



Transportation & Logistics Law Alert

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Arbitration of Logistics/Reverse Logistics Disputes in the E-Discovery Era

Electronic discovery has become nearly a constant in domestic commercial litigation. In recent years, both federal and state rules of civil procedure have defined the duties of parties to litigation to engage in e-discovery. Without doubt, e-discovery can significantly increase the cost of litigation and parties may presume that arbitration offers a means to avoid e-discovery. That presumption does not always hold true.

Whether to sign the arbitration clause on your next contract

In the logistics and reverse logistics industries, it is common to enter into contracts that require parties to resolve disputes through arbitration, often before the American Arbitration Association or its international arm, the International Centre for Dispute Resolution (ICDR). Most companies view arbitration as less costly and more efficient than litigation. In disputes among international businesses, arbitration has the additional advantage that it is more efficient to perfect an arbitration award than a civil judgment in foreign jurisdictions.¹ The traditional advantages of arbitration, however, do not mean that it is always in your interest to accept an arbitration clause. Before signing the next service provider contract, a logistics or reverse logistics company should consider whether the arbitration clause really offers these traditional benefits.

The impact of e-discovery in arbitration

Some of the advantages of arbitration may be waning in complex commercial matters, especially when the parties seek significant discovery. As sophisticated litigators begin to arbitrate complex disputes, there is a growing trend to allow e-discovery in commercial arbitration proceedings. In particular, there is a growing trend to allow more comprehensive discovery, including e-discovery, as a means to reach fair results in complex commercial matters.² This trend is not limited to domestic arbitration. E-discovery also is expected to become more and more common in international arbitration, even despite current widespread reluctance to adopt what is often criticized as “Americanized” discovery.³ As e-discovery becomes more accepted as a part of arbitration, companies whose commercial disputes are likely to involve exchanging significant electronically-stored information (ESI) need to understand the pros and cons of the arbitration clauses in the agreements they negotiate.

The potential impact of e-discovery in arbitration should be of particular interest to companies involved in supply chain management and logistics operations. At the heart of an efficient logistics operation is the efficient handling of electronic data. So much of what takes place in the logistics industry is scanned and tracked, computed and measured. A dispute over the quality of logistics services often implicates the metrics set forth in the contract. These metrics, in turn, trigger off of databases of electronic records of receipts, inventories, headcounts, repairs, refurbishments, shipping, etc. Especially in the reverse logistics industry, better data means better cost recovery.

With terabytes of data being created at an ever-increasing pace, e-discovery may take center stage in the dispute. Porter Wright has handled multiple arbitrations that involved significant amounts of e-discovery, including one matter, centered around a reverse logistics agreement, where roughly 400 gigabytes of data was exchanged between parties. In fact, if your data tells a better story, more formal e-discovery procedures may be to your advantage.

Knowing the rules upfront

With e-discovery, there is certainly great value in knowing the rules in advance. To have established rules at the start, you either need to bring your case before a tribunal with established rules, or specify the rules in your arbitration clause. In litigation, the federal and state rules establish procedures and standards for handling e-discovery. While the rules for e-discovery are just developing in arbitration, and different arbitral organizations are in different stages of development, knowing how the benefits of each context — arbitration or litigation — will affect your organization can help you make an informed decision for your organization.

Until there is authoritative guidance in arbitration settings, it is difficult to predict the scope and cost of arbitration for matters that would involve significant e-discovery. Parties who know that they are likely to exchange ESI in a dispute should consider whether an arbitration clause is really beneficial to their contractual interests.

While it is becoming clear that e-discovery in some arbitration proceedings is here to stay, little guidance yet exists for how to handle e-discovery in arbitrations. Arbitration organizations have just begun to tackle the daunting task of developing guidance for how to handle e-discovery without unduly sacrificing the efficiency or cost-effectiveness of arbitration proceedings.⁴ The Federal Arbitration Act does not address e-discovery. The American Arbitration Association's Procedures for Large Complex Commercial Disputes does not include any specific rule about e-discovery. Some international arbitral organizations have issued guidance with respect to e-discovery in arbitration.⁵ By and large, guidelines that are coming out favor preserving the efficiency and low-cost nature of arbitration over allowing broad discovery.⁶ Subject to that general principle, these guidelines allow for significantly restricted e-discovery in certain types of matters, arbitrators are trained to limit it, and arbitral bodies favor imposing the cost of e-discovery on the party seeking it. Despite the need for standards to handle e-discovery in arbitrations in efficient and predictable ways, the reality is that arbitrators still are left to make ad hoc decisions due to the lack of guidance in this area.⁷

Parties that agree to arbitrate matters likely to involve e-discovery should not assume that the current lack of guidance will reduce the risk of noncompliance, nor should parties assume that the rules established for the particular matter only will be loosely enforced. For example, the international arbitral organization FINRA began training its arbitrators on e-discovery just two years ago, and its policy is to leave ultimate decisions very much to the discretion of individual arbitrators. If there was any question about whether FINRA's guidance had teeth, it was answered in 2009 when the arbitral organization levied fines ranging from \$350,000 to \$1.2 million for failures to retain and produce e-mails in arbitration proceedings.⁸

Weighing the costs and benefits

Given the risks and consequences inherent in disputes likely to involve e-discovery, a company may want to negotiate for the greater certainty by choosing to litigate in a forum, such as a state or federal court system, with established e-discovery rules and practice. If, on the other hand, a company prefers to resolve disputes through arbitration even when e-discovery is likely to be exchanged, the company should consider defining the scope of discovery that would be permitted in arbitration. Arbitration is, after all, a creature of contract. Parties can add language to the arbitration clause to set limits on e-discovery, to define the standards to govern e-discovery, to define burdens of proof for seeking additional discovery, and to empower arbitrators to enforce discovery limitations and the defined processes. Parties may also want to define who bears the cost of e-discovery, and how those costs might shift based on the

parties' respective desires to engage in an exchange of e-discovery. Perhaps an easier route would be to incorporate by reference into the arbitration clause a particular e-discovery regime (such as the e-discovery provisions of the Federal Rules of Civil Procedure) in order to bargain for a more predictable scope and cost of e-discovery.

Of course, this choice needs to be made when entering into the contract. **Before putting pen to paper on the next logistics services contract, consider whether an agreement to arbitrate really makes sense under the circumstances.** Avoid the knee-jerk reaction that arbitration is better than litigation as a means to resolve disputes in supply chain industries. Critically consider what issues might be involved in a potential dispute between the parties. If a dispute arises, would its resolution require significant discovery? To resolve the dispute, would it be beneficial to you to exchange ESI subject to established procedures? If not, arbitration may make sense. If so, you should consider whether such a dispute might be better handled by the court system where procedures for handling and exchanging electronic information are formally defined. Or, if you have a strong preference for arbitration, consider negotiating the procedures for e-discovery as part of the arbitration clause.

Endnotes

¹ 144 countries have signed the United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention), which requires signatory nations to enforce applicable arbitration agreements and awards. See Steven Seidenberg, *International Arbitration Loses Its Grip – Are U.S. Lawyers to Blame?*, 96 A.B.A. J. 50, 51-52 (April 2010); Jessica Richardson and Rebekah Barlow Yalcinkaya, *Speed, Efficiency and Flexibility: A Call to return to Arbitration's Traditional Roots*, 9 U.C. Davis Bus. L. J. 111 (2009).

² J. Wilkinson, *Arbitration Contract Clauses: A Potential Key To A Cost-Effective Process*, 16 No. 1 Disp. Resol. Mag. 9 (Fall 2009). The results of a recent survey of arbitration practitioners sponsored by the International Institute for Conflict Prevention & Resolution, indicates that e-discovery is expected to become a part of mainstream commercial arbitration. Deborah Rothman and Thomas J. Brewer, *Survey: Difficult Arbitration E-Discovery Process Questions Suggest Increasingly Complex Future Problems on Costs, Scope, Part II*, 27 Alternatives to High Cost Litg. 152, 154-55 (Oct. 2009).

³ See Steven Seidenberg, *International Arbitration Loses Its Grip – Are U.S. Lawyers to Blame?*, 96 A.B.A. J. 50, 51-52 (April 2010); C. R. Ragan and Robert F. Copple, *E-Discovery Enters the World of Arbitration*, 239 N.Y.L.J. 5 (col. 1) (April 29, 2008).

⁴ Stephen C. Bennett, *E-Discovery Issues: What Parties and Their Counsel Need To Know In Anticipation of and During Arbitration*, 64-APR Disp. Resol. J. 20 (Feb-Apr 2009).

⁵ In fact, the ICDR Guidelines specifically provide that discovery procedures developed in American courts are not appropriate in international arbitration. International arbitration organizations are actively seeking to curtail American-style discovery, to the point of training their arbitrators how to limit expansive e-discovery. Steven Seidenberg, *International Arbitration Loses Its Grip – Are U.S. Lawyers to Blame?*, 96 A.B.A. J. 50, 55 (April 2010).

⁶ See, e.g., Chartered Institute of Arbitrators "Protocol for E-Disclosure in Arbitration; International Institute for Conflict Prevention and Resolution's "CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration"; see generally Stephen C. Bennett, *E-Discovery Issues: What Parties and Their Counsel Need To Know In Anticipation of and During Arbitration*, 64-APR Disp. Resol. J. 20 (Feb-Apr 2009). In 2008, the ICDR published its Guidelines on the Exchange of Information in International Cases. The ICDR's Guideline 4 offers some general rules that seek to significantly limit e-discovery, requires cause be shown before e-discovery is ordered, but still ultimately leaves the issue to the discretion of the arbitrator.

⁷ Deborah Rothman and Thomas J. Brewer, *Survey: Difficult Arbitration E-Discovery Process Questions Suggest Increasingly Complex Future Problems on Costs, Scope, Part II*, 27 Alternatives to High Cost Litg. 152, 155 (Oct. 2009).

⁸ See Cecilia Loving and Jacquelyn Vann, *eDiscovery for Corporate Counsel*, Chapter 19, Arbitration and Electronic Discovery (Oct 2010), § 19.4 (Restrictions on discovery in arbitrations – Key statutes).