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## The Convergence Awakens: How Principles of Proportionality and Calls for Cooperation Are Reshaping the E-discovery Landscape

Tevor Gillum

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THE CONVERGENCE AWAKENS: HOW PRINCIPLES OF  
PROPORTIONALITY AND CALLS FOR COOPERATION ARE  
RESHAPING THE E-DISCOVERY LANDSCAPE

*A comparison between the Federal Rules of Civil Procedure and  
prominent international arbitral guidelines.*

*Trevor Gillum*

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#### I.    INTRODUCTION

Established around 300 B.C., the ancient Library of Alexandria was humanity's first attempt at gathering the

sum total of human knowledge in one location.<sup>1</sup> Today, Alexandria's vast collection of works could fit onto a single USB flash-drive.<sup>2</sup> The ubiquity of computers in our everyday lives has revolutionized how we communicate and store information. Once limited to paper and ink, the digitization of data is having a profound effect on civil litigation and alternative dispute resolution – and not necessarily for the better.

The sheer volume of electronically stored information (ESI), when compared with historically printed information, illustrates the dramatic changes inundating modern legal disputes. It is important to note that everyone is a “file keeper” and generates massive quantities of ESI without even realizing it. Today, about half of the global adult population owns a smartphone, and by 2020 this number will rise to 80%.<sup>3</sup> Since 2005, the cost of sending one megabyte of data wirelessly has dropped from \$8 to only a few cents,<sup>4</sup> which is a significant reason 2014 mobile data traffic was 30 times greater than the entire global Internet traffic in 2000.<sup>5</sup> The explosion of mobile data usage means

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<sup>1</sup> Mary Murrell, *Digital + Library: Mass Book Digitization As Collective Inquiry*, 55 N.Y. L. SCH. L. REV. 221, 226-27 (2010).

<sup>2</sup> Leslie Bradshaw, *Big Data and What it Means*, U.S. CHAMBER OF COMMERCE FOUNDATION: BUSINESS HORIZON QUARTERLY// ISSUE 7 (2013),

<https://www.uschamberfoundation.org/sites/default/files/article/foundation/BigData.pdf>.

<sup>3</sup> *Planet of The Phones: The Smartphone Is Ubiquitous, Addictive and Transformative*, THE ECONOMIST (Feb. 28, 2015), <http://www.economist.com/news/leaders/21645180-smartphone-ubiquitous-addictive-and-transformative-planet-phones>.

<sup>4</sup> *Id.*

<sup>5</sup> *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update 2015–2020 White Paper*, CISCO SYSTEMS, INC. (Feb. 3, 2016),

that lawyers must grapple with the reality that clients are individually creating vast sums of ESI, all of which may come into play during litigation or international arbitration.

The growing burdens of digital data discovery are having a profound effect on businesses, regardless of their size. In the 1980s, a standard 3.5" floppy disk could typically hold a maximum of 1.44 megabytes, or about 720 typewritten pages of plain text.<sup>6</sup> A 650-megabyte CD-ROM can hold up to 325,000 typewritten pages, while a one gigabyte CD-ROM holds up to 500,000 typewritten pages.<sup>7</sup> For reference, the entry-level iPhone 6 starts at 16 gigabytes.<sup>8</sup> Large business computer systems store data measured in terabytes and petabytes, with one terabyte storing roughly 500 billion typewritten pages.<sup>9</sup> Considering the fact that one petabyte represents 1,000 terabytes, it is easy to see how production requests during the course of litigation or arbitral proceedings can spiral out of control. The reduced cost and increased feasibility of vast information storage, ironically, has dramatically increased the cost of electronic discovery.<sup>10</sup> As a result, parties are often unable to achieve a fair resolution on the merits of their case because they cannot afford the cost of discovery-litigation.

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[http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/white\\_paper\\_c11-520862.html](http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/white_paper_c11-520862.html).

<sup>6</sup> Manual for Complex Litigation, Fourth, FEDERAL JUDICIAL CENTER, 2004 WL 258627, at \*1 [hereinafter Manual].

<sup>7</sup> *Id.*

<sup>8</sup> *iPhone 6*, APPLE, <http://www.apple.com/shop/buy-iphone/iphone6> (last visited Apr. 20, 2016).

<sup>9</sup> Manual, *supra* note 6.

<sup>10</sup> Robert Hardaway et. al., *E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 522 (2011).

This article examines why existing principles of proportionality and party cooperation must be imposed as the requisite standard for shaping the scope of electronic discovery under the Federal Rules of Civil Procedure and international arbitration guidelines. By importing unique tenets from each other, the Federal Rules and international arbitral guidelines can effectively employ proportionality and cooperation to address the unique problems electronically stored information poses to each forum. Part I examines the development of electronic discovery under the Federal Rules of Civil Procedure leading up to the new e-discovery amendments, which took effect on December 1, 2015, and further examines e-discovery in international arbitration and developments under recent guidelines promulgated by the major international arbitral organizations. Part II analyzes principles of proportionality and party cooperation, and why they are indispensable for resolving electronic discovery burdens. Part II further argues that proportionality and cooperation can only be achieved through a reinvigorated judicial and arbitrator managerial role. Lastly, Part II concludes that a growing convergence between the Federal Rules of Civil Procedure (“FRCP” or “Federal Rules”) and international arbitral guidelines has been triggered in how both forums resolve e-discovery challenges. There should not, and realistically cannot, be a one-size fits all approach to resolving e-discovery challenges. However, definitive steps can be taken under the Federal Rules and arbitral guidelines to ensure that e-discovery does not overwhelm our legal systems.

## II. WHERE HAVE WE BEEN?

In order to address the complications presented by electronic discovery, it is important to briefly consider e-discovery’s evolution in the United States and, more

recently, in international arbitration. Although the implications of electronic discovery touch multiple Federal Rules, this paper will primarily discuss Rule 26, as well as a limited number of other rules specific to e-discovery. The relevant Federal Rules to consider in any e-discovery discussion include:

- FRCP 16 - outlining scheduling, pretrial conferences, and general case management.<sup>11</sup>
- FRCP 26 - outlining general provisions of discovery, the duty to disclose, and introducing the concept of "proportionality."<sup>12</sup>
- FRCP 33 - outlining the service of interrogatories to parties.<sup>13</sup>
- FRCP 34 - concerning the production of ESI, physical documents, and other tangible things.<sup>14</sup>
- FRCP 37 - addressing the consequences for a party's failure to disclose or cooperate.<sup>15</sup>
- FRCP 45 - governing the procedures for compelling discovery from third parties and nonparties.<sup>16</sup>

International arbitration, although fundamentally different from U.S. civil litigation, must still grapple with the brave new world of electronically stored information. While no arbitral organization to date has modified its rules to

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<sup>11</sup> Fed. R. Civ. P. 16.

<sup>12</sup> Fed. R. Civ. P. 26.

<sup>13</sup> Fed. R. Civ. P. 33.

<sup>14</sup> Fed. R. Civ. P. 34.

<sup>15</sup> Fed. R. Civ. P. 37.

<sup>16</sup> Fed. R. Civ. P. 45.

impose mandatory ESI obligations,<sup>17</sup> many leading arbitral authorities have promulgated various guidelines and suggestions for addressing e-discovery.<sup>18</sup> The following arbitral authorities are the leading organizations confronting the challenges of ESI in international arbitration:

- International Centre for Dispute Resolution (ICDR), which serves as the international division of the American Arbitration Association (AAA).
- Chartered Institute of Arbitrators (CI Arb).
- The International Chamber of Commerce International Court of Arbitration (ICC).
- London Court of International Arbitration (LCIA).
- IBA Arbitration Committee (IBA).
- International Institute for Conflict Prevention and Resolution (CPR).

Any discussion on how principles of proportionality and party cooperation must be used to ameliorate e-discovery burdens must carefully examine the intricacies of Federal Rules and international arbitral organizations in the context of our digital world. While it is misguided to

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<sup>17</sup> John Range & Jonathan Wilan, *Techniques for Obtaining Efficient and Economical E-Disclosure Despite Arbitral Resistance to U.S.-Style Discovery*, in E-DISCOVERY IN ARBITRATION: LEADING LAWYERS ON RECOVERING ELECTRONIC EVIDENCE, MEETING NEW DISCLOSURE GUIDELINES, AND IMPLEMENTING MEASURES TO STREAMLINE THE PROCESS, 2010 WL 556203, at \*3 (2010).

<sup>18</sup> Ethan Berghoff, *E-Discovery Invades International Arbitration*, in E-DISCOVERY IN ARBITRATION: LEADING LAWYERS ON RECOVERING ELECTRONIC EVIDENCE, MEETING NEW DISCLOSURE GUIDELINES, AND IMPLEMENTING MEASURES TO STREAMLINE THE PROCESS, 2010 WL 556201, at \*1 (2010).



consider e-discovery as a distinct category of traditional discovery, in order to better understand the impact that the digital era is having on legal disputes it is important to examine how far we have come in the realm of electronic discovery.

#### A. THE BROAD AND LIBERAL FEDERAL RULES

Since their promulgation in 1938, the Federal Rules embraced a “broad and liberal” discovery standard.<sup>19</sup> When the Federal Rules were adopted, information-sharing came at a premium – typically a significant monetary cost – thereby creating a power imbalance based on the financial capacities of either party.<sup>20</sup> The drafters viewed a broad exchange of information as the means by which discovery would redress this unfair power imbalance.<sup>21</sup> As a result, litigants have long relied on Rule 26 to obtain discovery concerning any non-privileged material relevant to the subject matter involved in a pending action, so long as it related to a claim or defense of the requesting party or any other party.<sup>22</sup> In its 1947 *Hickman v. Taylor* opinion, the U.S. Supreme Court affirmed that the routine cry of a “fishing

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<sup>19</sup> *Hickman v. Taylor*, 329 U.S. 495, 507 (1947); *see also* *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (emphasizing that discovery rules are to be accorded a broad and liberal treatment).

<sup>20</sup> Kathleen L. Blaner et. al., *Federal Discovery: Crown Jewel or Curse?*, 24 LITIGATION 8, 8 (1998).

<sup>21</sup> *Id.*

<sup>22</sup> Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather Than the Exception*, 87 DENV. L. REV. 513, 518 (2010).

expedition” no longer could preclude parties from discovering the underlying facts of an opponent’s case.<sup>23</sup>

#### 1. AMENDING THE RULES AND SETTING THE STAGE

Despite the broad and liberal standard of the original Federal Rules, parties still had to show “good cause” and submit a motion to obtain document production.<sup>24</sup> However, the original discovery rules operated without major grievances for nearly three decades.<sup>25</sup> In 1970, the first substantive revisions were made to the discovery rules, expanding the general discovery availability by eliminating the “good cause” and cumbersome motion requirements.<sup>26</sup> The Advisory Committee on Rules of Civil Procedure recognized the need to expand the definition of “documents” in order to “accord with changing technology,” and amended Rule 34 to ensure that information in digital form was considered to be the same as hard copy information.<sup>27</sup> Notwithstanding efforts to adapt the Federal Rules to changing technology, some questioned whether their underlying objective could be reconciled with the era of computers. Consider one federal judge’s

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<sup>23</sup> *Hickman*, 329 U.S. at 507.

<sup>24</sup> Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 749 (1998).

<sup>25</sup> Amelia F. Borroughs, *Mythed It Again: The Myth of Discovery Abuse and Federal Rule of Civil Procedure 26(b)(1)*, 33 MCGEORGE L. REV. 75, 80 (2001).

<sup>26</sup> Marcus, *supra* note 24, at 748-49.

<sup>27</sup> See Fed. R. Civ. P. 34, NOTES OF ADVISORY COMMITTEE ON RULES-1970 AMENDMENT, [https://www.law.cornell.edu/rules/frcp/rule\\_34](https://www.law.cornell.edu/rules/frcp/rule_34); see also JAY GRENIG & WILLIAM GLEISNER, *EDISCOVERY & DIGITAL EVIDENCE* § 6:1 (2016).

speculation, in 1980, when contemplating an ESI discovery request:

It may well be that Judge Charles E. Clark and the framers of the Federal Rules of Civil Procedure could not foresee the computer age. However, we know we live in an era when much of the data which our society desires to retain is stored in computer discs [sic]. This process will escalate in years to come; we suspect that by the year 2000 virtually all data will be stored in some form of computer memory. To interpret the Federal Rules which after all, are to be construed to "secure the just, speedy, and inexpensive determination of every action," [FRCP 1], . . . in a manner which would preclude the production of material such as is requested here, would eventually defeat their purpose.<sup>28</sup>

Thus, the central issue was not the discoverability of computerized information, but the scope of the production permitted.

In 1983, Rule 26(b)(1) was amended to address the significant problems of excessive discovery and resistance to reasonable discovery requests that had become commonplace under the broad and liberal interpretation.<sup>29</sup> The Advisory Committee noted that the Rule 26

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<sup>28</sup> Nat'l Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1257, 1262-63 (E.D.Pa.1980).

<sup>29</sup> See Fed. R. Civ. P. 26, NOTES OF ADVISORY COMMITTEE ON RULES-1983 AMENDMENT, [https://www.law.cornell.edu/rules/frcp/rule\\_26](https://www.law.cornell.edu/rules/frcp/rule_26).

amendments were intended to “guard against redundant or disproportionate discovery” by granting “the court authority to reduce the amount of discovery.”<sup>30</sup> Furthermore, the 1983 amendments introduced, for the first time, the general proportionality principle of determining whether “the burden or expense of the proposed discovery outweighs its likely benefits.”<sup>31</sup> The Committee delineated several factors bearing on proportionality, including the nature and complexity of the lawsuit, the parties’ resources, the importance of the issues at stake, the significance of the substantive issues, and public policy apprehensions.<sup>32</sup>

Recognizing the substantial growth in potentially discoverable information, and the corresponding increase in discovery costs, the Federal Rules were again amended in 1993. The 1993 amendments added two new considerations to Rule 26 bearing on the permissible breadth of discovery: whether “the burden or expense of the proposed discovery outweighs its likely benefit,” and “the importance of the proposed discovery in resolving the issues.”<sup>33</sup> The Advisory Committee explained that the changes to Rule 26(b)(2) were “intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery.”<sup>34</sup> Despite the Advisory Committee’s acknowledgement that “broad and liberal” discovery could lead to exploding costs, the Committee left unchanged Rule

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 14 SEDONA CONF. J. 155, 158 (2013) [hereinafter Sedona Conference Fall 2013].

<sup>33</sup> See Fed. R. Civ. P. 26(b), NOTES OF ADVISORY COMMITTEE ON RULES-1993 AMENDMENT, [https://www.law.cornell.edu/rules/frcp/rule\\_26](https://www.law.cornell.edu/rules/frcp/rule_26).

<sup>34</sup> *Id.*

26(b)(1)'s presumptive inclination towards broad and liberal discovery.<sup>35</sup>

By the late 1990s, it was apparent that the revised Rule 26(b)(2) was having little influence, while growth in email and other electronic information discovery practices were beginning to overwhelm the rules.<sup>36</sup> The 2000 amendments substantively narrowed the scope of discovery under Rule 26(b)(1) to materials relevant to the "claims and defenses" of any party, instead of merely the "subject matter" of the case.<sup>37</sup> Furthermore, the Advisory Committee revised Rule 26(b)(1) to include the (b)(2) proportionality provisions with the general discovery duty subdivision to "emphasize the need for active judicial use of subdivision (b)(2) [proportionality factors] to control excessive discovery."<sup>38</sup>

Although courts have relied on the 2000 amendments to limit disproportionate electronic discovery requests,<sup>39</sup> thirty-six years had elapsed since the Federal Rules had last been revised to specifically address computers and the digital realm. It had become increasingly apparent that

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<sup>35</sup> *Id.*

<sup>36</sup> Thomas Y. Allman, *The "Two-Tiered" Approach to E-Discovery: Has Rule 26(b)(2)(b) Fulfilled Its Promise?*, 14 RICH. J.L. & TECH. 7, 9 (2008).

<sup>37</sup> Netzorg & Kern, *supra* note 22, at 521.

<sup>38</sup> Sedona Conference Fall 2013, *supra* note 32, at 159.

<sup>39</sup> John M. Barkett, *Walking the Plank, Looking Over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation?*, Miami-630575-v2 (2010) <http://www.uscourts.gov/file/document/walking-plank-over-your-fearing-sharks-are-water-e-discovery-federal> (citing *Averett v. Honda of America Mfg., Inc.*, 2009 U.S. Dist. LEXIS 30179, (S.D. Ohio, Mar. 24, 2009)) (rejecting plaintiff's request for a search of all records referring to plaintiff in her 17 years of employment, the district court explained that the 2000 amendments to Rule 26(b) [sic] were intended to "communicate the message that discovery is not unlimited").

discovery of ESI differed in several critical ways from conventional hard-copy discovery, namely that ESI is inherently retained “in exponentially greater volume than hard-copy documents; is dynamic, rather than static; and may be incomprehensible when separated from the system that created it.”<sup>40</sup>

In 2006, the Federal Rules were amended to explicitly acknowledge the nascent and unique challenges of ESI discovery.<sup>41</sup> Conspicuous among the 2006 amendments was the revised Rule 26(b)(2), which provided that a “party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”<sup>42</sup> The revision to Rule 26(b)(2)(B) is often referred to as the “two-tiered” approach to e-discovery.<sup>43</sup> Under the two-tiered approach, a party must produce discovery of relevant and reasonably accessible ESI (tier-one sources).<sup>44</sup> However, a party need not

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<sup>40</sup> CIVIL RULES ADVISORY COMMITTEE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE (2005) [hereinafter Advisory Comm. 2005 Report], <http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-2005>.

<sup>41</sup> Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 YALE L.J. POCKET PART 167, 168 (2006) (Judge Lee H. Rosenthal, Chair of the Advisory Committee on Civil Rules, stated that the “amendments address five broad areas: (1) the parties’ obligations to meet and confer about electronic discovery early in litigation; (2) discovery of information that is not reasonably accessible and allocating costs of that discovery; (3) privilege review; (4) form of production; and (5) sanctions. An overarching change is the introduction of the term ‘electronically stored information’ to the rules”).

<sup>42</sup> Fed. R. Civ. P. 26(b)(2)(B).

<sup>43</sup> See Allman, *supra* note 36, at 1.

<sup>44</sup> Fed. R. Civ. P. 26(b)(2)(B); see also Theodore C. Hirt, *The Quest For “Proportionality” In Electronic Discovery – Moving From Theory to Reality In Civil Litigation*, 5 FED. CTS. L. REV. 171 (2011).

provide discovery of ESI that the party identifies as not reasonably accessible unless the requesting party establishes “good cause, considering the limitations of Rule 26(b)(2)(C).”<sup>45</sup>

Of equal, if not greater importance, were the amendments to Rule 26(f), which instructs parties to “meet and confer as soon as practicable” in order to engage in early and meaningful dialogue to, *inter alia*, consider the nature and basis of their claims and defenses, possibilities of resolving the case, and devise a discovery plan, including form or forms of production.<sup>46</sup> While procedural or judicial guidance is helpful in discovery management, ultimately cooperative party dialogue is key to resolving e-discovery disputes because it is the parties themselves who determine the course of any legal dispute. The district court in *S.E.C. v. Collins & Aikman Corp* endorsed the notion that the 2006 amendments, in general, impose a “mandate for counsel to act cooperatively,” and numerous courts have endorsed similar attitudes.<sup>47</sup> Subsequently, calls for greater party

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<sup>45</sup> Fed. R. Civ. P. 26(b)(2)(B); *see also* Hirt, *supra* note 44.

<sup>46</sup> Fed. R. Civ. P. 26(f).

<sup>47</sup> 256 F.R.D. 403, 415 (S.D.N.Y. 2009); *see* Bd. of Regents of Univ. of Nebraska v. BASF Corp., No. 4:04CV3356, 2007 WL 3342423, at \*5 (D. Neb. 2007) (“The overriding theme of recent amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable . . . Compliance with these changes has placed — on counsel — the affirmative duties to work with clients to make required disclosures, Rule 26(a)(1)(2) and (3); reduce oppression and burden, Rule 26(b)(2); cooperatively plan discovery with opposing counsel, Rule 26(f); affirmatively certify accuracy and good faith in requesting and responding to discovery, Rule 26(g); and confer with opposing counsel to resolve disputes before filing certain motions, Rule 37(a)(2)(B), among

cooperation have grown more vocal, with many judges endorsing the Sedona Cooperation Proclamation that “costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system.”<sup>48</sup>

A growing consensus developed after the 1983 amendments, to the consternation of many, that each subsequent round of revisions to the Federal Rules reinforced federal district judges' managerial authority.<sup>49</sup> Advocates for increased judicial management have long cited, *inter alia*, daunting case loads, expanded causes of action, and increasing costs of litigation as illustrative examples for why judges must play a greater managerial role.<sup>50</sup> Despite contentions that the 2006 amendments

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others.”); *see also* *Saliga v. Chemtura Corp.*, 3:12CV832 RNC, 2013 WL 6182227, at \*1 (D. Conn. 2013) (declining the plaintiff's request that defendant provide details of the data collection process being employed, stating that “the best solution in the entire area of electronic discovery is cooperation among counsel”) (citing *William A. Gross Const. Associates, Inc. v. American Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y.2009)).

<sup>48</sup> *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009) [hereinafter *Sedona Proclamation*]; *see DeGeer v. Gillis*, 755 F. Supp. 2d 909, 918 (N.D. Ill. 2010) (stating “[t]his Court has endorsed *The Sedona Conference Cooperation Proclamation* (2008) and its call for cooperative, collaborative, [and] transparent discovery.”) (internal quotations omitted); *William A. Gross Const. Associates, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (affirming that “[t]his Court strongly endorses *The Sedona Conference Cooperation Proclamation*.”).

<sup>49</sup> Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules-and the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191, 192 (2007).

<sup>50</sup> E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 309 (1986).



increase the “managerial role of courts in discovery,”<sup>51</sup> others have noted that the revised Rule 26(b)(2)(B) is actually modest and does not in fact afford judges new authority to limit discovery or shift costs.<sup>52</sup> In his critical, but persuasive article, *Good Cause Is Bad Medicine For the New E-Discovery Rules*, Associate Professor of Law, Henry S. Noyes, asserts that the 2006 amendments were in fact “so modest as to be essentially meaningless.”<sup>53</sup> Indeed, pervasive concerns calling for opposing counsel cooperation were falling on deaf ears, that courts were not adequately applying principles of proportionality, and that e-discovery costs were nevertheless pricing parties out of litigation, were the underlying reasons given for the most recent amendments to the Federal Rules, which took effect on December 1, 2015.<sup>54</sup>

## 2. THE 2015 AMENDMENTS: A NEW HOPE?

The 2006 amendments largely sought to address the mounting challenges of e-discovery burdens head on. Unfortunately, the continued practice of requiring a producing party to pay for production and adherence to broad discovery practices exacerbated many of the problems

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<sup>51</sup> Allman, *supra* note 36, at 13.

<sup>52</sup> ROSENTHAL, *supra* note 41, at 181.

<sup>53</sup> Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 73 (2007).

<sup>54</sup> CIVIL RULES ADVISORY COMMITTEE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE (2005), Appendix B (2014) [hereinafter Advisory Comm. 2014 Report], <http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2014>.

the amendments sought to alleviate.<sup>55</sup> Although principles of proportionality have been included in the Federal Rules since 1983, courts nonetheless have not applied proportionality limitations “with the vigor that was contemplated.”<sup>56</sup> Recognizing that “previous amendments have not had their desired effect,” the 2015 amendments incorporated the word “proportionality” for the first time, and moved the original proportionality factors to 26(b)(1) to explicitly indicate that proportionality is a component of the scope of discovery.<sup>57</sup>

Revised Rule 37(e) calls for parties to take “reasonable steps” to preserve ESI in anticipation of litigation,<sup>58</sup> thus potentially requiring consideration of proportionality principles before litigation has even commenced. Rule 37 also now affords judges greater discretion to impose sanctions or other punitive means to help ameliorate any prejudice that may arise from a party’s failure to adequately preserve discoverable ESI.<sup>59</sup> Revised Rule 26(f) acknowledges the call for greater party cooperation and an increased managerial role for judges by requiring the parties

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<sup>55</sup> Robert Hardaway et. al., *E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 565-66, 574 (2011) (noting that ambiguity surrounding the amendments has encouraged ancillary litigation concerning proper discovery techniques); see *Zuniga v. Bernalillo County*, CIV. 11-877 RHS-ACT, 2013 WL 3328692, at \*2 (D.N.M. 2013) (reiterating that federal courts have long construed the scope of discovery under Rule 26 as being “deliberately broad,” which includes information that “appears reasonably calculated to lead to the discovery of admissible evidence”) (internal quotations omitted).

<sup>56</sup> See Fed. R. Civ. P. 26(b), COMMITTEE NOTES ON RULES-2000 AMENDMENT, [https://www.law.cornell.edu/rules/frcp/rule\\_26](https://www.law.cornell.edu/rules/frcp/rule_26).

<sup>57</sup> Advisory Comm. 2014 Report, *supra* note 53, at B-8.

<sup>58</sup> Fed. R. Civ. P. 37(e).

<sup>59</sup> *Id.*

to address e-discovery plans and potential preservation duties at the Rule 26(f) conference.<sup>60</sup> Parties will be expected to have already engaged in meaningful dialogue concerning relevant ESI, storage locations, and proposed discovery plans.<sup>61</sup> Furthermore, revised Rule 34(b)(2)(c) also incorporates notions of party cooperation and proportionality by requiring parties who object to a production request to “state whether any responsive materials are being withheld on the basis of that objection.”<sup>62</sup> The 2015 amendments embody a full-throated advocacy of proportionality and party cooperation; however, it is too early to determine whether the revisions will indeed be up to the task of mitigating the burdens often associated with e-discovery.

#### B. INTERNATIONAL ARBITRATION: THE LITIGANT’S ALTERNATIVE

The fundamental nature of international arbitral proceedings affords limited insight into e-discovery practices currently being employed. Nevertheless, many arbitrators openly share the similar concerns of U.S. litigators that e-discovery could overwhelm international arbitration.<sup>63</sup>

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<sup>60</sup> Fed. R. Civ. P. 26(f).

<sup>61</sup> *Id.*

<sup>62</sup> Fed. R. Civ. P. 34(b)(2)(c).

<sup>63</sup> Jonathan L. Frank & Julie Bédard, *Electronic Discovery in International Arbitration: Where Neither the IBA Rules Nor U.S. Litigation Principles Are Enough*, 1 DISP. RESOL. J. 62, 68 (2008).

## 1. INTERNATIONAL ARBITRATION AND THE DATA DELUGE

The increasingly vital role ESI now plays in international business operations<sup>64</sup> has prompted the reluctant acknowledgment that an expanding dependence on e-discovery in international arbitration is “somewhat inevitable.”<sup>65</sup> Long championed as the flexible, efficient, and less contentious solution to the scorched earth discovery practices often found in U.S. litigation, recent trends in arbitral practices have stirred a growing chorus of voices calling into question the fundamental “incentives for parties to choose arbitration over litigation.”<sup>66</sup>

Are the inherent pressures associated with e-discovery and the production of ESI the sole culprits behind an arbitral process being increasingly “bogged down in long and costly legal proceedings?”<sup>67</sup> The short answer is *no*.<sup>68</sup>

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<sup>64</sup> Range & Wilan, *supra* note 17, at \*2 (describing how even the most basic business practices have dramatically changed in the era of big data, considering “less than fifteen years ago, much of what now exists as e-mail was conveyed over the telephone (or not at all) and was never reduced to writing or saved in any permanent way.”).

<sup>65</sup> Berghoff, *supra* note 18, at \*2.

<sup>66</sup> Valecia M. McDowell, *Arbitration in the Digital Age: Synchronizing your E-Discovery Plan with your Arbitration Strategy*, in E-DISCOVERY IN ARBITRATION: LEADING LAWYERS ON RECOVERING ELECTRONIC EVIDENCE, MEETING NEW DISCLOSURE GUIDELINES, AND IMPLEMENTING MEASURES TO STREAMLINE THE PROCESS (INSIDE THE MINDS) (Feb. 2010), 2010 WL 556204, at \*1.

<sup>67</sup> Steven Seidenberg, *International Arbitration Loses Its Grip: Are U.S. Lawyers to Blame?*, AM. BAR ASS'N. J. (Apr. 1, 2010), [http://www.abajournal.com/magazine/article/international\\_arbitration\\_loses\\_its\\_grip/](http://www.abajournal.com/magazine/article/international_arbitration_loses_its_grip/).

<sup>68</sup> *Id.* (Mr. Seidenberg explaining that, while “[m]any businesses, attorneys and international arbitral organizations lament the

However, tenets of e-discovery are inevitably “becoming a major cost driver in international arbitration.”<sup>69</sup> Consider that not long ago businesses conducted a substantial amount of their operations on paper and over landlines. Those days are quickly becoming a distant memory. Today, faxes and hard-copy memoranda have been replaced by emails and other electronic documents.

To better illustrate the sheer immensity at which businesses are generating data, consider the volume of emails generated by a single employee. In an insightful chapter of *Dispute Resolution and e-Discovery*, Deborah Baron explains that an employee can generate, on average, more than 1.25 GB of email annually, or roughly 93,000 printed pages.<sup>70</sup> Additionally, a single custodian’s annual data production, encompassing emails and other computer data files can range from 2GB to 10GB, or roughly 150,000 up to half a million printed pages.<sup>71</sup> So what effect on international arbitration do these staggering data statistics suggest? Since “[i]nternational arbitration, by definition, is almost always a commercial dispute,”<sup>72</sup> e-disclosure is an

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Americanization of international arbitration. But they are often themselves to blame.”).

<sup>69</sup> *Id.*

<sup>70</sup> Deborah Baron, § 2:3 *The impact of volume and diversity of data on legal disputes*, in *DISPUTE RESOLUTION AND E-DISCOVERY* (2013 ed.) (Ms. Baron writing, “discoverable data may amount to tens of thousands on up to millions of files. For example, an employee can generate over 1.25 GB of email in a year on average, or roughly 93,000 printed pages. A typical custodian collection, including email and other files, ranges from 2GB to 10GB or from 150,000 up to half a million pages. If the pages were printed, they would fill between 60 to 300 banker's boxes for *each* custodian.”).

<sup>71</sup> *Id.*

<sup>72</sup> Berghoff, *supra* note 18, at \*3.

inescapable reality in arbitral disputes. In the digitization era, businesses must be responsive to a new reality that arbitral disputes are increasingly more likely to bring into play vast sums of ESI, as well as new media, such as text messages, voice mails, Tweets, LinkedIn accounts and messages, YouTube videos, Facebook accounts and posts, and more.<sup>73</sup>

## 2. CLASH OF CULTURES?

International arbitration raises additional complex issues inherent to cross-border practice, such as “double deontology” (i.e., the requirement that parties observe applicable rules of professional conduct both in the home and host jurisdictions).<sup>74</sup> Because international arbitration draws into play a range of governing rules and norms, some argue that parties cannot “be assumed to conduct themselves according to a common set of standards.”<sup>75</sup> However, disputes implicating parties from different jurisdictions poses a genuine risk that the parties will employ different practices in the gathering and producing electronically stored evidence, which would ultimately “affect[] a tribunal’s ability to determine the dispute fairly.”<sup>76</sup> Thus, significant weight can be afforded to the notion that diverging standards of evidentiary practices by

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<sup>73</sup> *Id.*

<sup>74</sup> Gisele Stephens-Chu & Julie Spinelli, *The Gathering and Taking of Evidence Under the IBA Guidelines on Party Representation in International Arbitration: Civil and Common Law Perspectives*, 8 DISP. RESOL. INT’L 37, 38 (2014).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

parties imperils the principle of fairness embedded in the arbitral process.

Notwithstanding the transformative effect of big data and electronic discovery, not a single arbitral organization has reformed its governing rules to impose mandatory ESI obligations.<sup>77</sup> However, a number of international arbitration institutions have appointed task forces to study the issues posed by ESI, while others have adopted optional guidelines and protocols specific to e-discovery.<sup>78</sup> The fact that international arbitral organizations have been slower than common law courts to address ESI disclosure and production is not surprising considering the fact that most arbitrators and arbitral institutions maintain strong aversions to U.S.-style litigation and discovery.<sup>79</sup> The “far-reaching and invasive discovery”<sup>80</sup> often common to U.S. civil litigation, has encouraged strong opposition within the arbitral world to even using the term “discovery.”<sup>81</sup> Although slower in addressing the complex issues of ESI production, as compared to the Federal Rules, international arbitral organizations are nevertheless beginning to confront the issue of electronic discovery, albeit tepidly.

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<sup>77</sup> Range & Wilan, *supra* note 17, at \*1.

<sup>78</sup> David Howell, *Developments in Electronic Disclosure in International Arbitration*, 3 DISP. RESOL. INT'L 151 (2009); see Stephens-Chu & Spinelli, *supra* note 73, at 37; see also Seidenberg, *supra* note 66, at \*54.

<sup>79</sup> Range & Wilan, *supra* note 17, at \*1.

<sup>80</sup> Berghoff, *supra* note 18, at \*1.

<sup>81</sup> Range & Wilan, *supra* note 17, at \*1 (“In an International Chamber of Commerce arbitration in Paris, the president of the tribunal was so opposed to the use of the term ‘discovery’ that he placed a glass cup on the conference table during arguments concerning document disclosure, requiring counsel (both U.S. law firms) to deposit a token amount of money whenever one of the lawyers inadvertently uttered the word ‘discovery.’”).

### 3. THE INTERNATIONAL ARBITRAL PLAYERS

Party autonomy has long been one of the main differences between international arbitration and court proceedings.<sup>82</sup> However, the ability for parties to freely specify the procedures that will govern their dispute resolution in a manner that will best meet the characteristic needs of their case is under new pressure. International arbitration poses the additional complication of dissimilar data privacy laws, many of which are significantly more restrictive than privacy laws in the U.S.<sup>83</sup> Many parties to a commercial agreement often avoid or are unwilling to contemplate detailed disclosure procedures as part of their arbitral agreement, in the event a dispute arises.<sup>84</sup> Moreover, parties frequently are unable to anticipate the scope of potential discovery needs until the dispute develops,<sup>85</sup> a problem further compounded by the exponential growth of ESI in everyday business practices. Thus, international arbitration institutions find themselves tasked with adapting to the changing world of e-discovery, while seeking to preserve the tenets of party autonomy, flexibility, and economy.

#### a) THE AAA APPROACH

In order to ensure that its procedures upheld practices that were cost-effective and expedient, the

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<sup>82</sup> Laurent Vercauteren, *The Taking of Documentary Evidence in International Arbitration*, 23 AM. REV. INT'L. ARB. 341, 345 (2012).

<sup>83</sup> Berghoff, *supra* note 18, at \*3.

<sup>84</sup> Frank & Bédard, *supra* note 62, at 69.

<sup>85</sup> *Id.*



American Arbitration Association (“AAA”) Taskforce on the Exchange of Documentary and Electronic Materials was organized in July of 2007.<sup>86</sup> In May of 2008, the AAA Taskforce issued the Guidelines for Information Disclosure and Exchanges in International Arbitration Proceedings (“the Guidelines”) to be employed by its international arm, the International Centre for Dispute Resolution (“ICDR”), for all international cases commenced after May 31, 2008.<sup>87</sup> The Guidelines recognize that certain “procedural measures and devices from different court systems,” while fair under those jurisdictions, are nevertheless inconsistent with international arbitration’s ultimate objective of “simpler, less expensive, and more expeditious” dispute resolutions.<sup>88</sup>

Perhaps mindful of the prevalent attitude, especially within civil law jurisdictions, of preventing the Americanization of international arbitration, the Guidelines “adopt a strictly minimalist approach” on the disclosure of ESI.<sup>89</sup> Article 4 of the ICDR Guidelines, which have since been incorporated into the AAA’s Commercial Arbitration Rules,<sup>90</sup> provide that when electronic documents are requested,

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<sup>86</sup> Howell, *supra* note 77.

<sup>87</sup> ICDR *Guidelines for Information Disclosure and Exchange in International Arbitration Proceedings*, INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, [https://www.adr.org/cs/idcplg?IdcService=GET\\_FILE&dDocName=ADRSTAGE2021624&RevisionSelectionMethod=LatestReleased](https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2021624&RevisionSelectionMethod=LatestReleased) [hereinafter ICDR Guidelines].

<sup>88</sup> *See id.* at Introduction.

<sup>89</sup> Howell, *supra* note 77, at 152 (noting that the ICDR Guidelines only address electronic documents in a single paragraph).

<sup>90</sup> The Am. Arb. Assoc.’s (AAA) Commercial Arbitration Rules are generally available at [www.adr.org](http://www.adr.org); *see* AAA Rule 21.6 (incorporating ICDR Guidelines, *supra* note 86, art. 4 (specifically addressing electronic documents)).

[T]he party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the Tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a different form."<sup>91</sup>

Electronic document requests should be narrowly focused and structured to afford searching for them to be as economical as possible. Also, the Tribunal may order direct testing or any other means for limiting a search. The AAA Taskforce ultimately concluded that “. . . no further provision made specifically with electronic disclosure in mind was appropriate.”<sup>92</sup> The Taskforce worried that any additional rules specific to e-discovery might suggest an acknowledgement that issues connected to electronic disclosure are not controlled by the general standard imposed by the Guidelines, leading to different treatment of similar issues surfacing under other document requests.<sup>93</sup>

Articles 2 and 3 of the ICDR Guidelines address document production more generally, and provide respectively that “[p]arties shall exchange, in advance of the hearing, all documents upon which each intends to rely,”<sup>94</sup> while the Tribunal may require a party to provide documents “that are reasonably believed to exist and to be

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<sup>91</sup> ICDR Guidelines, *supra* note 86, art. 4.

<sup>92</sup> John Beechey, *The ICDR Guidelines for Information Exchanges in International Arbitration: An Important Addition to the Arbitral Toolkit*, 63 DISP. RESOL. J. 84, 88 (2008).

<sup>93</sup> *Id.*

<sup>94</sup> ICDR Guidelines, *supra* note 86, art. 2.

relevant and material to the outcome of the case.”<sup>95</sup> Although the ICDR Guidelines provide some useful clarifications and take the important first step of addressing ESI disclosure, the ambiguous and limited nature of the guidelines leave much to be desired, especially concerning proportionality and party cooperation.

b) THE CHARTERED INSTITUTE OF ARBITRATORS  
PROTOCOL FOR E-DISCLOSURE

The Chartered Institute of Arbitrators (CI Arb), a sponsor of arbitration related services and training based in London, issued their Protocol for E-Disclosure in Arbitration (“CI Arb Protocol”) in 2008.<sup>96</sup> As stated in the introduction, the CI Arb Protocol is only to be applied for cases “in which potentially disclosable documents are in electronic form and in which the time and cost for giving disclosure may be an issue.”<sup>97</sup> Furthermore, the CI Arb Protocol was not devised to be inflexible; instead, it was intended to serve as a “prompt of checklist” for parties, counsel, and arbitrators who may be less well-versed in typical e-disclosure issues.<sup>98</sup> The CI Arb, however, has not incorporated the protocol guidance into its rules, permitting parties to adopt the recommendations or disregard them as they please.<sup>99</sup>

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<sup>95</sup> *Id.* art. 3.

<sup>96</sup> *Protocol for E-Disclosure in Arbitration*, THE CHARTERED INSTITUTE FOR ARBITRATORS (Oct. 2008), <https://www.ciarb.org/docs/default-source/practice-guidelines-protocols-and-rules/international-arbitration-protocols/e-iscolusureinarbitration.pdf?sfvrsn=8> [hereinafter CI Arb Protocol].

<sup>97</sup> *Id.*

<sup>98</sup> Howell, *supra* note 77, at 153.

<sup>99</sup> Range & Wilan, *supra* note 17, at \*3.

The CIArb protocol offers numerous suggestions that, if employed, could help mitigate many of the common obstacles associated with ESI production and management. Recognizing the importance of party cooperation, Protocol One embraces the reasoning of FRCP 26(f), and encourages parties to “confer at the earliest opportunity regarding the preservation and disclosure of electronically stored documents,” and to pursue agreement on the “scope and methods of production.”<sup>100</sup>

Protocol Three provides several intuitive matters for early consideration that include: (i) whether electronic documents are likely to be the subject of a disclosure request by either party; (ii) the types of electronic documents within each party’s control and the nature of computer systems, electronic devices, storage systems, and media on which they are stored; (iii) ESI preservation and retention steps; (iv) any specific rules governing the scope and extent of disclosure, such as the IBA Rules on the Taking of Evidence in International Commercial Arbitration; (v) whether an agreement to limit the scope and/or extent of ESI disclosure is appropriate; (vi) any tools and techniques that may be useful to reduce the burden and cost of e-disclosure (i.e., search terms or sampling); (vii) whether any special arrangements regarding data privacy obligations or privilege are suitable; and (viii) whether professional guidance on IT issues relating to e-disclosure are necessary.<sup>101</sup>

Protocol Six embraces principles of proportionality and provides that, in making any order for e-disclosure, the Tribunal shall weigh the “reasonableness and

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<sup>100</sup> CIArb Protocol, *supra* note 95, at 2.

<sup>101</sup> *Id.* at 2-3.

proportionality” of the request against the cost and burden of production compliance, while also considering the amount in controversy.<sup>102</sup> Protocol Seven, like FRCP 26(b), embraces aspects of the “two-tiered” approach and notions of proportionality in its discussion of what ESI sources may be searched for production purposes for an arbitral hearing. Protocol Seven provides that the primary location for ESI searches should be “reasonably accessible data,” such as active data, near-line data, or offline data stored on disks.<sup>103</sup> In contrast, back-up tapes or archived data routinely deleted during normal business operations should only be searched upon demonstration that the “relevance and materiality” of the requested materials “outweigh the costs and burdens” of retrieval and production.<sup>104</sup>

c) INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION

The International Institute for Conflict Prevention and Resolution (“CPR”), is a nonprofit arbitral organization whose neutral panels are often comprised of former U.S. federal and state court judges.<sup>105</sup> The CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (“CPR Protocol”) was issued in

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<sup>102</sup> *Id.* at 4.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration*, INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, INC. (2009), <http://www.cpradr.org/RulesCaseServices/CPRRules/ProtocolonDisclosureofDocumentsPresentationofWitnessesinCommercialArbitration.aspx> [hereinafter CPR Protocol].

December of 2008, providing a guideline that “is in some ways even more specific than the CIArb Protocol.”<sup>106</sup> The Preamble outlines two purposes for the CPR Protocol. First, the Protocol is intended to assist arbitrators in carrying out their duties under CPR Rule 11 by conveying “general principles for dealing with requests for the disclosure of documents and electronic information.”<sup>107</sup> The second objective of the CPR Protocol is to provide parties drafting an arbitration agreement, or after a dispute develops, the ability to adopt “certain modes of dealing with the disclosure of documents.”<sup>108</sup> CPR International Rule 11 does not provide parties with much predictability concerning the scope of potential disclosure; thus, the CPR Protocol affords parties a better means to select specific and predictable paths governing the scope of disclosure in an arbitral proceeding.

Under CPR Protocol Schedule 2, four “Modes of Disclosure” are presented for parties to choose between, with the disclosure modes ranging from “minimal to extensive.”<sup>109</sup> The various modes contemplate a form of case categorization depending on a party’s desired or necessary scope of disclosure. Mode A resides at the “minimal” end of the disclosure spectrum, and provides that pre-hearing disclosure is limited to those electronic documents that each side will present and rely on in support of its case.<sup>110</sup> Mode B provides for ESI disclosure from a limited number of designated custodians, in a reasonably usable format, encompassing those materials between the signing date of

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<sup>106</sup> Range & Wilan, *supra* note 17, at \*5.

<sup>107</sup> CPR Protocol, *supra* note 104, at 5.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 3.

<sup>110</sup> *Id.* at 11.

the disputed agreement and the arbitral request date. Mode B further provides that ESI disclosure shall only be from primary storage facilities holding “reasonably accessible active data,” while no ESI disclosure shall be required from backup tapes, PDAs, or voicemails.<sup>111</sup>

Mode C is identical to Mode B, but it goes further in “covering a larger number of custodians [specify number] and a wider time period [to be specified].”<sup>112</sup> Mode C also permits the parties to demonstrate relevance and a special need in order to obtain ESI from sources deemed burdensome or inaccessible (i.e., backup tapes, PDAs, or voicemails). Mode D, which most closely resembles the ESI approach under the Federal Rules, permits disclosure of “electronic information regarding non-privileged matters that are relevant to any party’s claim or defense, subject to limitations of reasonableness, duplicativeness and undue burden.”<sup>113</sup> Furthermore, parties choosing Modes B, C, or D are required to “meet and confer” prior to the first scheduling conference with the tribunal in order to consider “the specific modalities and timetable for electronic information disclosure.”<sup>114</sup>

The CPR Protocol and its menu of disclosure modes affords parties a high degree of predictability, while still embracing the unique arbitral canons of flexibility and party autonomy.

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

## d) INTERNATIONAL CHAMBER OF COMMERCE

In June of 2008, the International Chamber of Commerce (ICC) established a Task Force to generate a report on “Techniques for Managing Electronic Document Production When it is Permitted or Required in International Arbitration” (ICC Report).<sup>115</sup> The Task Force stated that its primary concern was to ensure the preservation of essential arbitral advantages, while reassuring that “U.S.-style discovery ha[d] no place in international arbitration.”<sup>116</sup> The ICC Report was generated with the aim of providing information of practical utility to arbitrators and parties who may encounter challenges common to electronic document production.<sup>117</sup> The Task Force ultimately concluded, however, that it was not necessary to prescribe specific “rules” or “guidelines” applicable to the production of electronic documents, because such treatment for ESI could compromise tenets of arbitral flexibility.<sup>118</sup> Thus, the ICC Rules, in effect as of January of 2012, govern the production of electronic and paper documents equally.<sup>119</sup> Considering the substantial differences between ESI and paper documents, the ICC approach seemingly lacks the teeth

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<sup>115</sup> Howell, *supra* note 77, at 155.

<sup>116</sup> Range & Wilian, *supra* note 17, at \*9.

<sup>117</sup> ICC Arbitration Commission, *ICC Arbitration Commission Report: Managing E-Document Production*, INTERNATIONAL CHAMBER OF COMMERCE 1.1 (2012), <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Managing-E-Document-Production/> [hereinafter ICC Report].

<sup>118</sup> *Id.* at 2.2.

<sup>119</sup> *Id.* at 3.2.



necessary to confront the inevitable inefficiency and cost-related problems inherent to unbridled electronic disclosure.

Under the ICC Rules, no party has a general duty to disclose paper or electronic documents to its opponent(s), and no party has an automatic right to demand disclosure.<sup>120</sup> An arbitral tribunal may grant a party's disclosure request made upon the opponent, but this approach, especially when applied to ESI production, risks unpredictability.<sup>121</sup> Despite the absence of rules or procedures tailored specifically to electronic document disclosure, there are ICC Rules that can help mitigate some e-disclosure issues.<sup>122</sup>

#### e) INTERNATIONAL BAR ASSOCIATION

The IBA Rules on the Taking of Evidence (IBA Rules) were “[h]ailed as a breakthrough in international arbitration” when issued in 1999 to help fill perceived gaps in arbitral guidance,<sup>123</sup> and provide procedural “harmonization” for the international arbitration community regarding the taking of evidence.<sup>124</sup> As such, many parties select the IBA Rules to govern their arbitration agreements

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<sup>120</sup> *Id.* at 3.4.

<sup>121</sup> ANTONIO TAVARES PAES JR., DISPUTE RESOLUTION AND E-DISCOVERY § 12:4 (2011) (referring to provisions under ICC Rule 25).

<sup>122</sup> See ICC Report, *supra* note 116, at 3.2(c) (explaining that Article 25.1 of the ICC Rules demands the arbitral tribunal “proceed within as short a time as possible to establish the facts of the case by all appropriate means.”); see also *id.* at 3.2(d) (explaining that Article 25.5 permits the arbitral tribunal to “summon any party to provide additional evidence” at any time).

<sup>123</sup> Frank & Bédard, *supra* note 62, at 69.

<sup>124</sup> Georg von Segesser, *The IBA Rules on the Taking of Evidence in International Arbitration Revised version, adopted by the International Bar Association on 29 May 2010*, 28 ASA BULL. 735, 736 (2010).

and a significant number of tribunals recommend their application because of the broad level of consensus surrounding them.<sup>125</sup>

In 2010, the IBA adopted revised Rules on the Taking of Evidence in International Arbitration. The IBA Rules of Evidence Subcommittee held an intense debate on the topic of e-discovery leading up to the 2010 revisions. However, the Subcommittee ultimately concluded that “the IBA Rules did not need to be supplemented with guidelines and regulations” such as those promulgated by the AAA, the ICDR, or the CIArb.<sup>126</sup> The Subcommittee questioned whether detailed ESI rules would actually lead to more predictability or uniformity, and concluded that the opposite result might be the case.<sup>127</sup> Thus, the revised IBA Rules uphold arbitral discretion as the proper means for addressing many common concerns associated with e-discovery.

The 2010 IBA revised rules by no means eschew the topic of e-discovery and ESI production, as numerous articles seemingly embrace principles of proportionality and call for party cooperation. The IBA Rules state from the beginning that their purpose is to “provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions.”<sup>128</sup> Article 9.2(c) authorizes an

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<sup>125</sup> Howell, *supra* note 77, at 155; *see also* TAVARES PAES JR., *supra* note 120, at § 12:5 (explaining that Articles 19 and 25 of the ICC Rules has led to an increase in ICC arbitrations utilizing the IBA Rules).

<sup>126</sup> Segesser, *supra* note 123, at 746.

<sup>127</sup> *Id.*

<sup>128</sup> 2010 IBA Rules on the Taking of Evidence in International Arbitration, INTERNATIONAL BAR ASSOCIATION (May 29, 2010),

arbitral tribunal, on its own or at the request of a party, to exclude evidence that poses an unreasonable burden on the producing party,<sup>129</sup> which would be an extremely relevant provision for complex commercial arbitration hearings where large quantities of ESI are contemplated.

One of the most significant revisions under the 2010 IBA Rules is under Article 9.2(g), which calls for the consideration of “procedural economy” and “proportionality” when parties and arbitral tribunals are contemplating a production request.<sup>130</sup> Although non-electronic document production applies equally to ESI requests under Article 3.3 and Article 9.2, Article 3.3(a)(ii) authorizes parties to request, or an arbitral tribunal to order, a narrow category of ESI production through the identification of “specific files, search terms, individuals or other means of searching for such [ESI] in an efficient and economical manner.”<sup>131</sup> Of equal, if not greater, importance is the revised Article 2, which requires an arbitral tribunal to consult all parties at the earliest opportunity, in an effort to determine the procedures for the taking of evidence.<sup>132</sup> Although the 2010 IBA Rules do not employ specific rules or guidelines for ESI, the incorporation of proportionality principles and party cooperation encouragement through an early meet and confer session will uphold tenets of arbitral flexibility and economy.

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[http://www.ibanet.org/ENews\\_Archive/IBA\\_30June\\_2010\\_Enews\\_Taking\\_of\\_Evidence\\_new\\_rules.aspx](http://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx) [hereinafter IBA Rules].

<sup>129</sup> *Id.* at 9.2(c).

<sup>130</sup> *Id.* at 9.2(g).

<sup>131</sup> *Id.* at 3.3(a)(ii).

<sup>132</sup> *Id.* at 2.

### III. PROPORTIONAL TO THE NEEDS OF THE CASE AND A COOPERATION PROCLAMATION

Principles of proportionality and cooperation are essential to managing the expense and burden inherent to electronic discovery. In his 2015 Year-End Report on the Federal Judiciary, Chief Justice John Roberts alluded to the predominant consensus that “while the federal courts are fundamentally sound, in many cases civil litigation has become too expensive, time-consuming, and contentious, inhibiting effective access to the courts.”<sup>133</sup> A leading factor for this worrisome development are the swelling costs and party gamesmanship surrounding electronic discovery.<sup>134</sup> In order to ensure that U.S. civil litigation and international arbitration remain viable forums for all parties, regardless of

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<sup>133</sup> John Roberts, *2015 Year-End Report on the Federal Judiciary*, <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> [hereinafter Roberts Report 2015].

<sup>134</sup> See *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 423 (S.D.N.Y. 2002) (the magistrate judge lamenting “[t]oo often, discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter. As this case illustrates, discovery expenses frequently escalate when information is stored in electronic form.”); see American College of Trial Lawyers Task Force on Discovery & Institute For The Advancement of The American Legal System, Final Report 2 (2009), <http://www.uscourts.gov/file/document/final-report-actl-iaals-joint-project> [hereinafter ACTL & IAALS Final Report]; see Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV. L. REV. 227, 228 (2010) (Judge Rosenthal explaining that “the use or even the threat of broad discovery discourages potential plaintiffs from filing cases and, when cases are filed, encourages settlements, often on terms that do not reflect the strength or weakness of the merits of the claim or defense.”).

their data or financial position, proportionality and party cooperation must be compulsory from the earliest possible moment. A new cooperative culture and mentality must be embraced,<sup>135</sup> along with an expanded managerial role for the judiciary, if these two legal systems are to continue serving as a practical means of dispute resolution in the era of big data.

A. PROPORTIONALITY IS NECESSARY, NOT MERELY SUFFICIENT.

The concept of proportionality has been part of the Federal Rules since the 1983 revisions. Nevertheless, the word “proportionality” found its way into the text of the Federal Rules for the first time under the December 2015 revisions. Moreover, arbitral organizations are realizing that proportionality is a uniquely powerful weapon that can assist tribunals in managing the brave new world of ESI production.<sup>136</sup> The 2015 amendments have helped the concept of proportionality step into the e-discovery spotlight, while arbitral organizations are beginning to slowly awake from their status quo slumber.

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<sup>135</sup> See Roberts Report 2015, *supra* note 132, at 11 (urging an engineered change in U.S. legal culture “that places a premium on the public’s interest in speedy, fair, and efficient justice.”); see Range & Wilan, *supra* note 17, at \*13 (attesting to personal experience that opposing counsel objections to disclosure requests in international arbitration are sometimes strategic in order to avoid unfavorable ESI production).

<sup>136</sup> See, e.g., IBA Rules, *supra* note 127, art. 9.2(g).

## 1. PROPORTIONALITY STEPS OUT OF THE RULE 26 SHADOWS

Rule 26(b)(1) now outlines the scope of discovery as “regarding any non-privileged matter that is relevant to any party’s claim or defense and *proportional to the needs of the case.*”<sup>137</sup> The underlying benchmark for all discovery is reasonableness, which, in turn, depends in large part on whether proportionality was the standard applied.<sup>138</sup> Despite the explicit incorporation of the word “proportionality” into Rule 26, many lawyers, litigants, and judges will be uncertain as to how they can best apply this concept because of the rigid adherence to broad discovery practices and dubious gamesmanship among parties. Moreover, many others will question the necessity of a proportionality analysis.<sup>139</sup>

Thus, are principles of proportionality needed, or is this concept simply a solution in search of a problem? To be sure, an unambiguous reference to “proportionality” is by no means the “talisman”<sup>140</sup> for solving all e-discovery problems. Proportionality concepts have been part of Rule

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<sup>137</sup> Fed. R. Civ. P. 26(b)(1).

<sup>138</sup> *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (asserting that whether “discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards.”).

<sup>139</sup> Scott A. Moss, *Litigation Discovery Cannot Be Optimal But It Could Be Better: The Economics of Improving Discovery Timing In A Digital Age*, 58 DUKE L. J. 889, 890 (2009) (asserting “proportionality requires impossible comparisons between discovery value and cost” prior to the gathering of evidence).

<sup>140</sup> John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 461 (2010).

26 for over three decades and merely incorporating the explicit term of “proportionality” will not change the ingrained practices of U.S. lawyers and judges. That being said, it has become increasingly apparent that the status quo approach to e-discovery management is no longer sustainable in this era of exponential ESI growth and that principles of proportionality must be wielded by courts and parties in order to manage discovery.

The reality is that “[e]xcessive or evasive discovery tactics are among the most commonly used tools to induce a favorable settlement – or to deter a claim altogether,”<sup>141</sup> and such risks apply similarly to international arbitration. A broad and liberal standard permitting unbridled discovery in the era of ESI is not reconcilable with the tenets of Rule 1, striving for the “just, speedy, and inexpensive determination of every action and proceeding.”<sup>142</sup> Recognizing that broad and liberal discovery practices in the era of big data were no longer practical, many U.S. courts finally began applying the proportionality principles of the Federal Rules prior to the 2015 Amendments in order to help mitigate costs and better manage e-discovery burdens.<sup>143</sup> Despite this renewed

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<sup>141</sup> Netzorg & Kern, *supra* note 22, at 528.

<sup>142</sup> Fed. R. Civ. P. 1.

<sup>143</sup> See *Young v. Pleasant Valley Sch. Dist.*, No. 3:07CV854, 2008 WL 2857912, at \*2 (M.D. Pa. July 21, 2008) (Judge James M. Munley, in denying the plaintiff’s request to order the restoration and production of emails located on backup tapes, recognized that an estimated \$5,000 search expense “represents a significant burden to public school system,” and ultimately found that “the burden and expense of the proposed discovery outweighs its likely benefit.”); see *Cenveo Corp. v. Slater*, CIV.A. No. 06-CV-2632, 2007 WL 442387, at \*2 (E.D. Pa. Jan. 31, 2007) (The court articulated that the dispute “requires a weighing of defendants’ burden in producing the information sought against plaintiff’s interest in access to that information.”); see *Tamburo v.*

acceptance and application of proportional standards in U.S. discovery, widespread acknowledgement persisted that e-discovery costs and burdens were nevertheless too often disproportionate to any potential recovery and/or the needs of the case.<sup>144</sup>

In support of the 2015 Amendments, the Advisory Committee cited a survey of the ABA Section of Litigation that found that “78% of plaintiffs’ attorneys, 91% of defense attorneys, and 94% of mixed practice attorneys agreed that litigation costs are not proportional to the value of small cases.”<sup>145</sup> Furthermore, the Advisory Committee noted, “between 61% and 76% of the respondents in the ABA, ACTL, and NELA surveys agreed that judges do not enforce the [2006 federal] rules’ existing proportionality limitations on their own.”<sup>146</sup>

Revised Rule 26(b)(1) now requires that discovery be proportional, considering “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and

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Dworkin, No. 04 C 3317, 2010 WL 4867346, at \*3 (N.D. Ill. Nov. 17, 2010) (citing *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 294 (2010)) (Rule 26 affords courts with “significant flexibility and discretion to assess the circumstances of the case and limit discovery accordingly to ensure that the scope and duration of discovery is reasonably proportional to the value of the requested information, the needs of the case, and the parties’ resources.”).

<sup>144</sup> See *Newman v. Borders, Inc.*, 257 F.R.D. 1, 3 (D.D.C. 2009) (The magistrate judge explaining, “I am also well past being convinced that the potential legal fees in this case, thanks to the many discovery disputes, will dwarf the potential recovery.”).

<sup>145</sup> Advisory Comm. 2014 Report, *supra* note 53, at B-7.

<sup>146</sup> *Id.*



whether the burden or expense of the proposed discovery outweighs its likely benefit.”<sup>147</sup> These six factors are extraordinarily helpful in determining the proper proportional scope for discovery and, if properly applied, will help reduce the burdens of e-discovery. The scope of discovery must be proportional to the needs of the case in order to ensure that costs and burdens do not inundate litigation, which can only be achieved through the early and frequent enforcement of proportionality, party cooperation, and increased judicial and arbitral tribunal intervention.

## 2. PLEADING FOR ARBITRAL PROPORTIONALITY

As ESI begins to play an increasingly critical role in arbitral disputes, calls for more proportional arbitral e-discovery practices have also increased. Considering the extremely high standard to vacate an arbitral award, arbitrators are generally afforded a great deal of flexibility in determining the scope of permissible discovery.<sup>148</sup> Arbitrators are being called on to fashion and apply tangible rules of proportionality for managing cases involving ESI production requests.<sup>149</sup> Some practitioners emphasize that international arbitration’s role as an alternative to litigation

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<sup>147</sup> Fed. R. Civ. P. 26(b)(1).

<sup>148</sup> *Bain Cotton Co. v. Chesnutt Cotton Co.*, 531 Fed. Appx. 500, 501 (5th Cir. 2013) (“Regardless 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.”).

<sup>149</sup> Deborah Rothman & Thomas J. Brewer, *Survey: Difficult Arbitration E-Discovery Process Questions Suggest Increasingly Complex Future Problems on Costs, Scope*, 27 *ALT. HIGH COST LITIG.* 152, 155 (2009).

can be maintained as long as e-discovery is used only when absolutely necessary, and even then, it must be proportional.<sup>150</sup> Meanwhile, certain scholars have argued that “a conscientious arbitrator would be exercising sound discretion in applying the concepts of proportionality and cost-shifting” that are articulated in the 2015 amendments to the Federal Rules.<sup>151</sup> The complex commercial nature of international arbitral disputes illustrates why proportionality is critical to combating the increasing e-discovery burdens.

Contemplate proportionality principles in the context of an informative 2008 report by the Institute for the Advancement of the American Legal System, which notes that Verizon, a corporation on the front lines of e-discovery, internally estimates the cost of “processing, reviewing, culling, and producing 1 GB of data at between \$5,000 and \$7,000.”<sup>152</sup> Parties to a midsize case that results in 500 GB of data should anticipate spending between \$2.5 and \$3.5 million on ESI processing, reviewing, and production alone.<sup>153</sup> These statistics illustrate, ironically, that dramatic cost reduction in ESI storage has increased the financial costs of e-discovery. Furthermore, past practices long relied on

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<sup>150</sup> See James J. Sentner Jr., *Ethical Issues for the ADR Process*, in THE ROLE OF ETHICS IN ADR: LEADING LAWYERS ON UNDERSTANDING THE ETHICAL OBLIGATIONS OF ATTORNEYS ENGAGING IN ALTERNATIVE DISPUTE RESOLUTION 19, 2011 WL 5825128, at \*8.

<sup>151</sup> E. Norman Veasey & Grover C. Brown, *An Overview of the General Counsel's Decision Making on Dispute-Resolution Strategies in Complex Business Transactions*, 70 BUS. LAW. 407, 425 (2015).

<sup>152</sup> *Electronic Discovery: A View from the Front Lines*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 5 (2008), <http://iaals.du.edu/rule-one/publications/electronic-discovery-view-front-lines> [hereinafter IAALS].

<sup>153</sup> *Id.*

within international arbitration, such as resolving ESI disputes by simply ordering paper copies to be produced from the electronic data, are rightfully being challenged.<sup>154</sup>

Moreover, as commercial transactions continue to grow in complexity and corporations place greater sums of capital on the line, international arbitral organizations will not be able to ensure swift and cost-efficient dispute resolution by maintaining a status-quo mentality.<sup>155</sup> As it has become increasingly apparent in recent years that “international arbitration rules may have fallen out of step with modern best practices,” a growing consensus has coalesced around the need for proportionate discovery practices for all phases of e-discovery production.<sup>156</sup>

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<sup>154</sup> Range & Wilan, *supra* note 17, at \*13 (describing a personal experience where an arbitral tribunal ordered what it thought to be a reasonable compromise to an ESI dispute by requiring the requested ESI, which had been developed originally in electronic form, to be produced by making a paper copy of the data. As a result, the requesting party had to scan the documents as TIFF images, and then upload the re-digitized documents into their database, all at a substantially higher cost than if they had been produced in their original electronic form as initially requested).

<sup>155</sup> Seidenberg, *supra* note 66, at \*51 (explaining that because of growing costs and inefficiencies, caused in large part by mounting ESI challenges, a “growing number of businesses appear to be turning away from arbitration and resolving their international commercial disputes the old-fashioned way – in the courts.”).

<sup>156</sup> John Wilkinson, *Arbitration Discovery: Getting It Right*, THE AMERICAN BAR ASSOCIATION 66 (Jan./Feb. 2015) (“When discussing e-discovery at the first preliminary conference, the goals of the arbitrator should include the following: (1) Limit the custodians of data whose hard drives must be searched. (2) Restrict the scope of e-discovery to matters that are directly relevant and material to the outcome of the case. (3) Narrow the number of storage devices to be searched. (4) Define a reasonable time period to be covered by the search. (5) Reduce to the extent possible the

## B. THE COOPERATION PROCLAMATION AND A NEW CULTURE.

Reducing party combativeness, as well as, *inter alia*, the achievement of efficient, fair, and proportional electronic discovery cannot be achieved unless party cooperation is a basic expectation from the earliest stages of a dispute. The chorus for a cooperative conduct renaissance has grown to a crescendo in the U.S. and in arbitral organizations because of the ostensible decay in lawyering conduct.

### 1. CLAMORING FOR COOPERATION UNDER THE FEDERAL RULES.

In his 2015 Year-End Report, Chief Justice John Roberts vehemently emphasized the express “obligation of judges and lawyers to work cooperatively to control the expense and time demands of litigation – an obligation given effect in the [2015] amendments.”<sup>157</sup> While the 2006 Amendments were viewed by many as demanding more extensive party cooperation,<sup>158</sup> case law in recent years

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number of search terms to be used when scanning the ESI for relevant data.”).

<sup>157</sup> Roberts Report 2015, *supra* note 132, at 6.

<sup>158</sup> *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 415 (S.D.N.Y. 2009); *see Bd. of Regents of Univ. of Nebraska v. BASF Corp.*, No. 4:04CV3356, 2007 WL 3342423, at \*5 (D. Neb. 2007) (“The overriding theme of recent amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable . . . Compliance with these changes has placed – on counsel – the affirmative duties to work with

illustrates that those calls for cooperation have too often fallen on deaf ears.<sup>159</sup> Revised Rule 16 and 26(f) now require parties to reach an agreement on ESI preservation and discovery in their scheduling conferences and case management plans.<sup>160</sup> Thus, the amended Federal Rules ostensibly emphasize Chief Magistrate Judge Paul M. Grimm's eloquent words that proper conduct under the discovery rules "require[] cooperation rather than contrariety, communication rather than confrontation."<sup>161</sup> The revisions to Rule 1 most overtly indicate the renewed

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clients to make required disclosures, Rule 26(a)(1)(2) and (3); reduce oppression and burden, Rule 26(b)(2); cooperatively plan discovery with opposing counsel, Rule 26(f); affirmatively certify accuracy and good faith in requesting and responding to discovery, Rule 26(g); and confer with opposing counsel to resolve disputes before filing certain motions, Rule 37(a)(2)(B), among others."); see also *Saliga v. Chemtura Corp.*, 3:12CV832 RNC, 2013 WL 6182227, at \*1 (D. Conn. 2013) (declining the plaintiff's request that defendant provide details of the data collection process being employed, stating that "the best solution in the entire area of electronic discovery is cooperation among counsel") (citing *William A. Gross Const. Associates, Inc. v. American Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y.2009)).

<sup>159</sup> See *Capitol Records, Inc. v. MP3tunes, LLC*, 261 F.R.D. 44, 48 (S.D.N.Y. 2009) (citing *The Sedona Conference Cooperation Proclamation*, the magistrate judge criticized the defendant's failure to cooperate with the plaintiffs on developing ESI search parameters, and ultimately rejected the defendant's burdensome argument); see *JSR Micro, Inc. v. QBE Ins. Corp.*, C-09-03044 PJH (EDL), 2010 WL 1338152, at \*3 (N.D. Cal. 2010) (citing *The Sedona Conference Cooperation Proclamation*, the magistrate judge faulted the defendant for failing to meet and confer with the plaintiff to determine how narrow to interpret certain terms. The court further admonished the defendant's lawyer for "rude and unprofessional language" conveyed via email).

<sup>160</sup> Fed. R. Civ. P. 16(b); Fed. R. Civ. P. 26(f).

<sup>161</sup> *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354, 358 (D. Md. 2008).

expectation of greater cooperation, by now providing that the rules “be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>162</sup> Modified Rule 1 makes clear that Rule 1’s objective of a “just, speedy, and inexpensive” resolution is the responsibility of both the judges and the parties and cannot be achieved without cooperation.

E-discovery presents a range of novel challenges for courts and arbitral tribunals to confront, and innovative solutions encouraging party cooperation have been recognized as a crucial tool in mitigating e-discovery burdens. In 2009, the Seventh Circuit Electronic Discovery Pilot Program was launched to develop and implement procedures that would mitigate many of the burdens and costs associated with e-discovery.<sup>163</sup> The Seventh Circuit’s Pilot Program proposes a set of Principles for participating courts, attorneys, and parties to follow when engaging in e-discovery. Critical to the overall program is the concept of cooperation, with participating judges overwhelmingly expressing their belief that the Principles “were having a positive effect on counsel’s cooperation with opposing

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<sup>162</sup> Fed. R. Civ. P. 1 (emphasis added).

<sup>163</sup> Discovery Pilot, SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: FINAL REPORT ON PHASE TWO (MAY 2010 - MAY 2012), <http://www.discoverypilot.com/sites/default/files/Phase-Two-Final-Report-Appendix.pdf> (stating the purpose of the Seventh Circuit Pilot Program is to “conduct a multi-year, multi-phase process to develop, implement, evaluate, and improve pretrial litigation procedures that would provide fairness and justice to all parties while reducing the cost and burden of electronic discovery consistent with Rule 1 of the Federal Rules of Civil Procedure.”).

counsel.”<sup>164</sup> Principle 2.01 imposes a duty on the parties to meet and confer before the initial status conference with a court.<sup>165</sup> Among the topics to be discussed under Principle 2.01 is the “identification of relevant and discoverable ESI,” methods for identifying sampling sources, the “scope of discoverable ESI and documents to be preserved,” “formats for preservation,” and the potential for phased or staggered production to reduce costs.<sup>166</sup> By forcing parties to discuss broad e-discovery issues before the initial status conference, Principle 2.01 encourages preemptory party cooperation to help both parties begin their discovery plans together.

Of course, the Seventh Circuit Pilot Program’s emphasis on party cooperation is not alone. In a joint project between The American College of Trial Lawyers Task Force on Discovery and The Institute For the Advancement of the American Legal System, numerous principles incorporating early and frequent party cooperation were proposed as solutions to help resolve the challenges posed by e-discovery.<sup>167</sup> Among the proposals were recommendations that the parties “discuss the manner in which electronic documents are stored and preserved,” that “pretrial conferences should be held as soon as possible in all cases,” and that “[p]arties should be required to confer early and often about discovery.”<sup>168</sup>

Courts have increasingly embraced the notion of early and frequent party cooperation as a means for implementing

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<sup>164</sup> *Id.* at 1.

<sup>165</sup> *Id.* at 6.

<sup>166</sup> *Id.*

<sup>167</sup> ACTL & IAALS Final Report, *supra* note 133.

<sup>168</sup> *Id.* at 12-21.

proportionate e-discovery case plans<sup>169</sup> and are seemingly in agreement with many scholarly legal institutions in recognizing cooperation as essential to reducing e-discovery costs and general burdens.

## 2. CALLING FOR COOPERATION ACROSS THE POND

While arbitration is inherently different from litigation, such differences underlie arbitration's attractiveness to international corporations of all sizes. Party cooperation is essential to ensure arbitral disputes do not become the equivalent of litigation disputes. Over the past few decades, however, "parties and their legal counsel have used the flexibility of international arbitration to create proceedings that look more and more like U.S.-style litigation."<sup>170</sup> The proliferation of ESI storage is continually changing the daily operations and conduct of businesses, yet sky rocketing costs of electronic file searches and production for arbitral hearings has led to growing complaints that international arbitration increasingly embodies an acrimonious "American tone."<sup>171</sup> Party conduct in arbitral disputes now often includes fiercer advocacy, long and costly document production negotiations, frequent witness depositions (one of the more dramatic changes), more

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<sup>169</sup> See *Oracle USA, Inc. v. SAP AG*, 264 F.R.D. 541, 543 (N.D. Cal. 2009) (explaining that from the present action's first discovery conference "the Court has repeatedly emphasized that the scope of this case required cooperation in prioritizing discovery" in order to fulfill the proportionality requirement).

<sup>170</sup> Seidenberg, *supra* note 66, at \*52.

<sup>171</sup> *Id.* at \*53.



motions, and lengthier briefs.<sup>172</sup> Furthermore, party and arbitrator expectations and sensitivities are often quite different in international arbitration, especially when the dispute involves civil and common law participants.<sup>173</sup>

Thus, lawyers and corporate general counsels should embrace cooperative considerations on how best to approach e-discovery issues in a particular region or country as early in the process as possible.<sup>174</sup> Indeed, by electing to settle potential disputes through international arbitration, parties seemingly have made the conscientious decision to cooperate in a cost-effective and expeditious manner.<sup>175</sup> However, echoing sentiments expressed by numerous other arbitral participants, “there is a conviction of some [general counsels] that arbitration, among the ADR mechanisms, may end up being more expensive, time-consuming, and worrisome on the merits than full-blown litigation in court.” Increased party cooperation is essential to reducing the more combative tone taken in arbitral disputes, while also helping different cultural expectations approach ESI production in the most efficient and cost-effective manner possible.

In her intuitive article on e-discovery in arbitration, Maura R. Grossman explains that the most pressing issues surrounding ESI in arbitration should be amenable through

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<sup>172</sup> *See id.*

<sup>173</sup> Frank & Bédard, *supra* note 62, at 68.

<sup>174</sup> Veasey & Brown, *supra* note 150, at 432 (explaining that “with a diversified global business, it is important that the company's legal department analyze in advance how to approach dispute resolution on a region-by-region or nation-by-nation basis.”).

<sup>175</sup> *Id.* at 422.

early and cooperative dialogue.<sup>176</sup> Parties to an international arbitral dispute should not experience the same e-discovery burdens typical to U.S. litigation.<sup>177</sup> Thus it is critical that parties in the arbitration context invest time up front to determine precisely what is in dispute, what limited evidence would most expeditiously resolve the dispute, where such evidence may be located, and with which custodians.<sup>178</sup> These considerations are especially relevant to international arbitral disputes because large multi-national corporations often maintain various global offices with significant personnel numbers. Early case management conferences are essential to establishing a cooperative and efficient foundation for the entirety of the arbitral proceedings,<sup>179</sup> and will prove to be a similarly indispensable tool under the Federal Rules. Moreover, adversarial tactics concerning ESI production in an arbitral tribunal setting pose legitimate ethical issues that undermine lawyer credibility.<sup>180</sup> Therefore, cooperation is rightfully being viewed as a critical component to parties' overall discovery plan in arbitration.<sup>181</sup>

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<sup>176</sup> Maura R. Grossman, *Arbitration and E-discovery Overview: Potential Minefields and Dispute Resolution Strategies*, in DISPUTE RESOLUTION AND E-DISCOVERY § 7:1 (Garrie, D.B. & Griver, Y.M. eds., 2013).

<sup>177</sup> See *id.* § 7:3.

<sup>178</sup> *Id.*

<sup>179</sup> Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 AM. REV. INT'L ARB. 297, 344 (2014).

<sup>180</sup> JAMES J. SENTNER JR., *supra* note 149, at \*3.

<sup>181</sup> See Valecia M. McDowell, *Arbitration In The Digital Age: Synchronizing Your E-Discovery Plan With Your Arbitration Strategy*, 2010 WL 556204, at \*5.

C) PROPORTIONALITY AND COOPERATION DEPEND ON A REDEFINED JUDICIAL AND ARBITRATOR MANAGEMENT ROLE.

While principles of proportionality and a renewed emphasis on party cooperation are essential to mitigating e-discovery burdens, both will remain illusory aspirations unless judges and arbitrators decisively embrace an increased managerial role to implement proportionate and cooperative standards.

1. JUDICIAL INTERVENTION

Under the Federal Rules, judges must assume a more robust managerial role because liberal discovery tendencies, the adversarial lawyering culture, and exponential ESI growth all threaten to undermine the calls for cooperation and proportionate analysis. Consider a 2009 Federal Judicial Center (“FJC”) survey, where more than half of all respondents reported that no discussion of ESI occurs at the Rule 26(f) meet-and-confer conference, while only one in five court-ordered discovery plans included ESI provisions.<sup>182</sup> The seemingly flippant lens many parties, and even some judges, have previously viewed the Rule 26(f) conference is, rightfully, being challenged. In a 2009 opinion, Magistrate Judge Craig Shaffer offered a sharp rebuke to ambivalent

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<sup>182</sup> Patrick Oot et. al., *Mandating Reasonableness in A Reasonable Inquiry*, 87 DENV. U. L. REV. 533, 539 (2010) (citing EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 15 (2009), [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf)).

Rule 26(f) attitudes, stressing that “[c]ivil litigation, particularly with the advent of expansive e-discovery, has simply become too expensive and too protracted to permit superficial compliance with the ‘meet and confer’ requirement.”<sup>183</sup>

Although there has been resistance to increased judicial intervention,<sup>184</sup> former Magistrate Judge John Carroll asserts that “proportionality only works if the intervention is early and by a judge willing to perform the managerial role contemplated by the discovery rules.”<sup>185</sup> However, nothing in the 2015 revisions to Rule 26(f) require the explicit discussion of proportional e-discovery plans. Judge Carroll offers a poignant solution that addresses proportionality and party cooperation, arguing the court must require the parties to discuss proportionate burdens and expenses of the proposed discovery before each party submits its e-discovery plan.<sup>186</sup> Echoing similar sentiments, Judge Rosenthal notes that parties too often treat the meet-and-confer conference as a “perfunctory ‘drive-by’ exchange,” warranting close judicial involvement and supervision.<sup>187</sup> The Advisory Committee openly acknowledged its proposed changes to Rules 4, 16, 26, and 34 were, at least in part, specifically designed to promote earlier and more

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<sup>183</sup> *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, No. 01-CV-01644-REB-CBS, 2010 WL 502721, at \*13 (D. Colo. 2010).

<sup>184</sup> Elliott, *supra* note 49, at 314 (emphasizing a prevalent concern that judges are making early discretionary procedural decisions that effectively close off lines of substantive inquiry without permitting the development and consideration of the merits of the parties' positions).

<sup>185</sup> Carroll, *supra* note 139.

<sup>186</sup> *Id.* at 462-63.

<sup>187</sup> Rosenthal, *supra* note 41, at 176-77, 191.

active judicial case management.<sup>188</sup> Moreover, the joint project between the ACTL and IAALS proposed numerous principles to effectuate greater involvement by judges.<sup>189</sup>

## 2. ARBITRAL INTERVENTION

Flexibility continues to be a fundamental tenet of international arbitration, with many arbitral institutions recommending increased arbitrator discretion and intervention authority to determine the scope of discovery.<sup>190</sup> International arbitration's adherence to flexibility, while a necessary condition for efficient arbitral management of ESI production, can also have the opposite effect.<sup>191</sup> Increased judicial intervention with respect to e-discovery under the Federal Rules is necessary to proportionately limit ESI production, while increased arbitral intervention will permit, in some instances, increased proportional ESI production.

While many arbitral organizations are "attempting to stiffen arbitrators' spines"<sup>192</sup> so as to prevent parties from straying into litigious practices, it is equally the case that "arbitrators and arbitral institutions cannot ignore ESI or refuse to permit disclosure of electronic records."<sup>193</sup> Thus, arbitrators must assume a more active managerial role in

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<sup>188</sup> See Advisory Comm. 2014 Report, *supra* note 53, at B-11.

<sup>189</sup> ACTL & IAALS Final Report, *supra* note 133, at 23.

<sup>190</sup> Seidenberg, *supra* note 66, at \*55.

<sup>191</sup> *Id.* at \*52-53 (noting that in recent decades many attorneys have used arbitration's flexibility to engage in U.S.-style litigation, which prompted a backlash by many civil-law arbitrators to severely limit or even prohibit altogether ESI production in many circumstances).

<sup>192</sup> *Id.* at \*55.

<sup>193</sup> Range & Wilan, *supra* note 17, at \*11.

order to properly address the appropriate scope of ESI disclosure, while maintaining the arbitral hallmarks of efficiency, cost-effectiveness, and party autonomy. In a recent article, Thomas J. Stipanowich argued that greater arbitral intervention is necessary to promote cooperation through proactive work with the parties in managing arbitration proceedings, to promote early case management conferences, and to assess costs where parties have abused the system.<sup>194</sup> Recent protocols promulgated by the College of Commercial Arbitrators (“CCA”) emphasize the importance of proactive efforts by arbitrators to actively shape and manage the arbitration process by conducting thorough preliminary conferences and issuing comprehensive case management orders.<sup>195</sup> Furthermore, the ICDR Guidelines underscore the fact that arbitrators “have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process.”<sup>196</sup>

Increased arbitrator intervention will often be used to expand ESI disclosure, which typically is consistent with ensuring an efficient and less expensive process. Despite the existence of arbitral flexibility, arbitrators do need to embrace a more active case management role. David Howell suggests that arbitrator cost-shifting may serve as an “effective means of controlling requests of electronic disclosure,”<sup>197</sup> while other scholars assert that arbitrators should utilize their authority to weigh undue burden for a

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<sup>194</sup> Stipanowich, *supra* note 177, at 344.

<sup>195</sup> *Id.* at 348.

<sup>196</sup> *Id.*

<sup>197</sup> Howell, *supra* note 77, at 166.

proportionality-type analysis.<sup>198</sup> Arbitrator intervention will be necessary to limit particularly litigious parties, while intervention will also be necessary to fairly and proportionately expand ESI production in arbitral hearings.

D. UNIVERSAL E-DISCOVERY BURDENS HAS  
TRIGGERED A CONVERGENCE BETWEEN THE  
FEDERAL RULES AND INTERNATIONAL ARBITRAL  
GUIDELINES.

The exponential growth in data digitization and ESI present abundant challenges to U.S. civil litigation and international arbitration, and while each forum must confront e-discovery challenges with their distinct characteristics in mind, proportionality principles and cooperation are two responses that illustrate a developing convergence. Furthermore, by adopting certain approaches and characteristics unique to each forum, U.S. civil litigation and international arbitration can ensure that e-discovery does not overwhelm courts and arbitral tribunals.

1. PROPORTIONALITY EMBRACES FLEXIBILITY AND  
PREDICTABILITY.

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<sup>198</sup> Frank & Bédard, *supra* note 62, at 68.

Under the revised 2010 IBA Rules, Article 9.2(g) calls for consideration of “procedural economy” and “proportionality” when parties and arbitral tribunals are contemplating a production request.<sup>199</sup> Given the broad level of acceptance and consensus surrounding the IBA Rules, the concept of proportionality will likely become an increasingly familiar standard. The IBA Rules are recognized as being “particularly useful where an arbitration involves parties coming from different legal background[s],”<sup>200</sup> and considering the renewed emphasis that proportionality is now receiving under the Federal Rules, a clear convergence is emerging. Moreover, arbitral organizations like the ICC and the London Court of International Arbitration (“LCIA”), as well as party participants to those institutions, frequently elect the IBA Rules to govern an arbitration agreement.<sup>201</sup>

The IBA Rules are not alone in adopting proportionality principles to help determine the appropriate scope of ESI production or disclosure. CIArb Protocol Six, similar to FRCP 26(b)(1), embraces principles of proportionality and provides that a tribunal shall weigh the “reasonableness and proportionality” of a disclosure request against the cost and burden of production compliance, while also considering the amount in controversy.<sup>202</sup>

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<sup>199</sup> IBA Rules, *supra* note 127, art. 9.2(g).

<sup>200</sup> Segesser, *supra* note 123, at 751.

<sup>201</sup> TAVARES PAES JR., *supra* note 120, at § 12:5; *see* Richard M. Gelb, *E-Discovery Under the London Court of International Arbitration*, in *DISPUTE RESOLUTION AND E-DISCOVERY* § 11:6 (Garrie, D.B., & Griver, Y.M., Eds. 2013) (writing that the IBA Rules are instructive for LCIA tribunals confronting situations where parties are attempting to reach an agreement or when orders must be entered due to the absence of an agreement).

<sup>202</sup> CIArb Protocol, *supra* note 95, at 4.



Proportionality, similar in some ways to cooperation, can also be viewed as an overall outlook to be applied, based on the complexity of the commercial dispute.<sup>203</sup> Similarly, U.S. courts have also recognized that proportionality is most effective when wielded as a holistic tool and applied broadly, rather than narrowly contemplated, such as when determining the number of sources or responsive documents.<sup>204</sup>

A convergence between the Federal Rules and international arbitration is also developing with respect to how principles of proportionality are applied in more narrow aspects of e-discovery or disclosure. The revised FRCP 26(b)(1) lists a party's "relative access to information" as one of the proportionality considerations to help determine the permissible scope of discovery.<sup>205</sup> This is a critical consideration, because parties who have more information or maintain greater control of ESI are often asked to produce significantly more ESI than they seek or are able to obtain from an opposing party.<sup>206</sup> If properly

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<sup>203</sup> RICHARD CHERNICK & HON. CARL J. WEST, INTRODUCTION, DISPUTE RESOLUTION AND E-DISCOVERY § 10:1 (explaining that for arbitration to be truly cost-effective, a discovery plan must be proportionate to the complexity of the dispute and applied to avoid abuse and undue delay).

<sup>204</sup> *Moore v. Publicis Groupe*, 287 F.R.D. 182, 185 (S.D.N.Y. 2012) (*adopted sub nom. Moore v. Publicis Groupe SA*, 11 CIV. 1279 ALC AJP, 2012 WL 1446534 (S.D.N.Y. 2012)) (Magistrate Judge Andrew J. Peck explaining "where [the] line will be drawn [as to review and production] is going to depend on what the statistics show for the results, since Proportionality requires consideration of results as well as costs") (internal quotations omitted).

<sup>205</sup> Fed. R. Civ. P. 26(b)(1).

<sup>206</sup> DUKE LAW CENTER FOR JUDICIAL STUDIES, GUIDELINES AND PRACTICES FOR IMPLEMENTING THE 2015 DISCOVERY AMENDMENTS TO ACHIEVE PROPORTIONALITY (2015).

applied, proportionality will mitigate burdens that are often common to asymmetrical ESI cases, because proportionality demands equal access to necessary information, while guaranteeing that the amount of discovery does not depend on the amount of discoverable information.<sup>207</sup> CIArb Protocol Seven also addresses a party's relative access to the information sought and provides that the ESI searches should generally be limited to "reasonably accessible data," such as active data, near-line data, or offline data stored on disks.<sup>208</sup> Protocol Seven then explains that inaccessible data, such as back-up tapes or archived data routinely deleted, should only be searched upon demonstration that the "relevance and materiality" of the requested materials "outweigh[s] the costs and burdens" of retrieval and production.<sup>209</sup> Thus, the CIArb recognizes that a party's access to data sources must be viewed carefully through the lens of proportionality—a view prevalent in U.S. courts.<sup>210</sup>

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<sup>207</sup> *Id.* at 2 (Guideline 2(C) explains that just because a party has little discoverable information "does not create a cap on the amount of discovery it can obtain." Guideline 2(C) further explains that parties must be permitted access to necessary information, but "without the unfairness that can result if the asymmetries are leveraged by any party for tactical information. There will be instances where discovery costs and burdens are heavier for a party that maintains or has easier access to the "bulk of the essential proof in a case.").

<sup>208</sup> CIArb Protocol, *supra* note 95, at 4.

<sup>209</sup> *Id.*

<sup>210</sup> *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003) (In Judge Scheindlin's influential and heavily cited opinion, she explains "whether production of documents is unduly burdensome or expensive turns primarily on whether it is kept in an *accessible or inaccessible* format (a distinction that corresponds closely to the expense of production)."); *see Calixto v. Watson Bowman Acme Corp.*, No. 07-60077-CIV, 2009 WL 3823390, at \*11 (S.D. Fla. 2009) (relying in part on Judge Scheindlin's reasoning in *Zubulake*, the court found a \$40,000 estimate for restoring

Proportional standards surrounding e-discovery are permeating arbitral guidelines, illustrating one growing convergence in how international arbitration and the Federal Rules cope with ESI obstacles.

2. COOPERATION CONVERGENCE: UPHOLDING  
ARBITRAL AMBITION AND THE PROMISES OF FRCP  
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Party cooperation will prove indispensable in the effort to prevent further “Americanization” of the international arbitration system, while reversing the acrimonious nature that is synonymous with U.S. litigation. The revised 2010 IBA Rules emphasize the importance for parties and arbitrators “to get started early in the process with a consultation on evidentiary issues.”<sup>211</sup> The useful tools provided in the new IBA Rules will be largely ineffective if party cooperation is not embraced early and often, thereby undermining the arbitral objectives of efficiency and foreseeability. Recognizing the invaluable significance that increased party cooperation will afford parties and tribunals, the IBA Rules of Evidence Subcommittee elected to move the old Section 3 provision encouraging an early identification of the relevant and material issues through consultation and cooperation to Article 2 (Consultation on Evidentiary Issues).<sup>212</sup> This decision gives party cooperation more weight because Article 2 is an obligatory provision and provides that an

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and searching all backup tapes for key words rendered the requested ESI not reasonably accessible because of undue burden or cost).

<sup>211</sup> Segesser, *supra* note 123.

<sup>212</sup> *Id.* at 740.

“Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.”<sup>213</sup> Cooperation is essential to upholding arbitral tenets of autonomy, efficiency, and flexibility.

Cooperation has increasingly been embraced by courts, scholars, and many lawyers as essential to tackling the suffocating challenges that often accompanying e-discovery.<sup>214</sup> Highlighting the indispensable role that cooperation assumes in the digital era, Chief Justice John Roberts posits in his Year-End Report, “I cannot believe that many members of the bar went to law school because of a burning desire to spend their professional life wearing down opponents with creatively burdensome discovery requests or evading legitimate requests through dilatory tactics.”<sup>215</sup> In the world of big data, ethical client advocacy is unquestionably incompatible with uncooperative counsel conduct, a position not lost on the Advisory Committee, as articulated in the Committee Notes to the 2015 Amendments.<sup>216</sup> Thus, calls for party cooperation in the revised Federal Rules and in several recently promulgated arbitral guidelines illustrate cooperation’s role in triggering a convergence within the realm of e-discovery.

#### IV. CONCLUSION

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<sup>213</sup> IBA Rules, *supra* note 127, art. 2.

<sup>214</sup> *Supra* note 138.

<sup>215</sup> Roberts Report 2015, *supra* note 132, at 11.

<sup>216</sup> Fed. R. Civ. P. 1, Advisory Committee’s Note (2015) (“Effective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.”).

In our digital era it is inevitable that e-discovery is discovery, and that equitable dispute resolutions in U.S. courts and international arbitral tribunals will be illusory if proportionality and cooperation standards are not imposed by judges and arbitrators at the earliest opportunity. The scope of discovery or arbitral disclosure must be proportional to the needs of a case in order to ensure that costs and burdens do not inundate dispute resolution. This can only be achieved through the early and frequent enforcement of proportionality, party cooperation, and increased judicial and arbitral tribunal intervention. Judge Carroll intuitively notes that proportionality's "greatest value is creating a mindset in the court and litigants that discovery needs to be focused on the real issues in the case and that cost is a consideration."<sup>217</sup> The exponential growth in ESI demonstrates that the status-quo e-discovery practices are unsustainable, and instead, the Federal Rules and arbitral organizations must impose proportionality and party cooperation principles to effectively determine the proper scope of discovery.

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<sup>217</sup> Carroll, *supra* note 139, at 460.