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Will Discovery Kill Arbitration?

Kevin Mason*

I. INTRODUCTION

In response to the rising cost of litigation, arbitration has become the faster and less expensive alternative for resolving business disputes.¹ Arbitration is a “private system of adjudication where parties agree to refer their dispute to an arbitral tribunal of their choice, and to accept the tribunal’s decision as final and binding.”² Most arbitrations include aspects of litigation, such as discovery, which the parties agree upon beforehand. Essentially, the parties contract for how they want their dispute to be handled, and within those terms, the arbitrator hears both sides and makes a decision.³ Arbitration is often an attractive option because it is efficient in terms of both time and economic resources.⁴ However, since the expansion of discovery in arbitral procedures, arbitrations take longer, potentially rendering arbitration a less advantageous option than it was in the past.⁵

Historically, in the United States, pre-arbitration discovery was of minimal importance.⁶ Arbitration was first seen as a way for small issues to be resolved with “swift, rough justice.”⁷ The parties to an arbitration felt this form of justice was acceptable due to the small size and nature of the disputes brought to arbitration at that time.⁸ In fact, in many other countries, pre-arbitration discovery is *still* a non-issue.⁹ The laws of France and Spain, for example, provide for little to no pretrial discovery, and as a result, these countries do not have persisting issues with pre-arbitration discovery.¹⁰ In the United States, on the other hand, pre-arbitration discovery has become more extensive because the issues brought to arbitration have grown in size and importance.¹¹ Now, the arbitration of complex issues with

* J.D. Candidate, University of Missouri School of Law, 2020. I would like to thank Dean Bob Bailey for being my faculty advisor, Ryan Blansett for his guidance, and Robert Temple for selecting this article for publication.

1. Anne B. O’Hagen, *Balancing Burdens: Clarifying the Discovery Standard in Arbitration Proceedings*, 117 YALE L. J. 1559, 1559 (2008).

2. JOYCE A. TAN, WORLD INTELLECTUAL PROPERTY ORGANIZATION GUIDE ON ALTERNATIVE DISPUTE RESOLUTION OPTIONS FOR INTELLECTUAL PROPERTY OFFICES AND COURTS 31 (2d ed. 2018).

3. *Id.* at 32.

4. Adam Rattray, *Key Features of Arbitration*, WORLD INTELLECTUAL PROP. ORG. ARBITRATION & MEDIATION CTR. (Sept. 18, 2014), <https://ec.europa.eu/jrc/sites/jrcsh/files/adam-rattray-key-features-arbitration.pdf>.

5. John Wilkinson, *Arbitration Discovery: Getting it Right*, 21 DISP. RESOL. MAG. 4, 4 (2014).

6. *Id.*

7. *Id.*

8. *Id.*

9. Thomas Halket, *10 Important Elements of Arbitration Agreements*, PRIORI LEGAL (Jan. 25, 2017), <https://www.priorilegal.com/blog/10-important-elements-of-arbitration-agreements>.

10. Lukas Holub, *Discovery Abroad: An Overview of European Blocking Statutes & the Hague Convention on the Taking of Evidence Outside the U.S.—Part One of Two*, NAT’L INST. FOR TRIAL ADVOCACY BLOG (Oct. 27, 2019, 8:30 AM), https://www.nita.org/blogs/discovery-abroad-an-overview-of-european-blocking-statutes-and-the-hague-convention-on-the-taking-of-evidence-outside-the-us-part-one-of-two#_ftn4; see also Geoffrey Sant, *Court-Ordered Law Breaking*, 81 BROOK. L. REV. 187, 244 (2016) (providing greater depth on the blocking statutes found in the French and Spanish legal systems).

11. See Wilkinson, *supra* note 5.

millions of dollars at stake is common, and lawyers have fought to incorporate elements from litigation, including more expansive discovery, into the arbitration process so parties may present their best case to the tribunal.¹²

Though lawyers are advocating for expansive discovery procedures to facilitate the best-trying arbitrations for their clients, expansive discovery could cause arbitration to lose its key features or lead to abuses by repeat players within the arbitral system.¹³ Discovery with few limitations can make arbitrations more expensive and slower. While the average arbitration is approximately twenty months faster than the average trial, the time it takes for an arbitration to begin has been steadily increasing.¹⁴ Moreover, without a central binding authority defining or limiting the extent of discovery—thus leaving that determination to the parties—arbitrators can only suggest how discovery should be handled.¹⁵

This Comment will explore the reasons for the increase in discovery and discuss whether anything should be done to stifle the growth of pre-arbitration discovery. Section II will review the origins and history of arbitration in the United States and is followed by Section III, a discussion of why discovery must, in fact, be limited to preserve the advantages of arbitration. Section IV will explore the recent development of electronic discovery and its effects on the discovery process within arbitration. Finally, Section V will consider the use and advantages of an electronic neutral during pre-arbitration discovery as a way to streamline the discovery process. Ultimately, this Comment argues one of the key attributes of arbitration, its speed as compared to litigation, would be better preserved by limiting the discovery process in arbitration.

II. THE HISTORY OF ARBITRATION IN THE UNITED STATES

To understand how arbitration reached its current state as a “private forum for litigation practices,” it is necessary to understand arbitration’s origin and evolution.¹⁶ Arbitration first came into wide use in Western Europe within the region’s maritime-based economy.¹⁷ There, arbitration was used to minimize conflict between merchants and allow business relationships to carry on in a profitable manner during a dispute.¹⁸ Had parties litigated instead, the business relationship would likely have ceased.¹⁹

Arbitration was brought to North America well before the formation of the United States by colonizers from Western Europe.²⁰ Documents dated as early as the 1640s from the Massachusetts colony outline the settlement of a dispute over carpentry work through arbitration.²¹ George Washington, the first President of the

12. *Id.*

13. Hossam M. Fahmy, *Arbitration: Wiping Out Consumers Rights?*, 64 TEX. B.J. 917, 920 (2001).

14. *Id.*

15. Wilkinson, *supra* note 5.

16. Steven Certilman, *Throw Down the Muskets, Seek Out the Town Elders*, 3 N.Y. STATE BAR ASS’N DISP. RESOL. LAW. 4, 10 (2010).

17. *Id.*

18. *Id.*

19. *Id.*

20. Henry S. Fraser, *A Sketch of the History of International Arbitration*, 11 CORNELL L. REV. 179, 198 (1926).

21. Certilman, *supra* note 16.

United States, even recommended arbitration in his will, writing that all “disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants each having the choice of one and the third by the two of those.”²²

The use of arbitration boomed after the Civil War in response to the rise of disputes between African Americans and former slave-owners and disputes over land rights within the former Confederate States.²³ In 1871, the New Orleans Cotton Exchange became one of the first sizeable entities to fully move to arbitration as the means by which it settled all its disputes.²⁴ Like the maritime businesses of Western Europe, the New Orleans Cotton Exchange favored arbitration because it was fast and allowed business to continue during a dispute.²⁵ Similarly, when disputes involved farming ground, disputants turned to arbitration because they needed their issues resolved quickly so they could continue farming, producing, and earning income.²⁶

As the Industrial Revolution continued in the United States, trade groups realized arbitration’s advantages—its speed, simplicity, and low costs—and began adding bylaws that adopted arbitration as the primary method of dispute resolution.²⁷ Moreover, trade groups placed great value on being able to continue working relationships with parties after the dispute was decided, and arbitration allowed for quasi-litigation while also enabling the parties to continue a partnership that litigation would otherwise likely destroy.²⁸

The Federal Arbitration Act of 1925 (“FAA”) was the first statute supporting arbitration, thus solidifying arbitration’s place in United States dispute resolution.²⁹ The FAA’s goal was to overcome judicial hostility towards alternative dispute resolution (“ADR”) and help provide a framework for moving disputes to arbitration.³⁰ The FAA concerns maritime disputes and states, in relevant part, disputes would be “embraced within admiralty jurisdiction.”³¹ It is important to note that the FAA does not reference pre-arbitration discovery explicitly.³² However, Section 7 of the FAA indirectly touches on discovery by conferring arbitrators power to summon any person to appear before the arbitrator and bring “any book, record, document, or paper which may be deemed as material as evidence in the case.”³³

In 1970, U.S. arbitration reached another major milestone when the New York Convention became law upon the adoption of a second chapter to the FAA.³⁴ After

22. *Id.*

23. *Id.*

24. *Id.*

25. *See id.*

26. *Id.*

27. Certilman, *supra* note 16.

28. *Id.*

29. 9 U.S.C. § 1 (1947).

30. Certilman, *supra* note 16.

31. 9 U.S.C. § 1 (1947).

32. *See generally* George E. Lieberman, *Discovery in an Arbitration Proceeding & Appealing an Award Under the Federal Arbitration Act*, THE FED. LAWYER 54 (May 2009), http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2009/The%20Federal%20Lawyer%20-%20May%202009/Features/Discovery-in-an-Arbitration-Proceeding-and-Appealing-an-Award-Under-the-Federal-Arbitration-Act.aspx?FT=.pdf.

33. 9 U.S.C. § 7 (1947).

34. Certilman, *supra* note 16.

at this point, the use of arbitration in the U.S. substantially increased.³⁵ In fact, the impact of adopting the New York Convention is still visible today, as arbitration continues to be the main forum to decide international disputes amongst U.S. businesses and disputes between foreign and domestic businesses with huge economic stakes.³⁶ Between 1962 and 2002, there was an eighty-four percent decrease in the number of cases decided by federal courts.³⁷ Understandably, “because of expense and delay, both civil bench trials and civil jury trials are disappearing.”³⁸ As the use of civil litigation decreased, the use of arbitration increased.³⁹ Over time, the arbitration procedures of the past have evolved and adopted processes that were previously reserved for the courtroom. The benefits of arbitration are at risk because discovery, particularly electronic discovery, is becoming more prevalent as parties seek to build the best arguments possible to win in the arbitral tribunal.

III. LIMITING DISCOVERY TO PRESERVE ARBITRATION’S BENEFITS

With the expansion of discovery in litigation, arbitration has followed suit.⁴⁰ Disputants understandably want to uncover as much evidence as they can to have the best-possible arbitration result, especially in corporate disputes when millions of dollars are on the line.⁴¹ That said, disputants and arbitrators alike should proceed with caution in order to preserve the benefits of arbitration.⁴² Discovery, particularly electronic discovery, can be very expensive and time-consuming.⁴³ The longer it takes to complete pre-arbitration discovery, the more time and resources the parties expend,⁴⁴ and the more arbitration’s key benefits are eroded.⁴⁵ Although arbitration is still much faster and more economical, on average, than litigation, complaints of increased time and money in arbitration are rising.⁴⁶ Survey findings indicate that arbitration users who were dissatisfied with the speed, efficiency, and economy of arbitration believe the issues they encountered were due to excessive discovery in arbitration over fifty percent of the time.⁴⁷

35. *Id.*

36. *Id.*

37. College of Commercial Arbitrators, *Protocols for Expedious, Cost-Effective Commercial Arbitration: Key Action Steps for Business Users, Counsel, Arbitrators, and Arbitration Provider Institutions*, in COUNSEL, ARBITRATORS & ARBITRATION GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 456 (2010).

38. *Id.*

39. *Id.*

40. Wilkinson, *supra* note 5.

41. *Id.*

42. *Id.*

43. *Id.*

44. Carolyn B. Lamm, Eckhard R. Hellbeck, & Nikolaos Tsolakidis, *International Arbitration in a Globalized World*, 20 DISP. RESOL. MAG. 2, 4 (2014).

45. Nat’l Conference of Comm’rs on Unif. State Law, *Uniform Rules Relating to the Discovery of Electronically Stored Information* (Aug. 3, 2007), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=57388cb7-b6a0-4520-6f3d-099ea2e8fe3e&forceDialog=0>.

46. Wilkinson, *supra* note 5.

47. College of Commercial Arbitrators, *supra* note 37.

Organizations such as the American Bar Association (“ABA”) and the American Arbitration Association (“AAA”) are taking measures to limit the scope of discovery, such as advocating for arbitrators to take a more hands-on approach in the pre-arbitration stage, but practitioners, arbitrators, and participating parties must intentionally bring these mitigating factors into play.⁴⁸ The New York State Bar Association (“NYSBA”) issued *Guidelines for the Arbitrator’s Conduct of the Pre-Hearing Phase of Domestic, Commercial Arbitrations* (“*Guidelines*”) in 2009.⁴⁹ Shortly thereafter, in 2010, the College of Commercial Arbitrators (“CCA”) released *Protocols for Expedient, Cost-Effective Commercial Arbitration* (“*Protocols*”).⁵⁰ Both NYSBA’s *Guidelines* and CCA’s *Protocols* attempt to keep arbitration cost-and-time-effective by examining the arbitration process through the varied perceptions of businesses, in-house counsel, outside counsel, and arbitrators.⁵¹ The main way both sources attempt to increase efficiency is by limiting the pre-arbitration discovery process so that only the most relevant information is discoverable.⁵²

If all participants to arbitrations do not proactively implement *Guidelines* and/or *Protocols*, or similar mitigating tactics as suggested below, the benefits of arbitration will continue to erode until they have been lost altogether. However, if arbitrators can impress on the parties the need for arbitrator control over the discovery process, then the key benefits of arbitration over litigation, mainly its speediness and low cost, will be better preserved.

A. NYSBA Guidelines

One serious problem in pre-arbitration discovery procedures is inconsistency.⁵³ Inconsistent pre-arbitration discovery procedures have led to an unfortunate unpredictability, leaving parties wondering what to expect from the pre-arbitration process.⁵⁴ Some arbitrators allow massive discovery and, as a result, the parties lose all the benefits of arbitration. Other arbitrators are so focused on preserving the efficiency of arbitration that the process yields poor outcomes due to the lack of discovery, essentially robbing arbitration of its credibility as a dispute resolution mechanism.⁵⁵ The goal of *Guidelines* is to help arbitrators navigate the muddled waters and conduct an efficient proceeding while still enabling the parties to fully present their cases.⁵⁶

Guidelines sets a definite scope of discovery at the outset of the process before more concrete issues within the discovery process arise, thus avoiding uncertainty

48. Wilkinson, *supra* note 5.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Guidelines for the Arbitrator’s Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations & Guidelines for the Arbitrator’s Conduct of the Pre-Hearing Phase of International Arbitrations*, N.Y. STATE BAR ASS’N DISPUTE RESOLUTION SECTION 5 (2009), https://www.adr.org/sites/default/files/document_repository/NYSBA%20Guidelines%20for%20the%20Arbitrator%27s%20Conduct.pdf [hereinafter *Guidelines for the Arbitrator’s Conduct*].

54. *Id.*

55. *Id.*

56. *Id.* at 6.

and surprise during the pre-arbitration discovery period.⁵⁷ Early attention to the scope of the discovery increases the likelihood that the parties choose to focus on fairness and efficiency instead of the partisan positions that inevitably move to the forefront as the arbitration proceeds.⁵⁸ *Guidelines* also instructs arbitrators to “set ambitious hearing dates and aggressive interim deadlines which, the parties are told, will be strictly enforced, and which, in fact, are thereafter strictly enforced.”⁵⁹ When an arbitrator does so, the parties are forced to stay on track and be efficient with their discovery, so as not to miss any of the imposed deadlines and potentially hurt their case.⁶⁰

The drafters of *Guidelines* also suggest setting a definite scope for document requests.⁶¹ Document requests should be limited to “documents which are directly relevant to significant issues in the case or to the case’s outcome” and “restricted in terms of time frame, subject matter and persons or entities to which the requests pertain, and should not include broad phraseology such as ‘all documents directly or indirectly related to.’”⁶² Limiting document requests in this manner will ensure that discovery returns only the documents that are most relevant, thereby preserving efficiency.⁶³

B. CCA Protocols

Shortly after the NYSBA published *Guidelines*, the CCA published *Protocols*.⁶⁴ In agreement with the NYSBA, the drafters of *Protocols* believe the root cause of present-day efficiency problems to be arbitration’s growing similarity to litigation, due primarily to the increasingly high stakes of commercial arbitration.⁶⁵ The two main ways *Protocols* found arbitration to resemble litigation were in the pre-arbitration discovery process and in motion practice.⁶⁶ *Protocols* aims to preserve the key features of arbitration by encouraging arbitrators to provide more detail about the arbitration process on the front end and explain, in particular, the elements of the process.⁶⁷ Arbitrating “under [standard rules] without specifying in more detail . . . how discovery will be handled . . . [will result in] a proceeding similar to litigation.”⁶⁸ Therefore, the most important step an arbitrator can take to facilitate an efficient arbitration is to intentionally—and explicitly—control the discovery process to the best of his or her ability.⁶⁹

Although parties must agree, arbitrators can control discovery in multiple ways.⁷⁰ As suggested by *Protocols*, arbitrators can provide varied discovery options for the parties to choose from at the immediate outset of the dispute, before the

57. *Id.* at 7.

58. *Id.* at 7.

59. *Guidelines for the Arbitrator’s Conduct*, *supra* note 53, at 8.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 7.

64. College of Commercial Arbitrators, *supra* note 37.

65. *Id.* at 11.

66. *Id.* at 9.

67. *Id.*

68. *Id.* at 8.

69. *Id.* at 22.

70. College of Commercial Arbitrators, *supra* note 37.

discovery process has even started.⁷¹ Similarly, arbitrators can schedule checkpoints within the discovery process to stay actively involved in the arbitration.⁷² Finally, *Protocols* states the best way an arbitrator can ensure an efficient discovery process is to limit its scope to what is absolutely necessary and limit parties' ability to change the scope of discovery to instances in which they can demonstrate hardship.⁷³ These tactics can reduce costs, even if only by avoiding disagreements over the scope of discovery.⁷⁴

C. *Barriers to Limiting Discovery*

In addition to arbitrators, parties can also limit discovery by specifying the scope of discovery in the arbitration agreement.⁷⁵ Limiting discovery in this manner is very efficient, but may not always uncover the most effective arguments, as different disputes necessitate varying amounts of discovery.⁷⁶ On the opposite end of the spectrum, if both parties desire unlimited discovery, there is, unfortunately, nothing the arbitrator can do; he or she must simply respect the parties' decision and disregard *Guidelines* and *Protocols*.⁷⁷ In such a situation, the arbitrator must make clear to the parties the likely negative consequences of such broad discovery—increased time and money.⁷⁸

The potential legal ramifications of limiting discovery too much are a legitimate concern for arbitrators.⁷⁹ Section 10 of the FAA states that one of the few situations in which an arbitration award may be vacated is “where the arbitrators were guilty of misconduct in refusing . . . to hear evidence pertinent and material to the controversy.”⁸⁰ This has led some arbitrators to allow overly extensive discovery out of fear that their award could otherwise be challenged.⁸¹ It is worth noting that the drafters of *Guidelines* believe this concern to be overstated, as very few arbitral awards have been vacated due to a lack of discovery.⁸²

IV. ELECTRONIC DISCOVERY AND ARBITRATION

Electronic discovery is becoming more common, but remains notoriously resource-intensive, rapidly consuming both time and money.⁸³ Electronic discovery is the technological aspect of identifying, collecting, and producing electronically stored information (“ESI”) in response to a request for production.⁸⁴ ESI includes, but is not limited to: emails, documents, presentations,

71. *Id.* at 22.

72. *Id.*

73. *Id.* at 29

74. *Id.*

75. *Id.* at 26.

76. College of Commercial Arbitrators, *supra* note 37.

77. *Id.* at 22.

78. *Id.*

79. 9 U.S.C. § 10 (1947).

80. *Id.* at § 10(a)(3).

81. *Guidelines for the Arbitrator's Conduct*, *supra* note 53, at 11.

82. *Id.* at 12.

83. Wilkinson, *supra* note 5.

84. *The Basics: What is e-Discovery?*, COMPLETE DISCOVERY SOURCE, <https://cdslegal.com/knowledge/the-basics-what-is-e-discovery/> (last visited Apr. 1, 2019).

databases, voicemails, audio and video files, social media posts, and websites.⁸⁵ ESI has become much more prevalent in the last two decades as more and more information is created and stored electronically.⁸⁶ ESI can provide a multitude of relevant, easily accessible documents, but it is both time-consuming and expensive, which puts it at odds with the core goals of arbitration.⁸⁷ Today, over ninety percent of business information is stored electronically.⁸⁸ Thus, ESI is simply unavoidable.

The existence of ESI, of course, is not a problem on its own; it is the complexity of the technology that makes requesting, producing, and analyzing ESI so burdensome. ESI is often difficult to sift through due to the sheer volume of data produced and the intricacies of the files.⁸⁹ Electronic documents are dynamic, meaning they store more information than just the words in the document,⁹⁰ thus adding another complication to the search process.⁹¹ Metadata must often be preserved, as it may later have ramifications for dispute resolution; if metadata is *not* preserved, claims of spoliation may arise during arbitration.⁹² Because many parties are unequipped to handle the challenges of producing or filtering through ESI, electronic discovery can quickly threaten arbitration's speed and lower cost, once again, bringing it closer to litigation.

As ESI has developed, its use in the discovery process has become more common in litigation and, in turn, arbitration.⁹³ Due to the aforementioned complexity, parties should be cautious before diving into electronic discovery.⁹⁴ In many cases, though, electronic discovery can no longer be avoided because the world is becoming increasingly digital.⁹⁵ More than ever before, arbitrators must take an active role in the discovery process if the benefits of arbitration are to be fully realized.⁹⁶ The most important step an arbitrator can take is to determine the exact parameters for the use of ESI—scope of discovery, deadlines, preservation, and preliminary production issues—in the initial stages of the arbitration.⁹⁷

A. *Scope of Discovery*

At the beginning of the discovery process, data is analyzed to distinguish the clearly non-relevant documents and emails from relevant ones.⁹⁸ Next, the data is hosted in a secure environment and made accessible to reviewers who code the documents for their relevance to the legal matter being disputed.⁹⁹ Finally, potentially relevant data is collected and then extracted, indexed, and placed into a

85. *Id.*

86. Wilkinson, *supra* note 5.

87. *Id.*

88. Nat'l Conference of Comm'rs on Unif. State Law, *supra* note 45.

89. *Id.*

90. Electronic documents, for example, often contain metadata such as timestamps, author information, recipient information, and file properties. *Id.*

91. Nat'l Conference of Comm'rs on Unif. State Law, *supra* note 45.

92. Wilkinson, *supra* note 5.

93. *Id.*

94. *Id.*

95. Nat'l Conference of Comm'rs on Unif. State Law, *supra* note 45.

96. *Id.*

97. Richard Posell, *E-Discovery in Arbitration*, MEDIATE.COM: EVERYTHING MEDIATION (May 2010), <https://www.mediate.com/articles/posellR1.cfm>.

98. *Id.*

99. *The Basics: What is e-Discovery?*, *supra* note 84.

database.¹⁰⁰ To effectively engage in this process, parties must understand what they need and what the other side has requested, whether that be just a few emails or volumes of research data and business documents.¹⁰¹

As stated previously, defining the procedure and scope of discovery and production will help to mitigate disagreements later on, allowing for a more efficient arbitration process. Even if the scope of discovery changes, dictating scope early on will give all sides the chance to consider ways to limit discovery costs.¹⁰²

B. Deadlines

Counsel should use the first preliminary conference to gain an understanding of some realistic discovery and hearing dates, or to commit to reschedule a conference for the purpose of determining such dates.¹⁰³ If, during this pre-arbitration period, the arbitrator determines that more work remains to ensure an efficient arbitration, a “meet and confer” should be ordered.¹⁰⁴ A meet and confer is a meeting between the arbitrator and the parties to determine potential impasses and develop a plan to continue the arbitration.¹⁰⁵

The meet and confer should be viewed as a discovery crossroads.¹⁰⁶ If isolated issues remain unresolved but the parties are in agreement about the majority of issues pertaining to discovery, then the arbitrator should order the parties to resolve the isolated issues.¹⁰⁷ Examples of isolated issues that can likely be addressed in a meet and confer include the retention of privileged information, cost shifting, and the format of the data being produced.¹⁰⁸ These issues are fairly minor in the overall scheme of the discovery process, and the parties should be able to resolve them in a face-to-face meeting. The ideal outcome of the meet and confer is that all remaining issues are resolved and the discovery process can move forward.¹⁰⁹

C. Preservation

After data is identified by parties in a dispute, relevant documents are placed under a legal hold,¹¹⁰ meaning they cannot be modified, deleted, erased, or otherwise destroyed.¹¹¹ Oftentimes the relevant documents are converted to a static format, such as a TIFF or PDF,¹¹² making redaction of privileged and non-relevant information possible while also making substantive alterations impossible.¹¹³

100. *Id.*

101. Posell, *supra* note 97.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Posell, *supra* note 97.

108. *Id.*

109. *Id.*

110. *Id.*

111. *The Basics: What is e-Discovery?*, *supra* note 84.

112. “PDF” stands for Portable Document Format, and “TIFF” stands for Tagged Image File Format. *File Types Explained*, UC DAVIS STUDENT DISABILITY CTR., <https://sdc.ucdavis.edu/document-conversion/file-types-explained> (last visited Oct. 26, 2019).

113. *The Basics: What is e-Discovery?*, *supra* note 84.

The arbitrator may need to take an active role in the discovery process to ensure that the information is being preserved.¹¹⁴ For example, the arbitrator can set strict deadlines and enforce penalties for parties who do not produce electronic discovery or destroy ESI. Additionally, if a party destroys electronic documents, the arbitrator can assume the information destroyed was detrimental to the party who destroyed it.¹¹⁵ If a party is unwilling to take the necessary steps to preserve information, a court order, obtained by one of the parties, may be necessary before the arbitration can continue.¹¹⁶

D. Other Preliminary Production Issues

During preliminary production, the arbitrator should question whether counsel knows enough about their clients' systems and data storage to make commitments about some or all of the requested information.¹¹⁷ Are counsel sufficiently versed in the relevant technological issues to gather the necessary information, or will additional expertise be needed to address these issues?¹¹⁸ Electronic discovery experts may be required if the clients use highly-technical systems to store their data or if it is apparent that discovery will require technical expertise not possessed by the parties' attorneys.¹¹⁹

Electronic discovery experts—people who have expertise in filtering and finding electronically stored data—can create search protocols that are efficient while not being over or under-inclusive, protect proprietary information, and produce the data reliably and in a user-friendly format.¹²⁰ If the arbitrator concludes that a technical expert is necessary, the arbitrator may strongly urge the parties to add such an expert to the roster of attendees.¹²¹ In some cases, the need to hire such an expert is obvious and justified by the value of the dispute.¹²² While bringing in technical experts may create an added financial burden, doing so early in the arbitral process may help avoid costly mistakes and save multiples of the added cost in attorney time.¹²³ If parties resist, the arbitrator may hire his or her own expert and allocate the costs appropriately.¹²⁴

114. Posell, *supra* note 97.

115. E-DISCOVERY: THE FEDERAL RULES IN THE DIGITAL AGE, <https://www.sgrlaw.com/ttl-articles/820/> (last visited Apr. 1, 2019). This mirrors the stance of many U.S. jurisdictions that allow a jury to assume that the evidence destroyed was detrimental to the party destroying it. *Suppression Spoliation of Evidence*, LAW OFFICES OF KELLY & CONTE (July 9, 2017), <https://www.chestercountycriminalawyer.com/blog/2017/07/suppression-spoliation-of-evidence/>.

116. Posell, *supra* note 97.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Posell, *supra* note 97.

123. *Id.*

124. *Id.*

V. THE USE OF ELECTRONIC NEUTRALS IN ARBITRATION DISCOVERY

Electronic discovery, as well as budgetary restraints, have increased the need for experts in arbitration.¹²⁵ Budgetary restraints make experts attractive because, even though they cost more money when hired up front, their expertise will streamline the pre-arbitration discovery process and, in the end, save parties money.¹²⁶ Furthermore, there is a great need for electronic neutrals in arbitration discovery because so few attorneys and arbitrators are equipped to take on the unique challenges that ESI poses.¹²⁷ Fortunately, retaining an electronic neutral is more than just a necessity, as it benefits parties in arbitration in multiple ways.¹²⁸ The assistance of an electronic neutral in navigating electronic discovery is one way arbitrators and parties can manage discovery, thereby preserving arbitration's benefits.

Electronic neutrals go by many titles including special master, discovery arbitrator, and discovery referee.¹²⁹ Despite the various names, these individuals all perform the same task: produce electronic information.¹³⁰ An electronic neutral is generally an attorney with specific training in electronic discovery and alternative dispute resolution who acts as an amalgam of a judge and an expert.¹³¹ There are two types of electronic neutrals: ones that facilitate discovery and ones that act as decision-makers.¹³² Blogger Craig Ball describes an electronic neutral's job as "the sorts of things that the judge assigned to a case would do if the judge had more time and technical expertise, and that a neutral information technology ("IT") expert would do if the expert were an experienced trial attorney."¹³³

The legal training of an electronic neutral allows him or her to know what discovery is important and what is not.¹³⁴ Electronic expertise supplements electronic neutrals' legal knowledge, allowing them to navigate deeply into the digital realm.¹³⁵ Electronic neutrals help promote transparency and cooperation between the parties where possible and provide direction on discovery issues when the parties cannot reach a consensus.¹³⁶ By bringing in an electronic neutral, parties can save time and money during an arbitration.¹³⁷ These two benefits align perfectly with arbitration's key attribute of efficiency.¹³⁸

When parties consider using an electronic neutral, they are understandably concerned with cost and partisanship.¹³⁹ In actuality, an electronic neutral saves

125. Allison O. Skinner, *Alternative Dispute Resolution Expands Into Pre-Trial Practice: An Introduction to the Role of E-Neutrals*, 13 CARDOZO J. CONFLICT. RESOL. 113, 139 (2011).

126. *Id.*

127. Craig D. Ball, *E-Discovery Bulletin*, IMPROVING E-DISCOVERY OUTCOMES WITH ESI SPECIAL MASTERS (2014), http://www.craigball.com/LIT_FebMarch14_EDiscBulletin.pdf.

128. Skinner, *supra* note 125.

129. *Id.* at 114.

130. *Id.*

131. *Id.* at 133.

132. *Id.* at 114.

133. Ball, *supra* note 127.

134. Skinner, *supra* note 125.

135. *Id.* at 137.

136. *Id.* at 133.

137. *Id.* at 122.

138. *Id.* at 122-23.

139. *Id.* at 136.

money¹⁴⁰ because although electronic neutrals are generally more expensive than traditional IT experts, the cost is split between the parties.¹⁴¹ Clients may be resistant to retain an electronic neutral because they feel they are already paying the arbitrator and attorneys to do the same work.¹⁴² However, most attorneys and arbitrators lack the necessary technical expertise in digital matters and, as such, are not prepared to deal with the issues specific to electronic discovery. Thus, there is a high risk of attorneys who are not well versed in ESI overlooking or losing key information in the discovery process. In such cases, the arbitrator may make a binding decision in the absence of key information to the detriment of one or both parties.¹⁴³ Electronic neutrals can direct parties, help them outline the discovery process, and guide necessary production to minimize wasted time and resources and lessen the risks of oversight.¹⁴⁴ Parties save time because they are not hindered by an electronically–unskilled attorney performing electronic discovery or the unnecessary production of many irrelevant documents.¹⁴⁵

When material documents are mixed with privileged documents, an electronic neutral negates the need for separate and redundant examinations of the documents by partisan experts, again saving time and reducing costs.¹⁴⁶ An electronic neutral’s “ability to see information withheld on claims of privilege or confidentiality without triggering a waiver is a powerful hedge against abuse.”¹⁴⁷ Essentially, electronic neutrals are valuable to arbitrating parties because they play the role of an impartial participant whose overarching goal is to provide fair, speedy, and cost–effective electronic discovery.¹⁴⁸

An electronic neutral may also insulate parties from criticism during the discovery process.¹⁴⁹ As the discovery process proceeds, communication may break down, and the conflict resolution process can become a new and different conflict in itself.¹⁵⁰ An electronic neutral can help curtail the breakdown, at least with regard to conflicts that arise between parties over electronic discovery issues.¹⁵¹ When an electronic neutral is brought into the discovery process, he or she will first impart a clear understanding of what the disputants must do and what they must stop doing.¹⁵² A competent electronic neutral, for example, will stop data destruction—one of the largest concerns with ESI—and party posturing and help the parties separate the arbitration from the discovery process.¹⁵³ By reorienting parties, the electronic neutral will prompt parties to refocus on the merits of their claims.¹⁵⁴ The electronic neutral should also appoint a technical liaison from each party.¹⁵⁵ The technical liaison should not be one of the attorneys but, rather,

140. Skinner, *supra* note 125, at 136.

141. Ball, *supra* note 127.

142. *Id.*

143. *The Basics: What is e–Discovery?*, *supra* note 84.

144. Ball, *supra* note 127.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Ball, *supra* note 127.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

someone who works for a designated party and is equipped to answer questions about the relevant digital systems, applications, and capabilities.¹⁵⁶ Appointing a technical liaison introduces players into the discovery process with no history of animosity towards each other, thus establishing a culture of cooperation in the arbitration.¹⁵⁷

Although employing an electronic neutral may seem counterintuitive to some attorneys, the electronic neutral plays a valuable role. An electronic neutral, at the same time, must be prepared to remind counsel that the true beneficiaries of cooperation are the clients, and cooperation costs parties less in time and money while also safeguarding against both waste and sanctions.¹⁵⁸ Having an electronic neutral is an excellent way to promote the core tenets of arbitration.¹⁵⁹

VI. CONCLUSION

The core benefit of arbitration is its efficiency in reducing costs and resolution time as compared to a trial.¹⁶⁰ The increase in pre-arbitration discovery is threatening this efficiency.¹⁶¹ Arbitration practice follows trial practice, and as the discovery process in trial has become more expansive, so has it become more expansive in arbitration. Both the use of traditional discovery and electronic discovery have increased, resulting in concerns about arbitration's growing similarity to litigation.¹⁶² However, it is possible to address these complaints through increased arbitrator control of the discovery process and the selection of an electronic neutral for arbitrations that necessitate expansive electronic discovery.¹⁶³ Without action, the benefits of arbitration are at risk of being lost.

156. Ball, *supra* note 127.

157. *Id.*

158. *Id.*

159. *Id.*

160. Rattray, *supra* note 4.

161. Wilkinson, *supra* note 5.

162. College of Commercial Arbitrators, *supra* note 37.

163. *Id.*

