LTN Law Technology News

Arbitration's E-Discovery Conundrum[1]

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The National Law Journal

12-16-2008

It's no secret that the recent expansion of document discovery in federal civil litigation has driven many corporations and their lawyers to eschew court battles for alternative dispute resolution.

Today, however, the experience of massive, uncontrolled document discovery, particularly with regard to electronic documents, has eviscerated most of the benefits of arbitration.

The broad scope of Federal Rule of Civil Procedure 26, which deals with discovery, as interpreted by the courts and exacerbated by electronic technology and creative trial counsel, has hugely increased litigation costs in terms of dollars, time to resolution and the burden on management. Thirty years ago, the specter of copying, storing and producing tens of millions of hard-copy documents caused many in-house and outside counsel to consider arbitration as a cheaper and faster alternative to litigation.

But as litigation discovery techniques have become more prevalent in arbitration, arbitration has become just as time-consuming, expensive and burdensome. Without the benefit of an appeal process for the losing party, the primary remaining benefit for binding arbitration -- privacy -- is often outweighed by the other negative factors.

Parties and their litigation counsel have pointed to runaway discovery as one major reason why they have abandoned arbitration in favor of mediation in the United States and even internationally.

How can the long-recognized benefits of arbitration -- speed and cost savings -- be restored? To regain favor among parties and their legal representatives, the process must address the needs and interests that led them to arbitration in the first place: to balance the need to discover those documents reasonably necessary for a party to prove its case with the cost, burden and time involved in producing such documents, while taking into account the need for fundamental fairness and to avoid surprise and trial by ambush.

Understanding the problem requires a look at the development of electronic discovery rules and what some arbitral institutions are doing to address the situation. This article will describe briefly how we got here.

The 1925 Federal Arbitration Act created a body of federal substantive law that recognized contracting parties' obligations to honor a private agreement to submit a dispute to arbitration.

Although the FAA authorized arbitrators to subpoena witnesses and documents for testimony at hearings, it did not specifically address the subject of prehearing discovery. Many commentators and court decisions have differed on whether prehearing discovery is permitted under the act. At a minimum, one can infer that no right to discovery exists without an express agreement by the parties to the contrary.

Recent experience, however, has shown that arbitrators are reluctant to deny or limit discovery when confronted with trial counsel used to the breadth of discovery under Rule 26. Moreover, the threat of overturning an award or not being selected for a future case weighs heavily and has resulted in many arbitrators expanding the scope of prehearing discovery to more closely resemble that prevalent in the federal courts.

In addition, parties have adopted the approach of spelling out in detail in their predispute arbitration agreement the scope of discovery preferred in the event that a dispute arises.

The 1955 Uniform Arbitration Act, which was adopted by virtually all of the states except New York, was silent with respect to discovery. It was modeled after Article 75 of the New York Civil Practice Law and Rules, which still governs arbitrations in that state.

The 2000 Revised Uniform Arbitration Act includes several explicit provisions dealing with discovery. Section 17(c) provides that arbitrators "may permit such discovery as [they] decide ... is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious and cost effective." The RUAA has been adopted by at least 12 states and the District of Columbia and is currently under consideration for adoption in New York.

Although the RUAA provides that the scope and breadth of permitted discovery remain within the discretion of the arbitrator, the various factors described above have resulted in arbitrators acceding to the wishes of one party, or both, to expand discovery in prehearing arbitration proceedings to closely resemble that permitted in the courts.

Thus, the original benefits of arbitration perceived by the FAA and by corporate and legal proponents of arbitration -- speed, efficiency, low cost and control -- have fallen victim to the e-discovery morass. And companies and their lawyers who used to seek arbitration over litigation are now choosing mediation over arbitration.

What can be done to save arbitration from the e-discovery morass? To address this compelling need, arbitral institutions have assumed a greater role to provide comprehensive guidelines for shaping discovery and resolving disputes.

THE DRAFT CPR PROTOCOL

The International Institute for Conflict Prevention and Resolution arbitration committee has proposed and will soon promulgate a protocol that seeks to alleviate the problems created by runaway discovery.

Underlying the protocol is the philosophy that arbitration must be expeditious, cost-effective and fundamentally fair. Section 1(a) of the protocol reads, "[a]rbitration is not for the litigator who will 'leave no stone unturned.' ... [Z]ealous advocacy must be tempered by an appreciation for the need for speed and efficiency ... .[D]isclosure should be granted only as to those items that are relevant and materials for which a party has a substantial, demonstrable need."

The guidelines provide that the disclosure of electronic documents shall follow the general principles of narrow focus and balancing cost, burden and accessibility with the need for disclosure. Production of e-materials from a wide range of users or custodians, which is both costly and burdensome, should not be permitted without a showing of extraordinary need.

The CPR guidelines present a cafeteria list of potential modes of disclosure from which the parties may select as a practical approach to the breadth of permitted discovery. Mode A, the narrowest scope, provides for no prehearing disclosure other than copies of printouts of e-documents to be presented in support of each party's case. Mode B provides that each side produce e-documents maintained by an agreed limited number of designated custodians, that the disclosure be limited to e-documents created from the date of signing the arbitration agreement to the date of filing the request for arbitration, and that production be limited to e-documents from primary storage facilities. In other words, no documents from backup servers, backup tapes, cell phones, personal digital assistants or voicemails will be produced. And no information obtained through forensic methods will be admitted in evidence.

Mode C provides for a larger number of specified custodians and a wider time period than Mode B, and also provides that the parties may agree to allow documents obtained through forensic methods to be admitted. Finally, Mode D provides for disclosure of electronic information regarding nonprivileged matters relevant to any party's claim or defense, subject to limitations of reasonableness, duplicativeness and undue burden. It is a broad level of disclosure similar to that required or permitted under FRCP Rule 26.

Other arbitral institutions are issuing e-discovery guidelines similar to those of CPR.

CHARTERED INSTITUTE PROTOCOL

For example, the Chartered Institute Protocol for E-Disclosure in Arbitration, newly promulgated in October, shares many of the same purposes and concepts, including early consideration of the scope and conduct of e-disclosure; avoidance of unnecessary cost and delay; reasonable and appropriate steps for the retention and preservation of e-documents; agreements by the parties to limit the scope and extent of production; reduction of the cost and burden of production; and placement of the ultimate burden of persuasion on the requesting party.

The CIP authorizes the parties to confer at the earliest opportunity regarding the preservation and disclosure of e-documents and the scope and methods of production.

Matters for early consideration include the types of electronic documents, computer systems, devices, storage systems and media involved. Early consideration matters also include appropriate steps for the retention and preservation of e-documents; the applicable rules of practice; an agreement to limit the scope and extent of disclosure; the tools and techniques to consider in reducing the burden and cost of e-disclosure; and whether any party or the tribunal may benefit from professional guidance on information technology issues.

The Chartered Institute's Protocol for E-Disclosure in Arbitration, like the CPR Protocol, is quite comprehensive. A particular strength is the detail regarding IT capabilities, media and the potential use of professional IT experts. A possible weakness is the lack of detailed choices regarding potential modes of production, as provided by the CPR Protocol.

THE ICDR

The International Centre for Dispute Resolution, the international arm of the American Arbitration Association, issued guidelines for arbitrators concerning the exchange of information, which became effective in May.

While the introduction to the ICDR guidelines provides a general statement that international commercial arbitration should offer a "simpler, less expensive and more expeditious form of dispute resolution than resort to national courts," the guidelines themselves offer only limited suggestions for dealing with runaway discovery, especially e-discovery.

To that end, the guidelines provide that "[t]he tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy ... [by] avoid[ing] 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."

Under the ICDR guidelines, the only documents required to be exchanged are those on which a party intends to rely. The sole provision dealing with e-documents speaks primarily to the form in which such documents shall be disclosed (the form in which they are maintained, absent a showing of compelling need by the requesting party for production in a different form). Finally, requests for e-documents "shall be narrowly focused and structured to make searching for them as economical as possible."

IBA RULES

Similarly, the International Bar Association Rules on the Taking of Evidence (1999) provide little guidance in addressing the problems of runaway e-discovery in arbitration proceedings.

Article 3, Section 2 provides that any party may submit to the tribunal a request to produce documents (including electronic documents), subject to exclusion on grounds of relevance or

materiality, legal impediment or privilege, unreasonable burden to produce, or considerations of fairness or equality that the tribunal determines compelling. Section 9.2.

Thus, while the IBA Rules offer few specifics, one gets the sense that arbitrators armed with these rules may feel relatively secure exercising their discretion to resist e-discovery fishing expeditions.

In sum, the application of the broad discovery standards in arbitration proceedings has led to parties forgoing arbitration altogether in favor of mediation.

New arbitration protocols and guidelines seek to change the e-discovery landscape by narrowing the focus, providing a balancing test and shifting the burden to the requesting party to demonstrate that the need for disclosure outweighs the cost and burden of disclosure.

Thus, the protocols seek to recapture the traditional benefits of arbitration -- speed, efficiency and cost saving -- while preserving fundamental fairness.

Ultimately, the success of these efforts to stem the tide of runaway e-discovery in arbitration rests upon the parties' agreements to use the protocols and the arbitrators' willingness to exercise their discretion to enforce such agreements.

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