# POTENTIAL APPROACHES AND MATTERS TO CONSIDER IN ADDRESSING ISSUES AS TO ELECTRONIC DISCOVERY IN ARBITRATION

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Following are some potential approaches and matters for arbitrators to consider in addressing issues as to electronic discovery in arbitrations, subject to the needs of the particular case:[1]

- Where necessary, address issues as to appropriate "litigation holds" as to ESI;
- Generally require "meet and confers" concerning ESI, as well as discovery generally, when it appears there will be issues in this regard;
- Be cognizant of disparities as to technical sophistication between competing parties/counsel and consider how, if at all, to address same;
- Importance of generally fostering/requiring a spirit of cooperation among counsel concerning ESI, as well as concerning discovery generally;
- Requiring in appropriate cases that counsel be familiar at an early discovery conference with their client's information technology, sources of ESI, preservation practices, and the anticipated scope and form of ESI to be produced;
- Requiring in appropriate cases that requests for ESI identify with particularity the type of ESI sought, the underlying subject matter of the ESI requested, and the relevant time period for which ESI discovery is to be provided – and that objections to requests for ESI plainly identify the scope and limitation of any responsive production;
- Working with counsel, where appropriate, to determine and formulate appropriate search terms;
- Working with counsel, where appropriate, to determine the appropriate number of searches to be conducted;
- Working with counsel, where appropriate, to determine the appropriate time frames for electronic searches;
- Working with counsel, where appropriate, to figure out and determine the appropriate number of custodians and the appropriate files of designated custodians to be searched;
- Addressing issues as to the numbering or other identification of ESI to be produced;
- Addressing issues as to the form of identification and production of attachments to e-mails to be produced and the like;

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[1] There will be cases where one does not really need to do much as to ESI and will likely apply few, if any, of these approaches – and cases where, if counsel and/or the arbitrator(s) do not cause various of these approaches to be considered and applied, the parties may end up spending very substantial amounts of money on ESI. While in some cases, such a level of expense may be warranted, there will be many cases — and this is where these approaches can perhaps be most helpful — where the issues are complicated and the parties sophisticated, but the amounts of money involved do not justify the expense of full ESI discovery. In such cases, alert and savvy counsel and arbitrators need to be proactive to make sure reasonable parameters are in place.

- Evaluation of hit counts *vis-à-vis* proposed search terms, custodians, files, and the like;
- Provision for test searches based on proposed search terms, custodians, etc.;
- Overall objective of having the big ESI searches only have to be conducted once;
- The advantages and disadvantages of predictive coding;
- Format of production;
- metadata to be provided;
- Requiring in appropriate cases that production of electronic documents need only be from sources used in the ordinary course of business;
- Requiring in appropriate cases that there is no need to make production of electronic materials from back-up servers, tapes or other media, absent compelling need;
- Requiring in appropriate cases that, absent the showing of compelling need, the production of electronic materials need only be on the basis of generally available technology in a searchable format usable to the party receiving the e-documents and convenient and economical for the producing party;
- Requiring in appropriate cases that counsel agree on the form of production of ESI for all parties prior to producing ESI;
- Need for developing procedures for identifying privileged documents in collecting ESI and for clawbacks where appropriate;
- Requiring in appropriate cases that ESI to be produced first be "de-duped;"
- Considering cost-shifting when the costs and burdens of e-discovery are disproportionate to the nature and/or gravity of the dispute or to the relevance of the materials requested;
- Establishing, where appropriate, that there is no need to produce ESI that is already in the possession of the other side;
- Exploration of other and less expensive sources of the information contained in the ESI requested in the particular case;
- Requiring the requesting party to show the need for the ESI;
- Requiring that a party seeking metadata demonstrate that the relevance and materiality of the requested metadata outweighs the costs and burdens of producing same, unless the documents will otherwise be produced in a form that includes the requested metadata;
- Consideration of issues as to fairness and equality of treatment concerning ESI production, particularly where most or all the ESI is on one side;
- Requiring cost estimates from counsel with respect to alternate approaches to e-discovery in a particular case;
- Requiring, where potentially helpful, that each side have its ESI expert participate in discovery conference calls concerning e-discovery;
- The usefulness, by analogy, of certain parameters developed by various courts concerning the control of e-discovery;
- The overriding principle of proportionality and the need to consider it in defining the amount of e-discovery to be permitted/required;
- The compelling need to proactively engage with counsel as to the level, extent, and potential costs of various approaches to e-discovery in the particular case, in order to avoid the situation where counsel who are experienced in litigation but

not arbitration proceed with litigation-level e-discovery, without consideration of cost, efficiency, and proportionality;

- The potential for the tribunal to appoint its own ESI expert in an appropriate case;
- The usefulness of addressing ESI issues in the preliminary hearing and, in appropriate cases, establishing a schedule for counsel to meet and confer as to ESI and report to the arbitrator(s) as to same;
- The possibility, in appropriate cases, of parties making their respective electronic files available to the other for searching;
- The need not only to engage this issue early on, but to monitor it throughout the case;
- Alternatives to e-discovery in an appropriate case, including the use of such approaches as witness statements, particularizations, representations, and even depositions;
- Dealing with issues as to sanctions for spoliation or the intentional or negligent destruction or failure to preserve relevant ESI in light of the requirements of applicable law and of the applicable arbitration rules;
- Addressing issues of concern with respect to ESI requested of non-parties through subpoenas and the like;
- Trying to identify and address ESI issues before they become a problem and, most importantly, before they become the cause of substantial expense and delay; and
- Addressing any further issues counsel or the parties may have concerning ESI.

**Useful Sources as to ESI**

Following are some helpful sources that suggest best practices for addressing ESI issues, including some of the above approaches:

- New York State Bar Association (Dispute Resolution Section), (1) Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations and (2) Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Commercial Arbitrations, available at http://old.nysba.org/Content/NavigationMenu/Publications/GuidelinesforArbitration/DR_guidelines_booklet_proof_10-24-11.pdf
- New York State Bar Association (ComFed Section), Best Practices in E-Discovery in New York State and Federal Courts, available at http://www.nysba.org/workarea/DownloadAsset.aspx?id=523
- Chartered Institute of Arbitrators, Protocol for E-Disclosure in Arbitration, available at http://www.ciarb.org/information-and-resources/E-Discolusure%20in%20Arbitration.pdf