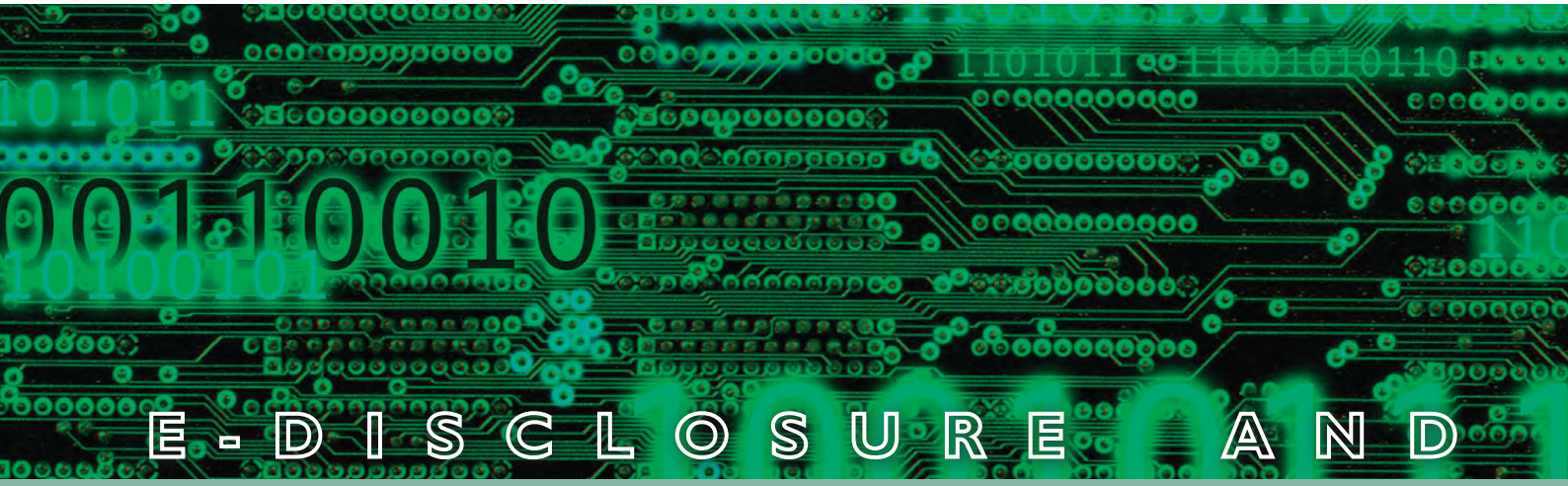
E-DISCOVERY & FORENSICS: EXPERT VIEW



E-DISCLOSURE AND ARBITRATION

Steven Finizio[1] of **WilmerHale** presents an overview of current global thinking on the acceptance of electronic evidence by the major institutions and rules

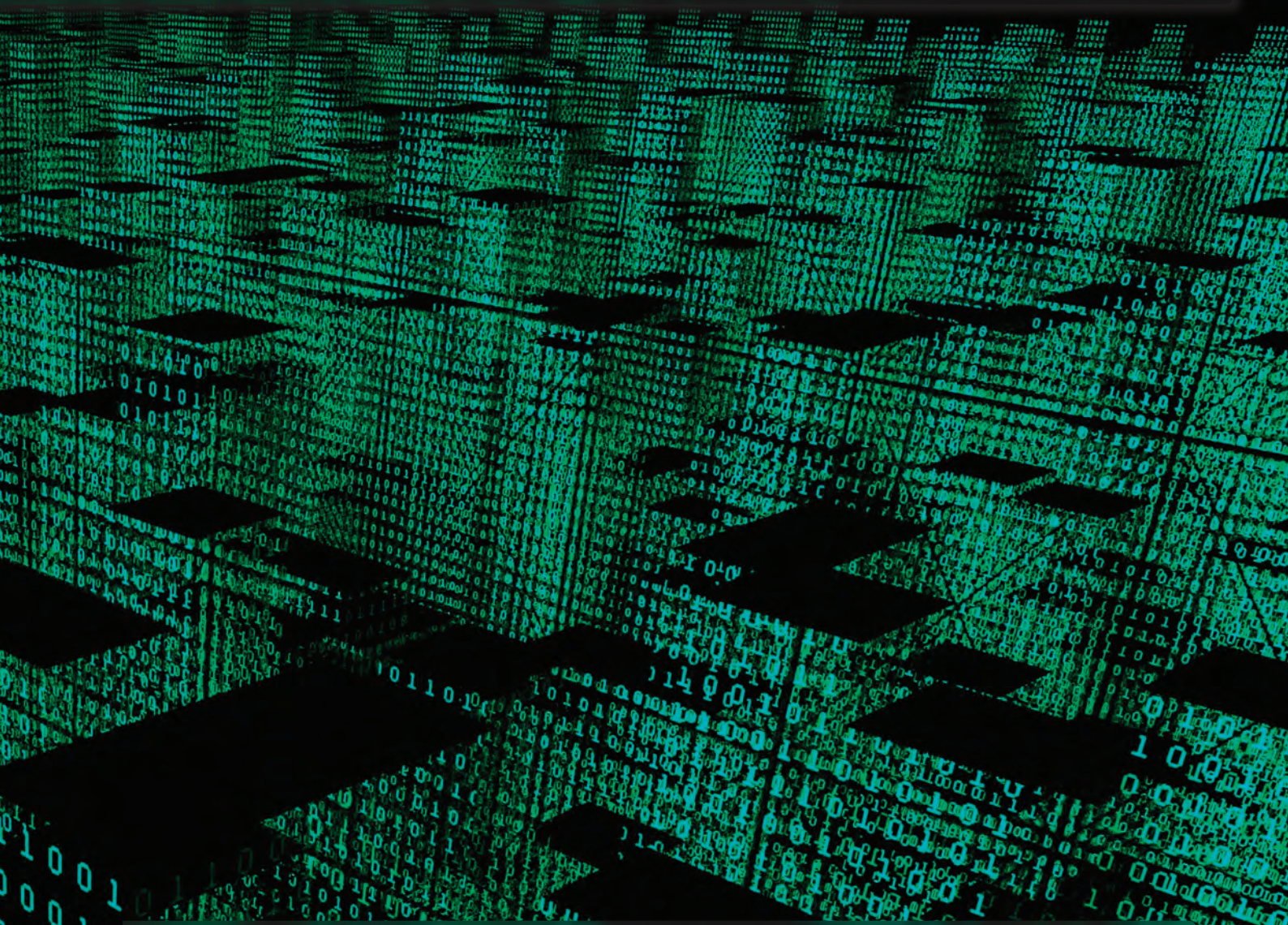
Having reached a sometimes uneasy acceptance of document disclosure as a regular feature of international arbitration, users of international arbitration have over the last few years started to wrestle with the so-called curse of Microsoft – the consequences of the now ubiquitous use of electronic documents, communications and electronically stored information (ESI). Given the complex business disputes resolved through international arbitration and the amount of information that now leaves an electronic footprint, it is not surprising that disputes about the treatment of electronic evidence are increasingly common, and can have very significant implications for both the management of a case and its outcome. While the same issues that arise in litigation with regard to electronic evidence also arise in arbitration, the approach to electronic evidence in international arbitration is necessarily different from litigation, particularly when compared to court systems in jurisdictions like the United States and England where electronic evidence is now a regular part of the process. Despite a number of recent initiatives as described in this article, there is not yet a consensus on how to approach these issues in international arbitration.

International arbitration is by its nature transnational and consensual, and usually not subject to mandatory and prescriptive rules of evidence or procedure. Decisions about how electronic evidence should be treated are made without the benefit of detailed and mandatory rules such as those seen in the English or US courts. No comparable rule exists in international arbitration to Practice Description 31B to Part 31 of the Civil Procedure Rules, which applies to litigation in England and Wales, and requires parties to discuss before the first case management conference the systems and devices on which electronic data may be held, document retention policies, tools and techniques for managing disclosure of such data (e.g. keyword searches, custodian lists, etc.), and preservation

and production of such data, among other things. Or to Rule 26 of the US Federal Rules of Civil Procedure, which mandates, among other things, that parties enter into a discovery plan which requires them to confer early in the case and make proposals about "any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced," the preservation and restoration of data, and the consequences of "lost" data.[2]

While document disclosure is permitted under the rules of all significant arbitral institutions, disclosure is usually not an express right (or obligation) and it does not take place in every arbitration. The availability and scope of disclosure is subject to the agreement of the parties, but parties rarely include in an arbitration agreement provisions describing in any detail how such issues will addressed. References to disclosure of evidence in international arbitration rules tend to be brief, and the authority provided to arbitral tribunals is usually discretionary (where the parties have not agreed otherwise). For example, Article 25(5) of the ICC Rules of International Arbitration simply states: "At any time during the proceedings, the Arbitral Tribunal may summon any party to provide additional evidence." Article 22.1(e) of the **LCIA** Arbitration Rules goes only slightly further, stating that "the Arbitral Tribunal shall have the power to order any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant." Moreover, unlike litigation, where there usually are clearly applicable rules of evidence (including rules concerning issues like the duty to preserve evidence, legal privilege, etc.), in international arbitration the tribunal usually will have broad discretion in determining what, if any, rules of evidence apply and in deciding on the admissibility and weight of evidence.

Parties and their lawyers (and the arbitrators themselves) will often have very different expectations



about the treatment of evidence based on, among other things, their different legal backgrounds and their expectations of the arbitral process. Even before the potential complexities of electronic evidence are added to the mix, the acceptance of document disclosure in international arbitration is sometimes grudging, particularly among some lawyers and parties from civil law jurisdictions. The variety of attitudes toward and experience with document disclosure also means that decisions about the scope of requested disclosure may get limited attention from tribunals and decisions can be inconsistent and unpredictable. This is true despite the wide and growing influence of the **IBA** Rules on the Taking of Evidence in International Arbitration (introduced in 1999 and revised in 2010) – which provide standards and procedures for requesting disclosure of documents and requires that document disclosure requests should be narrow and specific, and limited to documents that are relevant to the case and material to its outcome.

Some commentators see efforts to expressly address the possibility of e-disclosure as a further step toward what they perceive to be the Anglo-Americanisation of international arbitration and an unwelcome tendency to treat arbitration as no different from litigation. A number of commentators have argued that current document disclosure standards are adequate for dealing with electronic evidence and others go further and argue that disclosure of electronic evidence should be very limited and exceptional or not permitted at all. And even those who believe that disclosure is a necessary and important part of international arbitration recognise the potentially significant implications of electronic evidence for controlling time and cost.

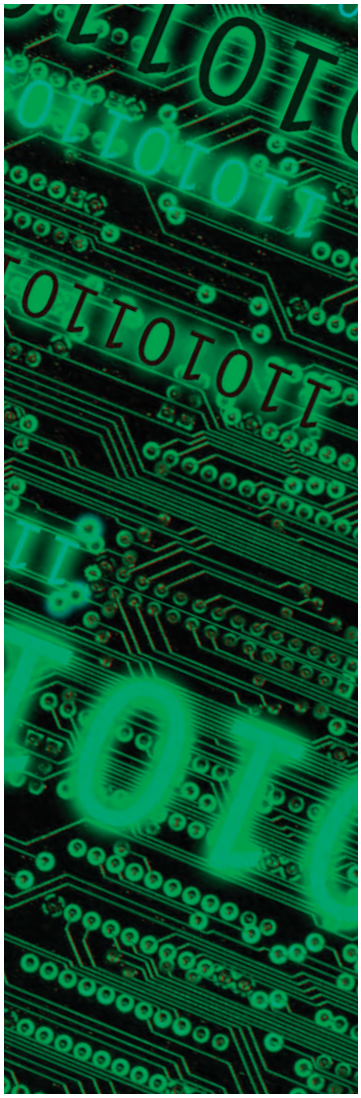
Against this background, in the last few years several arbitration institutions and groups have begun to address issues of electronic evidence in international arbitration, but mainly in terms of limiting such disclosure. These efforts tend to focus on ways to effectively manage disclosure of electronic evidence, with particular attention to costs and burden, the format for production, and addressing such issues as early as possible. None of the recently published ▶

initiatives are binding unless expressly adopted by parties and parties are in any event always free to agree that there will be no disclosure of electronic evidence or to adopt other steps to control the scope and process of disclosure. However, parties usually are cautious about doing so because of the difficulty of predicting what disputes may arise in the future and there is little anecdotal evidence suggesting that many parties are expressly adopting these or other limits on disclosure of electronic evidence.

The 2010 revision of the IBA Rules on the Taking of Evidence in International Arbitration

The IBA Rules are not binding unless expressly adopted by parties, and often adopted only as "guidelines." While electronic evidence was not the particular focus of the 2010 revision to the IBA Rules, Rule 3(3)(a) of the revised rules expressly addresses "[d]ocuments maintained in electronic form" in the context of a request for a narrow and specific category of documents and provides that the tribunal may order that the requesting party identify specific files and identify search terms and other means for searching for such documents efficiently and economically. The revised rules also address the form of disclosure – Rule 3(12)(b) provides that documents in electronic form should be submitted or produced by the party that maintains them in the form most convenient or economical to it that is reasonably usable by the recipients.

A number of the more general 2010 revisions to the IBA Rules are also relevant to managing issues that arise with e-disclosure. For example, the 2010 revisions require the arbitral tribunal to engage with the parties at the earliest appropriate time to try to agree on an "efficient, economical and fair process for the taking of evidence" and that the tribunal may separately schedule disclosure requests for each specific issue or phase of the arbitration.[3] The 2010 revisions also address in Article 9 issues of legal privilege and confidentiality, and provide express authority for the tribunal to take into account lack of good faith in the taking of evidence when determining costs.



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ICC Commission on Arbitration Task Force Report on *Techniques for Managing Electronic Document Production When it is Permitted or Required in International Arbitration*

A task force on the production of electronic documents commissioned by the **ICC Commission on Arbitration** issued a report in 2011 focused on production of electronic evidence. The report starts with the principle that the "move … to predominantly electronic storage of information within businesses requires no general reconsideration" of approaches to disclosure and that production of evidence "should remain limited, tailored to the specific circumstances of the case and subject to the general document production principles of specificity, relevance, materiality and proportionality."
The report describes a number of specific issues and considerations that arise in connection with electronic documents, and identifies techniques for managing the request for production of such materials. In doing so, it touches on a number of particularly difficult issues, including cost shifting relating to production requests, forms of production, treatment of privilege, and preservation of and failure to produce documents. The report also includes a useful *Primer on Electronic Documents* and a glossary.

The Chartered Institute of Arbitrators Protocol for E-Disclosure

The Chartered Institute's of Arbitrators' (CIArb) protocol is designed to be adopted by parties as part of an arbitration agreement or after a dispute has arisen and places particular emphasis on the need to "focus the parties and the Tribunal" and "to achieve early consideration" of issues relating to disclosure of electronic data. The Protocol offers ways to limit and manage disclosure of electronic materials by, for example, identifying limited categories of data, using date ranges or identified "custodians," agreeing search terms, and the use of software tools and data sampling. The Protocol also recommends early consideration of the format of disclosure, special arrangements regarding privilege, and notes that parties should consider whether a party or the tribunal may benefit from professional guidance on IT issues.

CPR's Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration

The **CPR Institute** is a think tank and appointing authority which publishes arbitration rules and procedures. The CPR Protocol is intended to assist arbitrators by setting out general principles for dealing with disclosure requests and also to provide standards that parties can adopt in an arbitration agreement or after a dispute arises.

The CPR Protocol begins with the principle that "production of electronic materials from a wide range of users or custodians tends to be costly and burdensome and should be granted only upon a showing of extraordinary need." The CPR Protocol provides four modes of disclosure for production of electronic materials, ranging from Mode A (minimal – allows production only of electronic materials that a party relies on) to Mode D (extensive – allows for production of all relevant, non-privileged data) that parties may adopt.[4]

The ICDR's Guidelines for Arbitrators Concerning Exchanges of Information

The **International Centre for Dispute Resolution**, which is the international division of the **American Arbitration Association**, in 2008 issued guidelines that focus on the duty of arbitrators to manage proceedings "so as to achieve the goal of providing a simpler, less expensive, and more expeditious process." To this end, the guidelines provide that requests for electronic materials be "narrowly focused and structured to make searching for them as economical as possible" and provide in particular that "[t]he Tribunal may direct testing or other means of focusing and limiting any search."

The various recent initiatives are useful in identifying some of the issues that need to be considered and they underscore the need for counsel and arbitrators to take the steps necessary to identify the specific issues in dispute and the consequences of electronic evidence in that context as soon as practical and continue to do so as a case progresses. They also are a reminder that parties and their lawyers (and arbitral institutions) need to consider the ability of potential arbitrators to understand and manage these issues. Electronic evidence is now an unavoidable fact of business disputes, and arbitrators and lawyers who take a myopic view of that evidence, and the issues it raises, risk making mistakes in the management of cases that have huge costs and undermine the very purpose of allowing disclosure from other parties of relevant and material evidence.

As more lawyers specialise in international arbitration, with limited exposure to the evolving approaches to electronic evidence in litigation and the tools and techniques for managing it, it is important that both arbitration counsel and arbitrators engage with the issues raised by electronic evidence. Given the potential costs involved, and the inherent lack of detailed procedural rules in international arbitration, arbitration lawyers need to be sufficiently familiar with these issues to efficiently and effectively manage electronic evidence – in supporting and assessing claims and defences, in seeking, responding to and using the results of disclosure, and in crafting the procedural steps and timetable most appropriate for a particular case. ■

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[2]Some courts go so far as to expressly impose on counsel a "duty to investigate and disclose" which makes it mandatory to review the client's information management systems including computer-based and other digital systems to understand how information is stored and how it can be retrieved, including from historical, archival, back-up, or legacy computer files. See, e.g., District of New Jersey Local Civil Rule 26(d)(1).

[3]IBA Rules, at Articles 3(14), 4(4) and 8(3)(e).

[4]Mode B allows production from a limited number of custodians, restricted to the time period from the date of the contract to the date of the Request for Arbitration, and only from the party's storage facility (it does not allow for production from backup tapes, mobile telephones, PDAs or voicemail), and requires that any data requested be reasonably accessible. Mode C is broader and allows for production of fragmented data or data from backup tapes upon a showing of need. See CPR Protocol on Disclosure, at Schedule 2.

[5]ICDR Guidelines, at 4.