Symposium: How Changing Technology Has Affected Arbitrations

Moderated by David Winters

Winters: ARIAS • U.S. is 25 years old, and there have been some remarkable technological changes during that time. For example, since the inception of ARIAS, the Internet "became a thing," as did electronic discovery, and the way that businesses and counsel communicate with one another changed from hard-copy letters to email. And that is just the tip of the iceberg.

The purpose of this symposium is to look back at how changes in technology have affected arbitration over the course of the last 25 years. To address this topic, I asked a panel of some of the most skilled and knowledgeable ARIAS arbitrators and practitioners to share their observations. Thank you all for participating.

I'd like to start the discussion with the topic of electronic discovery—that is, the production of electronically stored information in arbitration. How has electronic discovery changed arbitration?

Rubin: I can say that in the earlier arbitrations in which I was involved, there was no electronic discovery. It was all manual collection of documents and review and production. I think that the first time we really became engaged heavily in electronic discovery was probably in and around 1998 or 1999. We had a series of cases where collection of documents included electronic data, and the electronic data was quite meaningful. It required a different set of skills not only to collect that data, but then process it and analyze it and determine how to use it.

For those of us who had been practicing for quite a long time at that point, it was an interesting transition from manual production, collection and review of documents to now determining who were the people who would have documents, who were likely to have documents that had to be collected electronically, how to process them, and how to analyze them for privilege. It all changed over time beginning in the late 1990s.

Bank: Just to put it into some perspective, there were no pleadings per se to initiate an arbitration. You would send a two- or three-sentence letter making reference to the contract section and demanding arbitration. Likewise, discovery—and this is pre-email—was handled by letter. And you would ask the counter-party to produce X, Y, and Z. It wasn't overly specific. We were not really following any federal rules of procedure when we asked for discovery. Everything was done by letter or telephone.

Fowler: I think the experience of arbitrators is probably different than that of counsel. I suspect that counsel might have had an earlier exposure than that afforded to arbitrators. But the time frame of the late '90s brings back an epiphany that occurred to me and is reflective of Jim's comments about how you had to change your business practices.

The epiphany for me [came when] I was involved in a Bermuda arbitra-

tion. With the pleadings, I received 12 banker's boxes of documents—hard copy, of course. The hearing was in Bermuda, and it was in several phases. The panel deliberations were to occur in London. So I had to figure out a way to try to get 12 banker's boxes of information—upon which I had written, on many exhibits, my hand-written notes—down to the hearing in Bermuda; find a way to access them during the hearing so I could make notes on the same exhibits again; and then transport the ones that were the most important to London. Coping with that brought home a sure conclusion, which was: this is not going to work.

I suspect that's when a lot of arbitrators began to realize that as arbitration changes—and it was, as Jonathan pointed out, rapidly changing during that period of time—technology was a way of making it all possible, particularly with respect to an individual arbitrator's ability to cope with the process. In that regard, I remember telling people you've got to think of an arbitrator as being the equivalent of an itinerant judge—no courtroom, no clerk, no office, yet has to be prepared to deal with an ever-increasing mountain of information. Technology, at least in my case, made it all possible.

Rubin: To tell you about the time period and how the transition affected us, I had an arbitration in 1994 and 1995 when one of the arbitrators told us to take all of the exhibits—which existed in hard-copy form only, and there were hundreds—and put them in chronological order in the middle of the hearing. And that required people to stay up all night for a couple of nights trying to figure out how to manage all of the materials, get them copied—which, again, was a very time-consuming process—and get them to the panel.

I had an arbitration in the early 2000s where Caleb was the umpire, and he announced at the organizational meeting that he only wanted to receive information in electronic form. It was the first time that anybody on a panel had said that to us.

So the transition took place in a relatively short period of time, I think from about 1994-95 to 2004-2005. We really had to start dealing at that same period of time with litigation holds for our clients to preserve materials. There had been a decision, I can't remember exactly when, in the early 2000s, establishing the obligation to preserve documents in anticipation of litigation.

Mack: I think Jim is referring to the Zubulake decision by Judge Sheindlin.

Winters: Many believe that the change from hard copy to electronic greatly increased the scope and magnitude of discovery. Is that consistent with your experience, Jonathan?

Bank: Very, very consistent. I would almost say it turned into overkill, because it's almost as if nothing was unavailable electronically, which caused people to reach further than they would have done otherwise. Because it became easier and it became accessible, I personally think it had a dramatic input on the scope, broadening the scope of discovery and increasing the expense of the arbitration proceeding.

Winters: Has discovery become more or less efficient with the addition of electronic discovery in arbitration?

Bank: The word *efficient* is probably subject to a couple of different definitions, depending on maybe which side you're on. It made obtaining the documents less cumbersome; I would say reviewing the magnitude of documents made it more cumbersome.

Mack: I do think I empathize with what Jonathan is saying. But from the perspective of an arbitrator in recent arbitration hearings, I think electronic discovery has greatly assisted in the truth-finding function.

I know that all of [us] are dedicated to the integrity of the arbitration process. In recent arbitrations, I have come across e-mails from individuals, not necessarily directly related to the dispute and not necessarily executives, that have a different spin on the dispute. Whether those would have been picked up by paper discovery before the e-discovery process, I don't know. It seems to really—once the attorneys go through the expense and bother of going through e-discovery—it seems to really focus and crystallize the issues and truly assist in getting to the nub of the controversy.

Fowler: I think also from an individual arbitrator's perspective, finding the truth or at least evidence of the truth has become much easier. Going back to the example I started with, the 12 banker's boxes of documents—many times, as you all know, you read something and say, "I remember a previous communication about that." And we all labored under, I think, the burden of trying to find something in a stack of hard-copy materials that may have been several feet in height. Now, all I've got to do is put the search term into my computer and I can find ev-

erything. So, from an arbitrator's perspective, finding evidence and putting things together is much easier than it was in the early days, where you had very little technological help.

Winters: Moving away from discovery, how has email impacted arbitration? And a subset of that: Has it had an effect on civility between and among counsel in arbitrations?

Rubin: What I was going to say was in the '70s, '80s, and even in the '90s, we were required to write letters to opposing counsel if we wanted to communicate with them. I think writing letters required or caused people to be a little bit more thoughtful about what they put down on paper. I think a lot of that thoughtfulness has been lost when people can just begin typing and hit the "send" button on your computer. The fact that thoughtfulness and contemplation and the time that was required for your assistant or secretary to create four carbon copies of something has, I think, contributed to some of the lack of civility.

Fowler: I think another interesting question that perhaps gets to the core of the question is, what about panel communications and panel relationships? Have they improved or deteriorated due to the use of emails? Because, at least in my experience, there's little doubt that panels talk less than they used to.

I would make some of the same observations about the relationships in a panel that I did generally with regard to arbitrations. I think they've become more difficult over time. And I wonder whether that's because they don't talk to each other as much as they used to. I'm just not sure about that.

I know some arbitrators are sensitive to the concept of proportionality, and I think that it should and likely will become a regular theme in arbitrations and in respect to electronic discovery as we move forward.

—Jim Rubin

Winters: I'd like to hear Susan and Jonathan weigh in on the question that Caleb just posed, which is, has email changed the way panels deliberate with each other?

Mack: Yes, I think it has. I think it is more likely that there will be brief in-person or telephonic deliberations, and if the three panel members are not aligned, there will be a back-and-forth of express positions by email confidentially to each other in an attempt to narrow the issues or to arrive at an agreement. I think that's markedly more the case than perhaps even a decade ago.

Bank: I agree with that.

Winters: Moving on to arbitration hearings themselves, I'd like to get the panel's first impressions on whether and to what extent technology has changed arbitration hearings.

Fowler: Dramatically. Going back to the early '90s, I remember you brought stacks of paper to the hearing. Each exhibit was handed out individually, both to counsel and to the panel. So there were delays, because the exhibits would have to be handed around. Or maybe you had a stack of all the exhibits in binders behind you. I remember it was sort of funny—you had 30 people in the room, and you had to wait 5 or 10 minutes because somebody couldn't find the exhibit in their binder. And there was always this exchange, "what binder, what exhibit, what page, where is it," and binders flying all around the room.

You contrast that with what happens today. Lot of hearings that I go to don't even have binders anymore; I have not asked for witness binders for probably a decade. Today, the exhibits go up, often simultaneously on individual displays that are before both counsel and the panel. A lot of times you don't see any hard paper at all. So there's no doubt that the presentation of evidence has changed. As we all know, we're spoiled now by having access to LiveNotes, so we have the transcript in front of us. If you miss a word, you just look down and see it. In my way of thinking, there's been a dramatic change in how hearings have been conducted.

Rubin: It's interesting to listen as a practitioner as opposed to an arbitrator. I've always wondered whether our

presentations became more effective as a result of all the electronic information that we have to use. My own view is there have been occasions when I thought the technology helped me make a point. That is, I could very easily assemble electronically several documents and present them in a way that would be very difficult or more difficult to present if I had to use hard copies and everybody was fumbling to find them.

So I've often thought there were times when the electronics enabled me to make a point more effectively than in the past. And not just with documents—there was also a time when I had videotaped a deposition where the witness had made a series of admissions during his deposition, and we were able to play the videotape repeatedly throughout the hearing. I thought in the end that it affected the credibility of the witness in a way that favored our side.

Mack: I would like to address video deposition excerpts with a war story from early in the use of videos. This is going back I guess to the early 2000s, like 2003 or 2004. The party by whom I was appointed as arbitrator videotaped the deposition testimony and put it on in their own case of a senior executive. That person clearly was not taking the matter seriously, looked very taciturn, spoke over the questions, and in general expressed disinterest. This had the effect of actually hurting that party's case.

So, with deposition video clips, I think it's important to use it, as a practitioner, very judiciously. In the case that Jim mentioned, videotaped deposition clips showing admissions by the other party's executives is, I think, very useful.

Winters: What are the panel's thoughts on the biggest risks related to technology going forward in arbitration?

Mack: I think the biggest risk of technology would be the inadvertency of disclosure and how changes in confidentiality rules such as HIPAA and protected personal information has affected arbitrations. I think that, particularly in life reinsurance arbitration, we have to take great care to make sure that protected information is deleted from the produced materials, such as policyholders, Social Security numbers, and other issues. We have to be ever-attentive to that risk.

Fowler: Boy, do I agree with that. We talked about needles in haystacks and searching for the truth. I can only relate—and, fortunately, nobody in this group was involved in it—an arbitration I had which was very contentious. There was a blanket production of documents. One of the emails inadvertently produced was from one of the counsel to his client, saying, "We have to recognize that the information sought is greatly damaging to our case, but we have decided we don't have to produce it"—or words to that effect, even though it was covered by the panel's discovery ruling. Then they tried to call it back, saying that it had been inadvertently produced. Obviously, things went downhill from there. Susan is absolutely right: You really have to be careful what the hell you produce, because some slippery stuff can get through the cracks there.

Rubin: In addition to that, there's one other issue much more significant as we go forward, and that is the idea of proportionality. It got codified into the Federal Rules a few years ago. I know some arbitrators are sensitive to the concept of proportionality, and I think that it should and likely will become a regular theme in arbitrations and in respect to electronic discovery as we move forward. Proportionality should apply in arbitrations just as it applies in federal courts.

Fowler: And technology really enables that argument. Before, I was talking about search terms and hits and so forth. Now we get, as arbitrators, information back from counsel saying, well, the proportionality of this request is out of skew because we've identified 110,000 documents with the term X in it, and for us to review 20 gigabytes of data, etc. In other words, they're much more informed. As a result of that, the panel has a much better appreciation of the magnitude of effort required to achieve the discovery that's desired. Obviously, that brings proportionality and burden directly to the forefront.

Winters: We've reached the end of our time. I'm delighted by all the responses and want to close with a thank you to everyone.

This roundtable discussion was transcribed by Aline Akelis of Winter Reporting, which provides court reporting and complete litigation support services for depositions, arbitrations, meetings, hearings, and conferences. The discussion participants and ARIAS thank Winter Reporting and Ms. Akelis for the generous donation of their services. The transcript has been lightly edited to improved readability.

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