American Arbitration Association E-Discovery Considerations for Construction Arbitrations

The American Arbitration Association® ("AAA®") developed this document working closely with the AAA's National Construction Dispute Resolution Committee ("NCDRC"). It is a companion piece to AAA's previously published Discovery Best Practices for Construction Arbitration Recommendations for AAA Construction Advocates and Arbitrators ("Best Practices")[1]. The considerations outlined in this document are not mandatory, may not apply in every case, and are not meant to encourage engaging in e-discovery when it is not relevant and material to the case at hand or disproportionate under the circumstances. Rather, they are meant to illustrate some of the electronic discovery ("e-discovery") [2] issues that arbitrators and parties may encounter, with the goal of assisting them in effectively managing the e-discovery process to achieve "a fair, efficient and economical resolution of the dispute."Construction Industry Arbitration Rule ("CIAR") R-23(b). See also CIAR Preliminary Hearing Procedure P-1(a) ("holding a preliminary hearing as early in the process as possible will help the parties and the arbitrator organize the proceeding in a manner that will maximize efficiency and economy and will provide each party a fair opportunity to present its case.").

Statement of Intent

The purpose of this document is to highlight for arbitrators and parties the need to actively manage the e-discovery process from the outset of the proceeding to achieve the sometimes competing goals of fair, efficient, and economical dispute resolution (CIAR R-23(b)) and safeguarding each party's opportunity to fairly present its claims and defenses (id. R-24(a)). All arbitration participants should be committed to an e-discovery process that is fair and transparent, allows discovery of relevant and material electronically stored information ("ESI") commensurate with the size and scope of the case, and consistent with the hallmark benefit of arbitration: efficient and cost-effective dispute resolution.

Introduction

Theoretically, the considerations surrounding e-discovery are no different to those applicable to "paper" discovery: relevance, materiality, and proportionality. ESI, however, presents unique and significant challenges to the goal of making arbitration an efficient and economical means for dispute resolution. The Federal Judicial Center publication, Managing Discovery of Electronic Information: A Pocket Guide for Judges,Third Edition ("FJC Guide"),[3] observes that ESI differs from conventional, paper-based information in several respects. First, "the volume of ESI is almost always exponentially greater than that of paper information, and ESI may be located in

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[1]Available at https://go.adr.org/rs/294-SFS-516/images/AAA341_AAA_Discovery_Best_Practices_Construction_Arbitration.pdf (last accessed 7/31/2024).

[2]"E-discovery" generally refers to the process of process of collecting, preparing, and producing information that is stored digitally - commonly referred to as "electronically stored information" or "ESI" - for use as evidence in legal proceedings. See, e.g., Managing Discovery of Electronic Information: A Pocket Guide for Judges, Third Edition (Federal Judicial Center 2017) at 51. Available at https://www.fjc.gov/sites/default/files/materials/38/Managing%20Discovery%20of%20Electronic%20Information_Third%20Edition_Second%20Printing_2019.pdf

[3]See note 2.

multiple places that are widely disbursed(sic)."[4] Second, ESI is "dynamic and mutable," in that computer systems and programs can alter information without direction from, or the knowledge of, the user.[5] Third, electronic documents have characteristics, most obviously metadata, that have no counterpart in paper documents.[6] Finally, electronic information may be created using proprietary software, such as Primavera scheduling software, which cannot be read without the software. [7]

Closely related to the issue of data volume is the issue of expense. A 2012 Rand Corporation monograph on electronic discovery[8] indicated that the average total cost of collecting, reviewing, and producing electronic data is $18,000 per gigabyte. [9]

E-discovery can provide many benefits, such as the ability to narrowly search for and collect relevant and material ESI using the text and associated data. At the same time, ineffectively managed e-discovery is a potential source of cost, burden, and delay. Because construction projects typically involve large volumes of records and data, managing e-discovery demands a careful balance between efficiency and economy on the one hand[10] and providing the parties a full and fair opportunity to present their cases on the other.[11] As arbitrators and parties pursue a resolution that is both fair and cost-effective, it is crucial they develop e-discovery protocols meeting these objectives as early as possible in the proceeding. The considerations set forth below are intended to aid the arbitrator and the parties in optimizing the e-discovery process within the framework of the CIAR and to ensure that e-discovery comports with the goal of achieving a fair, speedy, and cost-effective determination of the parties' disputes.

[4]FJC Guide at 3. The authors note research indicating that an average employee sends or receives more than 100 electronic messages per working day, which translates into nearly 2.5 million messages a year for an organization of 100 employees. Id. at 3-4.

[5]*Id.* at 4.

[6]*Id.*

[7]*Id.* at 4-5.

[8]Nicholas M. Pace and Laura Zakaras, Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery, Rand Institute for Civil Justice, 2012.

[9]*Id.* at 20. On average, a gigabyte of data equates to 15,000 to 200,000 "paper" pages depending on the file type and characteristics.

[10]CIAR R-23(b) ("At the preliminary hearing, the parties and the arbitrator should be prepared to discuss and establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute.").

[11]CIAR R-24(a) ("The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.").

Core Principles

As with any discovery in arbitration, e-discovery requests should be narrowly tailored to seek information that is relevant and material to the outcome of disputed issues in the case and proportional to the scope of the dispute.

- **Relevance**. The information sought has a connection to an issue in dispute (e.g., project schedules are relevant to a delay claim, but not necessarily relevant to a defect claim).
- **Materiality**. The relevant information has probative weight (i.e., reasonably likely to influence the arbitrator in making a determination on an issue in dispute).
- **Proportionality.** The e-discovery cost and time impacts are justified under the circumstances of the case.

ESI Considerations

1. Cooperation

Party cooperation on issues relating to the preservation, collection, search, review, and production of ESI is a critical component to a successful arbitration. Zealous advocacy is not compromised by conducting discovery in a cooperative manner. Cooperation in reasonably limiting e-discovery requests on the one hand, and in reasonably responding to e-discovery requests on the other hand, serves to reduce costs and delay.

2. Proportionality

The arbitrator and parties should examine the issue of proportionality – whether the cost and time impacts of e-discovery are justified in a particular case – in connection with each element of an e-discovery plan, including identification, preservation, collection, search, and production. Among the factors to be considered are the amount in controversy, the issues at stake in the action, the parties' relative access to relevant information, the parties' resources, the importance of the e-discovery to the adjudication of the merits (including the impact on a party's full opportunity to present its case), and whether the burden or expense of the proposed e-discovery outweighs its likely benefit. E-discovery requests (and responses) that are reasonably targeted, clear, and as specific as practicable can greatly benefit the participants' proportionality discussions.

3. Initial Assessment and Planning

- **Party Meeting:** Prior to the preliminary hearing, parties should meet to discuss the necessity of e-discovery and, if needed, the scope of such discovery. A dispute that involves a relatively small amount of damages, or even a larger dispute involving discrete issues, may not justify the cost (time and money) of e-discovery or may justify only limited e-discovery. In order to be meaningful, the parties' meet and confer should be as sufficiently detailed on these topics as is appropriate in light of the specific claims and defenses at issue in the case.
- **E-Discovery Plan:** The parties should memorialize their agreements regarding e-discovery in a plan or protocol that outlines the types of ESI considered relevant, the timeframe for document production, and the methods for exchanging documents. Accompanying this document are (1) an E-Discovery Checklist and (2) a template e-discovery protocol. The use of these documents is not mandatory; instead, they are provided to assist the arbitrator and the parties with "issue spotting."

4. Identification of Electronic Information

- **Data Mapping: Parties should identify:**
  - » All potential types of ESI containing relevant and material information (*e.g.*, emails, electronic documents, databases, social media, and cloud storage). Particular attention should be paid to software applications used in the construction industry. A non-exclusive list of data sources is attached as Appendix A.
  - » All locations where relevant and material information resides (*e.g.*, servers, PCs, mobile devices, etc.).
  - » Data that is reasonably accessible versus not reasonably accessible.
  - » Identification of key personnel who have control over, or access to, electronic information relevant and material to the issues in dispute ("Custodians").

5. Preservation

In determining what ESI to preserve, the parties should consider proportionality in defining a scope of preservation that is reasonable and not disproportionately broad, expensive, or burdensome. Factors to consider include: limiting the sources, scope and type of ESI to be preserved, specifying date ranges, and limiting the number of custodians whose ESI will be preserved. Parties' ESI preservation should include:

- **Litigation Hold:** Implementing a litigation hold to preserve relevant electronic information once arbitration is reasonably anticipated.
- **Document Preservation:** Preserving metadata and ensuring that documents are maintained in their original format where reasonably possible.

6. Collection and Processing

- **Limitations:** Assess appropriate date ranges, key custodians, likely sources of information.
- **Data Collection:**
  - » Collect data in a manner that preserves the integrity of the electronic information where possible and is not cost prohibitive. Use forensically sound methods to ensure that data can be verified as unchanged.
  - » Phase discovery so that collection first occurs from sources or custodians most likely to contain relevant, unique and material information, postponing or ultimately not pursuing collection from sources or custodians less likely to contain relevant, unique and material information.
  - » The development of search strategies such as use of search terms or technology-assisted review ("TAR"), or a combination.
  - » The use of advanced review technologies like generative artificial intelligence to identify relevant documents.
- **Data Processing:** Process collected data to convert it into a reviewable format, while culling irrelevant and duplicative files to focus on the most pertinent data and reduce costs and burden.

7. Privilege

- Address appropriate procedures for the handling and exclusion from production of privileged information. In addition, discuss and agree on the type and necessity of privilege logs and clawback procedures.
- Consider the potential need for a protective order and any procedures to which the parties might agree for handling inadvertent production of privileged information and other privilege waiver issues. *See, e.g.,* Fed. R. Evid. 502.

8. Production and Exchange

- **Form of Production:** Agree on the form in which ESI will be produced (*e.g.,* native files, PDFs, TIFFs), as well as the metadata to be produced.
- **Secure Exchange:** Utilize secure methods to exchange electronic data, such as encrypted data transfers, a shared or joint database, or secure data rooms.

9. Privacy and Security Considerations

- **Confidentiality Agreements:** Implement agreements to protect sensitive information and personal data, especially when handling materials that fall under privacy laws.
- **Security Protocols:** Establish security protocols for handling and storing electronic data to prevent unauthorized access and data breaches.

10. Compliance and Ethics

- **Ethical Handling:** Ensure that all parties involved in the e-discovery process adhere to ethical standards regarding the handling of electronic evidence.
- **Compliance Checks:** Regularly audit the e-discovery process to ensure compliance with the agreed protocols and legal requirements.

11. Dispute Resolution and Amendments

- **Resolve Disputes:** Address any disputes over e-discovery promptly through the arbitrator, if not resolvable among the parties.
- **Flexibility:** Be prepared to revise to the e-discovery plan as the case evolves or new information emerges.

12. Cost Allocation

- **CIAR R 25:** Address whether the fair, efficient and economical resolution of the case requires the arbitrator to allocate the cost of producing ESI to the requesting party.

By establishing clear and concise e-discovery protocols that align with the AAA Construction Industry Arbitration Rules, parties can ensure a more streamlined and effective arbitration process. This approach minimizes disputes over discovery and focuses on resolving the core issues of the arbitration efficiently.

Commentary

Arbitrator authority is derived from the parties' contract, the rules selected by the parties, and the applicable arbitration acts. The Federal Arbitration Act does not contain any provisions related to discovery. Certain state acts, particularly those adopting the Revised Uniform Arbitration Act, may provide for discovery "as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective."[12] The CIAR Regular Track Procedures provide for the exchange of information (R-24), but otherwise are silent on discovery; the Procedures for Large, Complex Construction Disputes state that the arbitrator may place limits on agreed discovery or allow disputed discovery consistent with the expedited nature of arbitration. Party contracts rarely, if ever, address permitted discovery. An arbitrator thus is given much discretion on whether there is to be discovery, and, if so, the extent of such discovery.

With regard to the exercise of the arbitrator's discretion over discovery, particularly e-discovery, the parties and the arbitrator should be mindful of the following: First, there is no "right" of discovery in an arbitration proceeding. As one court noted:

> *An arbitration hearing is not a court of law. When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of these accoutrements is the right to pre-trial discovery.*

Burton v. Bush, 614 F.2d 389, 390 (4th Cir. 1980). Second, the denial of discovery generally is not a basis for vacatur of an award under the FAA. Bain Cotton Co. v. Chesnutt Cotton Co., 531 F. App'x 500, 501 (5th Cir. 2013) ("Regardless [of] whether the district court or this court – or both - might disagree with the arbitrators' handling of Bain's discovery requests, that handling does not rise to the level required for vacating under any of the FAA's narrow and exclusive grounds."). See also Hyatt Franchising, LLC v. Shen Zhen New World I, LLC, 876 F.3d 900, 902 (7th Cir. 2017); Doral Financial Corporation v. García-Vélez, 725 F. 3d 27 (1st Cir. 2013) (rejecting claim that denial of third-party subpoenas constituted "misconduct in refusing to hear evidence pertinent and material to the controversy" under Section 10(a)(3)); Hudgins v Ameriprise Fin. Servs, 2018 U.S. Dist LEXIS 169378 (N.D. Tex. Sept. 30, 2018) (denial of discovery not grounds for vacatur under FAA Sections §10(a)(2) (partiality or corruption) or 10(a)(3) (misconduct or misbehavior)). Third, a denial of discovery may only give rise to a finding of vacatur when the denial deprives a party of the right to a fair opportunity to present its case. E.g., Lindsey v. Travelers Commercial Ins. Co., 636 F. Supp. 3d 1181 (E.D. Cal. 2022), aff'd, Lindsey v. Travelers Commercial Ins. Co., 2023 U.S. App. LEXIS 32911, 2023 WL 8613598 (9th Cir. 2023) (unpublished) (district court properly found arbitrator misconduct and vacated award where arbitrator denied Lindsey discovery of "the very evidence that he later faulted him for not producing," thus "rendering the proceeding fundamentally unfair.").

[12] **UAA (2000), § 17(c).**

Resources

The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, The Sedona Conference Journal, Vol. 19 No. 1 (2018)

Primer on Managing Electronic Discovery in Small Cases, The Sedona Conference, December 2022 (Public Comment Version)

Managing Discovery of Electronic Information: A Pocket Guide for Judges, Third Edition (Federal Judicial Center 2017)

Maura R. Grossman & Gordon V. Cormack, The Grossman-Cormack Glossary of Technology-Assisted Review, 7 Fed. Cts. L. Rev. 85 (2014)

Appendix A

Sources of Potentially Relevant and Material ESI

General

- Email systems
- Text messaging systems
- Collaborative and messaging applications (e.g., Slack, Google Chat, Facebook Messenger, WhatsApp)
- Social media applications
- Websites and web servers
- Voicemail systems
- Communication platforms (Microsoft Teams and Zoom)
- Servers
- Cloud-based storage and applications
- Backup systems
- Legacy systems
- Archival systems
- Personal computers and laptops
- Mobile devices, smartphones and tablets
  - » Company-owned
  - » Personal devices used for business
- External drives, flash media and network attached storage
- Home computers used for business
- Document management systems
- Databases

Specific

- Drawings (*e.g.*, BIM, CAD) and 3D models (CADWorx)
- Estimating software
- Schedule files (*e.g.*, Primavera, MS project)
- Job cost control software
- Project management software (*e.g.*, Autodesk, Procore)
- Production tracking (mechanical, electrical, piping, welding)

- Material management systems
- Photography (cameras, video, drones, Go-pro)
- Wearables

E-Discovery Checklist

In cases where the parties anticipate the need for electronic discovery ("e-discovery"), the following checklist suggests topics that the parties and the arbitrator may wish to address at the preliminary hearing to ensure both reasonable discovery of relevant and material electronically stored information ("ESI") that is proportional to the size and scope of the case as well as fair, efficient, and cost-effective dispute resolution. The usefulness of any particular topic below will depend on the nature and complexity of the matter.

1. **Definitions of terms used in the Protocol or Discovery Plan**
2. **Liaison**
   - **(a)** Each party should identity an e-discovery liaison, who will be knowledgeable about and responsible for the negotiations and discussions related to the party's ESI.
3. **ESI Identification**
   - **(a)** Identification of data sources where potentially discoverable information is stored (e.g. cloud storage, servers, systems, applications, computers, mobile devices, external drives).
   - **(b)** Identification of systems from which discovery will be prioritized (e.g., email, messaging applications, texts, financial, project management, production management).
   - **(c)** Location of systems in which potentially discoverable information is stored.
   - **(d)** How potentially discoverable information is stored.
   - **(e)** How discoverable information can be collected from systems and media in which it is stored.
4. **Preservation**
   - **(a)** The relevant time period for ESI preservation.
   - **(b)** The identification of data from sources that are not reasonably accessible and that will not be produced, but that will be preserved.
   - **(c)** The description of data from sources that (a) the party believes could contain relevant information but (b) has determined, under the proportionality factors, is not discoverable and should not be preserved, such as backup systems, deleted, slack or fragmented information, temporary files or other ephemeral data.
   - **(d)** Whether or not to suspend auto-delete protocols, such as ongoing erasures of e-mails, voicemails, and other electronically-recorded material, backup procedures, and/or document destruction under existing record retention policies.
   - **(e)** The names and/or general job titles or descriptions of custodians for whom ESI will be preserved (e.g., "HR head," "project manager," "marketing manager," etc.).
   - **(f)** Method: collect-to-preserve versus preservation-in-place.
   - **(g)** The number of custodians for whom ESI will be preserved.

(h) The list of systems, if any that contain ESI not associated with individual custodians and that will be preserved, such as enterprise databases.

(i) Identify and mitigate potential spoliation issues.

(j) Scope of "litigation hold."

5. Proportionality and Costs

(a) The amount and nature of the claims being made by either party.

(b) The nature and scope of burdens associated with the proposed identification, preservation, collection, review, and production of ESI.

(c) The likely benefit of the proposed discovery.

(d) Type of collection (e.g., full forensic, targeted, or self-collection).

(e) Costs that the parties will share to reduce overall discovery expenses, such as the use of a common electronic discovery vendor or a shared document repository, or other cost-saving measures.

(f) Limits on the scope of preservation or other cost-saving measures (e.g., excluding archival or legacy data).

(g) Limits based on time period when discoverable information was most likely to have been created or received.

(h) Methods for reducing data volume (e.g., de-duplication, email threading).

(i) Use of search terms, technology-assisted review ("TAR"), advanced review technologies like generative artificial intelligence ("GenAI"), or a combination.

6. Phasing

(a) Whether it is appropriate to conduct discovery of ESI in phases.

(b) Sources of ESI most likely to contain unique, relevant information and that will be included in the first phases of discovery.

(c) Sources of ESI less likely to contain unique, relevant information from which discovery will be postponed or avoided.

(d) Custodians (by name or role) most likely to have relevant information and whose ESI will be included in the first phases of document discovery.

(e) Custodians (by name or role) less likely to have relevant information and from whom discovery of ESI will be postponed or avoided.

7. Search

(a) Data culling

(i) Deduplication

(ii) Key custodians

(iii) Date range

(iv) File type

(v) Email threading

(b) The search method(s) that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery.

(i) Key word searching of words or phrases

(ii) TAR

(iii) Advanced review technologies like GenAI tools

(iv) A combination of search terms, TAR and/or GenAI tools.

(c) The quality control method(s) the producing party will use to evaluate whether a production is missing relevant ESI or contains substantial amounts of irrelevant ESI.

8. Production

(a) The formats in which structured ESI (database, collaboration sites, etc.) will be produced.

(b) The formats in which unstructured ESI (email, presentations, word processing, etc.) will be produced.

(c) The extent, if any, to which metadata will be produced and the fields of metadata to be produced.

(d) The production format(s) that ensure(s) that any inherent searchability of ESI is not degraded when produced.

9. Privilege and Privacy

(a) How any production of privileged or work product protected information will be handled, including whether the parties will exchange a privilege log, and the requirements of same.

(b) Whether the parties can agree upon alternative ways to identify documents withheld on the grounds of privilege or work product to reduce the burdens of such identification, such as the exchange of "metadata only" or "metadata plus" privilege logs.

(c) Whether the parties will enter into a stipulation and order addressing inadvertent production and the scope thereof and any clawback procedures.

(d) What locations and/or documents are subject to legal privacy requirements.