrator and the other party’s counsel in reaching a reasonable agreement on the ESI issue that adequately safeguards the client’s interests.

Enter into a Clawback Agreement

There is always a danger of inadvertent production of privileged documents in discovery. This is also true of the ESI that is exchanged. In anticipation of this problem, the parties should provide in the arbitration clause (or agree at the preliminary hearing) that if privileged or confidential information (whether in electronic or hard copy form) is inadvertently produced to the other party, the party that produced such information will recall it and the party that received it will return it to the producing party. This is sometimes referred to as a “clawback agreement.” It has three objectives: (1) it preserves legal privileges, attorney work product and other privileged or confidential information; (2) it reduces the need for an extensive privilege review; and (3) it represents an agreement that documents identified as privileged or confidential need not be disclosed.

A clawback agreement entered into before the arbitrator is appointed should be presented to the arbitrator prior to the preliminary hearing for consideration and entry as an order by the arbitrator.

ESI and the Preliminary Hearing

Arbitrators are cognizant that discovery is one of the most complained-about activities in arbitration. ESI has added to this problem and arbitrators must be proactive to see that ESI production does not get out of hand.

Arbitrators should instruct counsel to be prepared to discuss the extent of discovery, including ESI, at the initial preliminary management hearing. They should also ask whether the parties have already entered into an agreement to exchange ESI (as well as a clawback agreement). If not, the arbitrator should strongly suggest that they do so at the preliminary hearing.

Even where the parties have agreed on an ESI exchange, we recommend that arbitrators actively probe the parties’ ESI needs. They should determine: (1) the specific types of ESI sought by each party, (2) the terms of the exchange, and (3) whether counsel anticipate any problems with the ESI exchange. Arbitrators should not allow the parties to “kick the ESI-exchange ball” to an uncertain day in the future. If one side demonstrates, candidly or implicitly, that it is not prepared to make ESI-exchange decisions at the preliminary hearing, the arbitrator should set an interim scheduling order and arrange for another pre-hearing conference. In a moderately sized construction dispute, such an interim order could contain the following directives:

- Parties shall present a proposed form of a protective order governing the inadvertent disclosure of confidential or privileged ESI. Such an agreement is designed to accelerate the ESI exchange by eliminating the need for the producing party to first conduct a page-by-page privilege review. Moreover, it minimizes the allegation that otherwise privileged communications were waived through innocuous information exchange.
- Any documents or ESI withheld from production on the grounds of a legal privilege shall be identified on a “privilege log.”
- Ten days before the preliminary hearing, each party shall identify with particularity any known ESI it wants the opposing party to produce and state the form in which such production is requested to be made. The explanation shall include a statement of the relevance, why no other sources of the infor-
mation exist, and how the request is proportionate to the relevancy of the materials sought. Five days before the preliminary hearing, each party shall respond to the ESI sought with a response regarding the relevance, burden and costs of the production.

- Ten days before the preliminary hearing, each party shall identify no more than three employees of the opposing party whose ESI concerning the Project should be produced. Five days before the hearing, the producing party shall state the manner in which it proposes to produce the ESI of this employee along with an explanation of any difficulties with compliance with this provision.

- If any party asserts that the production of the one employee’s ESI is too voluminous given the material issues in dispute, then the party seeking discovery shall submit a reasonable number of search terms that can be used to narrow the scope of the production.

At first glance, this approach may seem like overkill. But this interim order is designed to ferret out known trouble spots with ESI, force counsel to learn about their client’s ESI, and encourage cooperation among counsel in the selection of the types of ESI, custodians and search terms.

What if a company provides an unsubstantiated, shockingly high estimate of the cost of gathering and producing ESI? A natural tendency is to consider shifting the cost of production to the requesting party. This often leads to a more focused document request. While shifting costs may be appropriate in some cases, the arbitrator should distinguish between asserting high cost as a litigation tactic and fuzzy internal estimates on the one hand, and legitimate problems on the other hand.

Overblown estimates of ESI production are often predicated on a “page-by-page” privilege review of every document and item of ESI. However, as noted above, the necessity and reasonability of this review is negated by the requirement of a clawback protective order.

Arbitrators faced with highly litigious parties in a dispute with substantial amounts at stake could consider retaining a disinterested third-party e-discovery vendor as a consultant, preferably with the consent of the parties, to investigate the ESI of both parties and provide a recommendation. The arbitrator may allocate the cost of the consultant between the parties as an administrative cost.

The arbitrator’s decision on e-discovery issues must be guided by a cost-benefit analysis with the concepts of economy and usefulness foremost in mind, rather than full discovery. The role of the arbitrator is to keep the search for relevant information focused on the most material facts with the least disruption and cost incurred by the parties.

Follow Up and Enforce Deadlines

The arbitrator should ask counsel to certify when information exchange obligations have been satisfied. Preliminary hearings are helpful to check on the status of pre-hearing activities and address and resolve discovery disputes. Arbitrators should also request prompt updates when it appears that the deadlines established in the initial case management order are not being honored. Where persistent disputes arise through motions or otherwise, the arbitrator should act firmly to order compliance with the scheduling order and send a clear signal that costs will be allocated to the moving party for its warranted efforts to compel the information exchange. If arbitrators are not attentive to deadlines set in the scheduling order, or if they allow the parties to “rewrite” the scheduling order, the arbitration will probably not be successful in fulfilling the promise to provide a simpler, less expensive, and more expeditious form of dispute resolution than litigation.

Conclusion

There is a steep learning curve to becoming educated about ESI. There is also an intimidation factor from court decisions that impose strict standards of disclosure and draconian sanctions for noncompliance. Arbitrators must learn the technical aspects of the issue, not just the terminology, for proper management of ESI and resist the temptation to punt the e-discovery learning process or defer it to a more interested junior colleague.

Critics of arbitration have gained traction by claiming that arbitration has become as expensive as litigation. E-discovery provides a great opportunity for arbitrators to show that they can control the process so that material information is divulged at the most economical cost. Achieving this goal requires buy-in from all players to become aware and cooperate with each other to manage the ESI exchange in arbitration.

(Endnotes are on page 76)
1 Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, 14 (Rev. April 15, 2009).

2 Much of this duplicative and/or irrelevant information will be found on employee personal laptops and smartphones.

3 The amendments were to FRCP Rules 16, 26, 33, 34, 37, and 45.

4 FRCP Rule 26(a)(1)(A)(ii) & (b)(1):
   (a) Required Disclosures.
   (1) Initial Disclosure. (A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties ... (ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;...

(b) Discovery Scope and Limits.
   (1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense—....

See also Committee Notes on Rules–2006 Amendment (Rules 26).

5 FRCP Rule 26(b)(2)(B):
   (b) Discovery Scope and Limits.
   ... (2) Limitations on Frequency and Extent ... (B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

6 FRCP Rule 26(f)(3)(C).
   (f) Conference of the Parties; Planning for Discovery. ...
   (3) Discovery Plan. A discovery plan must state the parties' views and proposals on: ... (C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;....

7 Final Report, supra n. 1, at 14.

8 Id.

9 We recognize the risk of being branded Pollyannas by suggesting collaboration among litigants and counsel. It is true, however, that the parties agreed to arbitrate, which at least requires collaboration on arbitration procedures if a dispute is ever to be arbitrated.


12 The Sedona Conference Cooperation Proclamation 1 (July 2008), endorsed by over 100 judges from 29 states.

13 Id. at 3.

14 Rule 24(a)(i) of the AAA Construction Industry Arbitration Rules provides: “(a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct (i) the production of documents and other information...” In addition, Rule 24(d) states: “There shall be no other discovery except as indicated herein unless so ordered by the arbitrator in exceptional cases.”

Rule 17 of the JAMS Engineering and Construction Arbitration Rules & Procedures more closely follow the automatic exchange requirement in the Federal Rules of Civil Procedure. Rule 17(a) provides: “The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information (ESI) relevant to the dispute or claim immediately after commencement of the Arbitration).”

15 The ICDR is the international division of the AAA.

16 The introductory comments in the Guidelines for Arbitrators Concerning Exchanges of Information state: “The purpose of these guidelines is to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process.”

17 Id. at ¶ 6 & 8.

18 The CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration can be found at http://cpradr.org/.

19 Id. at § 1(a).

20 Mode A is the most restricted. It permits disclosure of electronic information to be presented in support of that party’s case. Modes B and C permit disclosure of ESI from a defined time period and limited number of custodians. Mode C provides more flexibility regarding ESI from secondary storage facilities (e.g., backup tapes, cell phones) upon a showing of special need and relevance. Mode D essentially adopts the litigation standard of ESI exchange — “relevant to any party’s claim or defense, subject to limitations of reasonableness, duplicativeness, and undue burden.” CPR Protocol, supra, n. 18, at 10-11.

21 The ELA reserves the right to submit the matter to arbitration while setting forth defined procedures regarding pre-trial activities. The ELA is meant to be an agreed-upon substitute for the administration of a matter vested in state or federal court.

22 ELA at 11-16.

23 The devices include computers, cell phones, laptops, digital cameras, flash drives, stand alone hard drives, VOIP phones, back up tapes and other storage systems.

24 In some cases one or two interviews will be sufficient.

25 If the case were in court, the data map will prepare counsel to participate in the FRCP 26(f) preliminary conference.
Consider the following construction arbitration:

The contractor filed a $500,000 claim against the owner for the unpaid contract balance and disputed change orders. The owner asserts that it is entitled to set-off the unpaid contract balance against the cost of repairing the contractor’s defective and incomplete work. Counsel representing each party is now participating in a preliminary hearing conference with the arbitrator. They advise the arbitrator that they have agreed to a discovery plan and a procedural schedule. The discovery plan contemplates an exchange of project documents, an exchange of all project e-mail in electronic format, and five depositions per party (limited to 35 hours for all depositions). The procedural schedule sets aside 10 days for the arbitration hearing, allowing each party no more than 30 hours to present their case, from opening statement to closing argument.
How should the arbitrator respond if he or she believes that all or part of the discovery plan is excessive and the schedule unworkable? Is it appropriate to reject the parties’ joint discovery plan and procedural schedule in whole or in part? Alternatively, must the arbitrator accept the plan and schedule in their entirety because arbitration is a creature of contract and the arbitrator has no authority to deviate from agreements of the parties?

**Arbitrator Attitude Toward Case Management and Party Autonomy**

When I took my initial arbitrator training course from the American Arbitration Association (AAA) in the late 1980s, the trainer posed a hypothetical with similar facts. I recall that many classmates had very different views from mine about the proper role of the arbitrator. More than a few of them viewed the arbitrator as a “referee” whose objective was to enforce the discovery plan and schedule the parties had agreed upon. This view abdicated all case management responsibility unless the parties were unable to agree on them. As a result, arbitration proceedings became less efficient and more costly as discovery could be prolonged, motions could be filed at will, and counsel could present whatever evidence he or she wanted, regardless of whether the evidence was cumulative, repetitive, or irrelevant to the outcome.

It seemed to me that the underlying foundation for this view was either the fear of being “overturned” on appeal, or a lack of understanding of the broad authority granted to arbitrators under the AAA rules, despite the fact that the AAA training program emphasized the arbitrator’s authority to actively manage the process.

A second view cast the arbitrator as more or less a “dictator” whose role is to protect the efficiency and cost-effectiveness of the arbitration process, regardless of the parties’ wishes. Under this view, the arbitrator dictates both the procedures and the schedule for the arbitration. If the parties want to take five depositions, the dictator would not allow it because of the time that the depositions would take. She might also baldly assert, “There are no depositions in arbitration.”

In the hypothetical presented above, the dictator would reject the parties’ agreed discovery plan and hearing schedule, and order a hearing in 90 days, giving each party one day to present its case. In this way the dictator would achieve her brand of efficiency, cost control and “rough justice.” The dictator has no regard for the autonomy of the parties and their role in structuring the arbitration process.

The third view expressed by some of my classmates, which I shared then and now, is that it is the arbitrator’s responsibility to be an active manager who works with the parties to devise an efficient and fair process and schedule that are appropriate for the particular case, and then sees that the parties adhere to them.

Even as a new arbitrator, I recognized that the arbitrator’s view of her role has great significance for the parties and the process. Given that arbitrators today still hold different views of their role in arbitration, advocates and their clients should attempt to determine the arbitrator’s philosophy when selecting an arbitrator for a case.

In my view then and now, the role of the arbitrator is neither that of a dictator nor a referee, but something in the middle. Arbitration was always intended to be different from litigation—free from its strictures and formality. It is supposed to be less expensive and more efficient while affording the parties a fair and impartial hearing on the issues submitted to arbitration. It is also supposed to be flexible, adaptable to the needs of the particular case, and not a “one size fits most” approach. How can arbitration achieve these objectives unless the arbitrator receives input from the parties and actively works with them to craft and schedule efficient pre-hearing and hearing procedures?

The past two decades, particularly the past 10 years, have seen a wave of discontent concerning arbitration. Many complaints have been aired contending that arbitration is no longer a cost-effective, efficient method of resolving disputes. Some commentators have described it as litigation except that the arbitrator is paid, not elected or appointed in a political process. The term
“arbrigation” was coined to describe an arbitration process in which litigation procedures have replaced the simpler and more informal arbitration procedures.

Much of the criticism of arbitration has focused on the amount of discovery that is being used. Although it is usually the parties’ attorneys who have brought this about, arbitrators, many of whom are lawyers and ex-judges, bear some responsibility for passively allowing this to happen. Arbitral institutions have also received their share of the blame.

Learning from the ICDR Guidelines

In order to restore confidence in arbitration as a cost-effective alternative to litigation, arbitral institutions have undertaken new efforts to make arbitrators, counsel and parties aware of the need to avoid delay and agree to procedures that are efficient and will not bog down the process.

One of the earliest steps taken in this direction was the 2008 publication of the International Centre for Dispute Resolution (ICDR)’s “Guidelines for Arbitrators Concerning Exchanges of Information.” The introduction to the guidelines expresses the commitment of the AAA and ICDR “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 introduction states the view of the AAA and ICDR toward “arbrigation”:

While arbitration must be a fair process, care must also be taken to prevent the importation of procedural measures and devices from different court systems, ... which are not appropriate to the conduct of arbitrations in an international context and which are inconsistent with an alternative form of dispute resolution that is simpler, less expensive and more expeditious.

Next, the guidelines focus on the problem with litigation-style discovery in arbitration:

One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation.

It is only then that we learn the true purpose of the guidelines, which is “to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process.”

The guidelines then address “information exchanges,” exhorting the arbitrator and the parties “to endeavor to avoid unnecessary delay and expense” while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party’s opportunity to present its claims and defenses fairly. They further say that the parties’ views on the amount of information to be exchanged, even if provided to the tribunal, are not controlling because “the tribunal retains final authority to apply the above standard.” Under the guidelines, therefore, party autonomy may trump arbitrator management of the proceedings “only if the parties have entered into an express agreement among all of them in writing and in consultation with the tribunal.” Thus, while the guidelines may seem to authorize a more dictatorial arbitrator, they actually respect party autonomy when both sides agree in writing.

The guidelines stress the arbitrator’s “authority and responsibility” to actively manage the arbitration process to make proceedings more efficient and economical by avoiding delay and controlling the use of procedures that are inconsistent with the purpose of arbitration. While they were prepared for use in international cases, the AAA anticipated that they would have application in all kinds of disputes, including domestic construction disputes.

Since the guidelines were published, the AAA has continued its commitment to ensure that arbitration remains “speedy and cost efficient.” In the fall of 2009, the AAA co-sponsored, with JAMS, the International Institute for Conflict Prevention and Resolution (CPR), the Chartered Institute of Arbitrators, and Pepperdine University’s Strauss Institute for Dispute Resolution, a conference of the members of the College of Commercial Arbitrators (CCA) to discuss and gather data.
about the cost and delay in commercial arbitration. After analyzing the data collected from the conference, the CCA issued four protocols on saving time and money: one for users and in-house counsel, one for attorneys who serve as outside arbitration counsel, one for arbitrators, and one for arbitration providers. The protocols have excellent ideas that all participants in arbitration can employ when appropriate. Summaries of the protocols were published last year in the Dispute Resolution Journal in a handy pullout form that arbitrators and attorneys can and should easily use for reference.5

The key take-away from this discussion is that the arbitrator has the obligation to actively manage the arbitration process. She must use her knowledge, experience and training to work with the parties in the service of crafting appropriate arbitration procedures for the case. It is these assets that make up a significant part of the value added that arbitrators bring to the dispute resolution table.

Knowledge, arbitration experience and training make up a significant part of the value added that arbitrators bring to the dispute resolution table.

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"Right-Sizing" Discovery
In my view, the biggest challenge facing arbitration at the preliminary management hearing is “right-sizing” discovery to the dispute. Far too often, lawyers will take unnecessary depositions and cull through all of the opponent’s electronically stored information (ESI) in search of a “smoking gun” where the amount in controversy simply does not justify the costs incurred. Often, parties to arbitration will blame the arbitration process for high lawyer, arbitrator and expert fees, rather than the discovery decisions they or their counsel made, which significantly contributed to those costs.

Right-sizing discovery should mean that the type and amount of discovery matches the needs of the case—no more and no less. The arbitrator should exercise her management authority to ensure that discovery, if appropriate, is focused toward material disputed issues in the case, and that the scope of discovery accords with the size and complexity of the case.

Unnecessary discovery (whether a request for an exchange of all ESI under the party’s control, or excessive depositions, or interrogatory requests) is a waste of the parties’ time and money. So why do the attorneys seek it? In some cases, it is due to a lack of understanding on the part of litigators serving as arbitration counsel about how the arbitration process differs from litigation. In other cases, the desire for excessive dis-
discovery can be traced to overzealous attorneys who have doubts about the strength of their client’s case, or lack confidence in the arbitration process, or the arbitrator selected for the case.

Whatever the cause, my advice to arbitrators is to use counsel’s joint discovery plan as the starting point for these discovery discussions. Then, if the plan is overbroad, explain to the attorneys that their discovery requests not only exceed the bounds of what is appropriate in arbitration, they are disproportionate to the size and complexity of the case. The goal is to propose modifications to limit discovery to that which is relevant to a material issue in the arbitration. This may involve putting reasonable limitations on the amount of documents and ESI exchanged and the number and length of depositions.

Proportionality is also a concern, especially when it comes to ESI. Almost all information today is created and stored electronically. The costs involved in reviewing and retrieving ESI can be staggering. Ten years ago, the biggest contributor to the cost of arbitration was the amount of time allotted for depositions. Today, the costs involved with producing and reviewing ESI dwarfs the cost of any other method of discovery. This is not a concern in AAA fast-track construction cases because there generally is no discovery beyond an exchange of important documents. However, in regular track cases, parties have a tendency to request multiple depositions and production of all ESI related to the project. This is where active management by the arbitrator is essential.

In large, complex cases, the amount of discovery is likely to be greater and will routinely include an exchange of some amount of ESI. The arbitrator must actively manage the parameters of the ESI exchange with a keen understanding from the parties of the costs associated with the discovery that they have requested.

There are a number of principles and techniques that arbitrators could use to address an excessive discovery request, whether or not ESI is involved. The first is not to allow a fishing expedition for potential evidence. Requests for information, particularly ESI, must be carefully tailored to seek only information that is material to an important disputed issue in the case.

Second, the requesting party must be able to succinctly state why the discovery sought is necessary in this case. If it cannot provide a satisfactory explanation, discovery should not be allowed.

Another principle is to require, as per the ICDR guidelines, production of ESI in the most convenient form, which could include paper copies of ESI in smaller cases. Again, the concept is to right-size discovery so that the type and amount of electronic information matches the needs of, and is proportional to, the case.

The arbitrator also needs to exercise managerial authority if the parties have requested depositions and/or interrogatories. A limited number of depositions may disclose useful information in appropriate cases, but depositions take employees away from their work and ultimately cost the company money. Arbitrators should inquire into the reasons for deposing each proposed deponent. If the information requested is central to the case but it could be obtained by means of a document exchange or from one deposition rather than three, then the need for some depositions can be eliminated.

Corporate designee depositions can be a useful way of obtaining central information from a corporate respondent without wasting unnecessary time and expense on a litany of potential fact witness depositions.

When interrogatories are requested, the arbitrator must find out why. Interrogatories were designed for litigation and until recently were a foreign practice in arbitration. Their use is and should be very rare. If the arbitrator decides to allow interrogatories, they should be very limited in number and seek only specific facts or further detail with respect to specific contentions of the party.

Selecting the Right Counsel and Arbitrator

In my experience, parties who manage the arbitration process most efficiently recognize that arbitration is fundamentally different from litigation, so they don’t try to litigate in the arbitration forum. First of all, they do not just toss a boilerplate arbitration clause in their contract. They use a well-tested arbitration clause (as opposed to a pathological clause) that they may have tailored to the needs of the transaction. In addition, they recognize the importance of selecting the right counsel to represent them in the arbitration.

Once a dispute arises, in-house counsel will interview lawyers from different firms to find one who has solid experience representing parties in arbitration and respects the company’s goals for the arbitration. Both subject matter expertise and a detailed understanding of the arbitration forum are vital considerations in the selection of counsel.

Next, in-house counsel works with outside counsel in the arbitrator-appointment process. The goal is to appoint a highly qualified arbitrator who has subject matter expertise, arbitration process experience, a reputation for being an
active manager, and a temperament and style that are appropriate for the dispute.

Selecting the right arbitrator is absolutely critical to achieving an arbitration that will satisfy each party’s goals for the arbitration. Parties and their counsel often fail to spend the time and effort necessary to ensure that they are selecting an arbitrator who is appropriate for the particular case to be arbitrated.

In-House Counsel’s Involvement Is Strongly Encouraged

Arbitration proceedings are conducted more efficiently and economically when each party’s in-house counsel is proactively involved in the case from day one, and participates in making strategic decisions before and during preliminary hearings, such as whether to file a particular motion, or how much and what kind of discovery to request, whether experts will be needed and if so, how expert evidence will be presented, among other things. With the involvement of in-house counsel throughout the proceeding, the parties’ attorneys are less likely to initiate strategies that would increase the cost and time of the arbitration.

Closing Thoughts and Learning Points

When properly managed, arbitration is the gold standard in binding dispute resolution. It is the most fair, flexible, efficient and cost-effective method available for resolving disputes. In order to achieve these objectives, arbitrators, counsel and the parties should keep the following 10 learning points in mind:

1. The role the arbitrator plays in arbitration should not be that of a dictator nor a referee. While respecting the principle of party autonomy, arbitrators have the authority and the obligation to be active managers of the arbitration process.

2. Arbitration is fundamentally different from litigation; procedures designed for the courtroom may not be appropriate for most arbitration cases.

3. One of the greatest benefits of arbitration is its flexibility to structure the arbitration process to meet the needs of the case. Arbitration is not a “one-size fits most” process.

4. When the procedures requested by the parties threaten the efficient and cost-effective resolution of the matters to be decided in arbitration, arbitrators should intercede, using their arbitral management skills, for example by articulating the negative consequences of those procedures and offering better alternatives.

5. Unnecessary discovery is a waste of the parties’ time and money.

6. The arbitrator has authority to proactively manage the arbitration process. The appropriate exercise of this authority is particularly important as it relates to the nature and extent of discovery, including the scope of electronic discovery and the number and length of depositions.

7. The arbitrator should employ the principle of proportionality when exercising her authority concerning discovery. When additional discovery is appropriate in the arbitrator’s view because it is material to an important disputed issue in the case, the discovery request should be narrowly focused and not disproportionate to the amount in controversy.

8. Recognizing that arbitration is fundamentally different from litigation, both subject-matter expertise and a detailed understanding of the arbitration forum are vital considerations in the selection of counsel.

9. Arbitration proceedings are conducted more efficiently and economically when in-house counsel is proactively involved from the outset of the case.

10. Arbitration was intended to be different from litigation. It was intended to be free from litigation’s strictures and formality, as well as less expensive, more efficient, and final and binding, while affording the parties a fair and impartial hearing on the issues submitted to arbitration.

ENDNOTES

1. The ICDR is the international division of the AAA.
2. The ICDR guidelines are available on the ICDR Web site at www.ICDR.org.
3. The guideline states: “The tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy.”
4. The guidelines can be adopted in an arbitration clause or separate agreement of the parties and the tribunal in other types of cases administered by the AAA, including construction cases.
6. Motion practice can add substantially to the cost and time it takes to complete an arbitration.
Click here to go to the Commercial Arbitration Rules

Effective 10/1/13

Click here to go to the Construction Arbitration Rules

Click here to go to the Employment Arbitration Rules

Click here to go to the Labor Arbitration Rules