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ARTICLES

An Introduction to International Arbitration

By Justin L. Heather

International arbitration is a growing field and is becoming more prevalent in a broader range of subject-matter areas. Globalization and the increasing use of outsourcing by companies lead many attorneys to include international arbitration as the preferred method of dispute resolution. For litigators inexperienced in the area of international arbitration, the procedures and processes may prove daunting and a distraction from the merits of the proceedings. This article provides an overview of some key differences between the familiar concept of litigation and the unique practices and procedures of international arbitration.

Drafting the Arbitration Clause

Transaction lawyers often do not consult litigators when drafting dispute-resolution provisions of contracts. Input from practitioners in the area of international arbitration, however, is essential to the drafting of proper and effective dispute-resolution provisions. The importance of input from international-arbitration lawyers cannot be understated. The use of standard arbitration clauses—clauses that do not take into account issues such as the contextual backdrop, business relationship, and amount at issue—can lead to unnecessary costs for the client and to international arbitration procedures ill-fitted to an eventual dispute. Drafters of arbitration clauses should consider the following concepts affecting international clients in drafting a dispute-resolution provision.

Seat of the Arbitration

Contracts between parties of different countries require a neutral seat for resolution of any conflict. In choosing the seat, parties must account for where the arbitration will occur. The seat of the arbitration may have important impact on the procedural rules that govern an international arbitration, such as the availability and form of discovery, in the absence of governing rules.

Governing Law

This provision also should be neutral in nature. The question of governing law is important to the ultimate contractual interpretation in arbitration. Where neither party is a U.S. company, New York law often is used as the default jurisdiction by the drafters. Parties should take great care in selecting the governing law used in a contract and ensure they are familiar with the nuances of the particular jurisdiction selected.

Governing Convention

There are many international arbitral institutions, each with their own particular procedural rules and varying levels of details and specificity with respect to procedures and practice. Before



adopting a particular governing convention, counsel should review the rules and procedures of the institution and consider whether the rules are appropriate and sufficient. For example, parties should consider whether particular types of discovery or procedures for review of tribunal decisions may be desirable and select the appropriate convention.

Composition of Arbitral Tribunal

Lawyers often use a standard three-person arbitral tribunal in drafting dispute-resolution provisions. More arbitrators naturally mean more costs and expenses for the parties. When drafting arbitration clauses, counsel should factor costs, as costs associated with an international arbitration may easily dwarf the amount in controversy, (especially in contractual disputes where the amount at issue is small).

Preconditions to Arbitration

Drafters should consider including a time frame for mutual discussions or mediation as a precondition to international arbitration proceedings. Providing a structure for potential settlement of any disputes prior to beginning international arbitration can potentially reduce a client's expenses and preserve the parties' business relationship.

These factors, among others, inform the process of drafting and tailoring contractual dispute-resolution provisions. Corporate counsel and clients' interests are best served by engaging litigation counsel experience in international arbitration in the drafting process. The importance of dispute-resolution provisions cannot be understated when setting the parameters for any ultimate arbitration.

Preliminary Considerations

At the outset of any arbitration, there are a number of preliminary matters that parties must consider before turning to the substantive merits of the dispute. Specifically, there are several matters in international arbitration that practitioners should take into account. Although every case is unique, practitioners should consider the following before pursuing an international arbitration in earnest.

Lawyers must first educate their clients about the process of international arbitration. Most clients have little, if any, experience in international arbitration and are usually unfamiliar with its often unique process and rules. Differentiating international arbitration from the client's own national legal-system experience is essential. By educating the client, a lawyer can allay the client's fears and make the client more comfortable with the international arbitration process.

Lawyers also need to educate themselves about the governing rules and procedures of the international arbitration convention and governing law provided in the contract. As mentioned earlier, each institution has its own particular rules and procedures. These rules and procedures often are quite different from the standard rules and procedures that govern litigation in federal or state courts. Practitioners must be familiar with these unique rules and procedures.

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Selection of Arbitrators

Where contracts provide for party-appointed arbitrators in international arbitration, counsel must begin the process of identifying and interviewing potential arbitrators. Unlike typical litigation where judges are randomly assigned to cases, international arbitration often affords parties the opportunity to select (subject to confirmation) an arbitrator. Several factors can inform counsel about the propriety of potential arbitrators in an international dispute, including regional norms on relationships, the seat of the arbitration, the legal background of arbitrators (common law versus civil law background), whether potential arbitrators have specialized knowledge in the subject matter, available published awards, and arbitrator interviews. The client’s input and role in arbitrator selection also is an important consideration.

Several ethical and practical considerations also may inform counsel about selecting appropriate arbitrators. While there is no standard set of ethical rules governing all international arbitration, the International Bar Association (IBA) Rules of Ethics for International Arbitrators provide guidance about the ethical framework in which arbitrators should discharge their duties. A survey of the arbitrator disclosure rules of various institutions reveals two guiding principles for arbitrator selection and confirmation: impartiality and independence.

Parties must carefully interview prospective arbitrators to avoid impugning the independence or impartiality of prospective arbitrators. Arbitrator interviews generally should be limited in time and scope to inquiries regarding the prospective arbitrator’s suitability and availability for appointment and should avoid any discussion of the merits of the case. Prior contact with arbitrators (including as an arbitrator in prior proceedings) or representation of a party may counsel in favor of appointment; however, repeated appointment of an arbitrator by a party or its counsel may jeopardize an arbitrator’s impartiality or independence.

Once selected by a party, arbitrators generally must make certain disclosures to the other party and the international arbitral institution. For international arbitration, there are no uniform procedures regarding arbitrator disclosures. The IBA Guidelines on Conflicts of Interest in International Arbitration acknowledge the growing difficulties inherent in arbitrator disclosures and, in an effort to achieve greater consistency and fewer challenges to arbitrators, these guidelines provide categorical lists of factors that may or may not require disclosure. Moreover, the attitude and perspective on disclosure and whether arbitrators may be confirmed often vary by region.

Once lawyers address these preliminary matters, they can turn to the merits of the international arbitration. Many arbitration procedures are analogous to those in standard litigation, but there are several unique aspects and procedures in international arbitration.

International Arbitration Procedures

In international arbitration, the “notice of arbitration” operates as the initial pleading (similar to a complaint in litigation) in arbitration and triggers any contractual alternative-dispute mechanisms

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that exist. Parties must comply with all requisite contractual provisions, including preconditions to arbitration such as a notice of dispute and good-faith efforts to resolve matters amicably. At the beginning of arbitration, parties should request a preliminary hearing on procedural matters because generally there is no requirement for such a hearing and whether such a hearing occurs is left to the discretion of the tribunal. The parties and arbitral tribunal determine the rules that govern the conduct of the arbitration, including those for disclosure, discovery, and the taking of evidence, through this preliminary hearing or scheduling conference and any resulting procedural order.

The style of the answer and any counterclaims in international arbitration vary dramatically between counsel and parties, especially based on their legal background and traditions. As with all pleadings, there must be balance between providing a complete recitation of the facts and putting the opposing party on notice of claims and defenses. The details included in pleadings vary by region, which is similar to the differences between notice and fact-pleading jurisdictions in the United States.

Parties and the arbitral tribunal in international arbitration usually document, in the “terms of reference,” the scope of the tribunal’s authority with respect to the issues to be decided in the arbitration. In addition to certain technical requirements, such as identification of parties and counsel, the terms of reference typically include a summary of the parties’ respective claims, relief sought, and issues to be determined by the arbitral tribunal.

Discovery in international arbitration is fundamentally different from that in standard U.S.-based litigation. In determining procedural matters and drafting the terms of reference, the parties and tribunal should consider rules governing document production and other discovery tools. Practitioners and arbitrators often use the IBA Rules on the Taking of Evidence in International Arbitration to establish the rules and detailed procedures for discovery in international arbitrations.

These procedures generally require narrowly crafted requests and a detailed explanation as to why the requested documents are necessary to resolve the dispute; broad discovery requests, which are typical in U.S. litigation, generally will be found objectionable. Once a party propounds such requests, opposing counsel can respond to the requests by interposing objections; the requesting party may then, with leave of the tribunal, respond to objections from opposing counsel. Unlike domestic litigation where parties typically limit the number of discovery disputes taken to court, the international arbitral tribunal ultimately may resolve each of the discovery disputes. Differing views of discovery in the international community often result in very limited document productions, even in the case of large disputes.

The taking of evidence in international arbitration also varies substantially from that in domestic litigation and arbitration. While domestic litigation and arbitration usually involve the taking of deposition testimony, a common occurrence in international arbitration is the submission of

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written witness statements. Under the IBA Rules on the Taking of Evidence in International Arbitration, the tribunal may direct parties to identify witnesses they intend to call and submit witness statements. Parties often submit witness statements in response to these initial statements, and the various witness statements may then be offered in lieu of complete direct examination during the course of oral hearings on the merits of the underlying claims. Conversely, some jurisdictions allow little, if any, input from witness (either written or oral). For example, Chinese arbitration commissions generally allow no witness statements or live testimony unless requested and allowed by the tribunal.

The development and submission of expert testimony in international arbitration also vary substantially from that in domestic litigation and arbitration. One of the primary differences in international arbitrations is the use of tribunal-appointed expert witnesses in lieu of, or in addition to, party-appointed experts. Moreover, unlike domestic litigation, drafts, reports, and communications with experts generally are not discoverable, subject to certain limited disclosures. This system provides for a freer flow of information between counsel and experts and can be essential to efficient preparation of cases where counsel and expert witnesses are not in the same geographic region. The IBA Rules on the Taking of Evidence in International Arbitration and CIArb Protocol for the Use of Party-Appointed Experts in International Arbitration also provide for conferences between experts prior to any hearing on the merits to identify areas of agreement and highlight the issues where disagreements must be resolved by the arbitral tribunal based on expert evidence.

International Arbitration Hearings

International arbitration hearings and the events surrounding such hearings are somewhat similar to those of domestic litigation and arbitration. However, there are subtle differences with which international arbitration practitioners must be familiar.

Prior to any hearing on the merits in international arbitration, there are various prehearing submissions that parties must prepare for submission to the tribunal. Some of these materials are prepared solely by the respective parties, while others (similar to pretrial orders) are prepared and provided as joint submissions. In addition to briefing on the merits or any procedural matters, parties must prepare exhibits to be used during the course of a hearing, which are commonly referred to as “bundles.” These bundles are voluminous, and preparation must begin well in advance of the hearing for the parties to reach agreement on their context and properly prepare them for submission. These bundles are essentially exhibit books for use by the parties and the arbitral tribunal during the merits hearing.

The actual conduct of the merits hearing in an international arbitration is subject to the discretion of the tribunal; however, there are some interesting aspects typical of an international arbitration. The peculiar aspects include preparing and eliciting testimony from fact witnesses; prospective-witness rules that differ from those in domestic litigation; expert-witness conferencing; variation of arbitration styles from jurisdiction to jurisdiction; and the use of foreign law experts or co-



counsel. Many international arbitrations use a “chess clock” procedure whereby the parties split the time equally in which they may present evidence and parties should make sure to allot time for unexpected developments and spontaneous questions from arbitrators.

Similar to post-trial briefing procedures, many international arbitrators allow for post-hearing submissions. Rather than restate a party’s earlier submissions, post-hearing submissions should be used as an opportunity to draw out hearing evidence favorable to the party, explain damaging evidence, and refocus the discussion on the party’s principle themes. Having had the opportunity to observe the demeanor and interests of often disparate arbitrators during the course of the hearing, counsel also should endeavor to bridge any intellectual or cultural gaps when preparing the post-hearing submission. In addition, parties should beware of raising (or seeing) new issues and arguments.

Conclusion

As international arbitration continues to grow as a preferred method of resolving disputes, lawyers should become more familiar with the process and procedures of how international arbitration is performed. This article does not provide a comprehensive overview of all possible intricacies inherent in international arbitration; however, it highlights some of the major issues unique to international arbitration. For example, in addition to the IBA rules mentioned, there are many different rules and procedures that vary amongst international arbitral institutions and which may also be varied by contractual agreement. Wise practitioners should learn these various differences and the nuances inherent in every international arbitration. Proper representation of your client’s interests requires a full examination and understanding of international arbitration rules and procedures.

Justin L. Heather is a founding member of Korey Cotter Heather & Richardson, LLC in Chicago, Illinois, and also is an editor of *The Young Advocate*. He is grateful for the assistance of his former colleagues Frances Kao, Ryan Horning, and Martin Sinclair who helped prepare the presentation upon which this article is based.

Keywords: arbitration, dispute resolution, tribunal, international arbitration, IBA rules

Writing Your First Appellate Brief

By Haley Maple

As a young litigator, you likely are accustomed to drafting and responding to motions and memoranda on dismissal, summary judgment, discovery issues, and other issues that arise before trial. Not much tops the feeling of successfully obtaining summary judgment for your client or otherwise winning a motion or an argument. If those orders are appealable, however, you may end up on the receiving end (or if unsuccessful, the filing end) of a notice of appeal. If you are

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not in a firm with an appellate department, or sometimes even if you are, you may be asked to draft the appellate brief.

Tackling an appellate brief is much different from your familiar ground at the trial level. Not only is the style of argument different, but also very specific, and arguably unintuitive appellate rules govern every step of the way. Additionally, appellate judges approach an appeal differently from how a trial court approaches a motion. As such, you need to be ready to handle this new animal called an appeal.

First Steps

Before beginning the actual writing of an appellate brief, young lawyers should take the following first steps to prepare for writing it.

Procedural Rules

You should be familiar with the rules of civil procedure, rules of appellate procedure, the local rules for the appellate and trial courts, and any “internal operating procedures” of the appellate court (typically available on the court’s website). Such rules often are modified via separate documents. More importantly, these rules describe deadlines; brief printing requirements; required brief sections and outlines; page limits (or word limits); citation requirements (you may not be permitted to cite unreported opinions, for example); font requirements (note that at least in Florida federal and state courts, briefs typically require 14-point font, which can be tricky if, for example, an entire brief is written in 12-point font and then exceeds the page limit once transferred to 14-point font); and more. You absolutely must be familiar with what rules apply to your appeal and know those rules before you begin writing your appellate brief.

Pleadings

You immediately must obtain all applicable pleadings, which would include the order, motions, memoranda, and documents filed and related to the issue appealed and the transcript of any hearings on motions or at trial. In my experience, obtaining trial transcripts is far more expensive than I ever expected; contact the court reporter’s office for an estimate of the cost.

Admission to Court

You must be sure that you are admitted in the appellate court. If you are not, take immediate steps to gain appropriate admission.

Confer with Your Boss

Meet with your supervising attorney to find out the direction of the appellate argument. You do not want to spend time and client money researching and writing on an issue that either the client or supervising attorney does not want to address. Once you are immersed in the drafting process, do not be afraid to bring up and review with your boss additional arguments that you think are worth making.



Notice of Appeal

If you are filing the notice of appeal, it is imperative that the notice is timely filed and filed correctly. Rules governing the timeliness of an appeal often are strictly enforced, and failure to comply with the time-for-filing provisions likely will result in dismissal of the appeal. You must check your local rules at the trial and appellate levels. You may be surprised to find out that the notice of appeal is typically filed with the trial court rather than the appellate court. Know the amount of the filing fee and where and when the filing fee must be sent. Additionally, the local rules and rules of civil and appellate procedure have many requirements for the notice of appeal, which may or may not include the filing of certified copies of the order(s) being appealed. It is important to remember that the notice of appeal sets many procedures and activities into action.

The Record

You must know what items are contained within the record, whether and how you need to request that items be included in the record, and the deadlines for achieving these goals. Without an appropriate record, appeals may end up being dismissed or unsuccessful.

The Writing Process

Once you are intimately familiar with your case at the trial level and have assessed all of your appellate arguments, including reading and shepardizing case law relied upon by all parties, then begin the process of outlining your brief (or creating a “skeleton brief”). To create the skeleton for your brief, check the rules for what sections are required in your brief, including table of contents, table of authorities, requests for oral argument, statement of jurisdiction, and font certifications. I typically draft a brief by creating this very basic skeleton and using page breaks in the word-processing document to remind me of any required components of the brief. For example, I do not fill out the request for oral argument, but I create a page for the request that I can fill out later.

To create an orderly appellate brief, you must start with a solid outline. After you have your skeleton brief, begin outlining your arguments. Appellate briefs require very well written and concise headings that outline your arguments, as headings and subheadings may be all that some folks read. As a result, you may need more headings and subheadings than you originally thought. At this stage of drafting, I outline the arguments as the headings would appear in the brief, then place notes in the appropriate section. These notes can include a very brief statement of what I want to argue in that section, cases I want to discuss or distinguish, and parts of the record that should be addressed. At this point, you have created a solid outline. Do not be afraid to spend time outlining; a good outline creates the foundation for a great brief and will assist you in efficiently drafting a persuasive brief.

Standard of Review and the Facts

After building your outline for your brief, you can begin writing. It is helpful to draft your “standard of review” section first as it sets the stage for your arguments and is important to the persuasiveness of your brief. Next, begin writing the factual summary. You only should use facts



available from the court below and include citations to the record for each fact. I often draft the facts section, then go back through and add the record citations because adding such citations while writing can disrupt the flow of your drafting. Include key facts and necessary background, use appropriate and persuasive headings, but never be argumentative in the facts section.

Adding in Arguments

Arguments should be written concisely and in plain English; it should be easy for the appellate court to understand your arguments. Work necessary facts into your argument (along with record citations), and resist the temptation to “copy and paste” arguments from the lower court’s memoranda as it often results in typographical or conceptual errors. I’ve seen appellate briefs that clearly contained arguments copied and pasted from lower court filings where the appellate argument stated, for example, that summary judgment should be granted instead of stating that the lower court’s opinion should be affirmed or reversed under the applicable standard of review. Additionally, you need to *weave* the record into your appellate argument as copying and pasting simply leads to choppy arguments. Note what case law the court below relied upon and, depending on your position in the appeal, be sure to effectively support that reliance or distinguish the case law and explain why the lower court was right or wrong in its decision. Each section should appropriately transition to the next but should be able to stand alone if a judge wants to focus on a particular argument. If a judge wants to go back and read your discussion on one element or argument, then you want your brief to serve that purpose.

Avoid the temptation to provide a drawn out, beautifully drafted background on the history of U.S. Supreme Court decisions. Of course, you may need to discuss and outline the history of the law, but all too often I’ve received a draft brief that contains pages upon pages of discussion of basic legal principles. Judges are busy, and they do not have the time or desire to read extended background argument. If you do too much of this, you risk losing judges before you even get to your real argument.

Edit Your Brief

After you have your initial draft, go back through it and sharply edit the entire brief. If you do not use a particular fact in your argument that is included in your factual summary, then evaluate whether you can delete that fact from the fact section. Confirm that your argument complies with applicable rules. Delete what is unnecessary, tighten up your language, and discuss case law to the extent necessary. Finally, resist the urge to excessively quote sources or over-argue.

Over the Page Limit

Lawyers tend to like to talk and write. I’ve rarely had a first draft of a brief fall within the required page limits. How can you deal with this without losing the “meat” of your arguments?

The first thing you should do is see if you really are over the page limit. If you are using margins that are too big, for example, you may actually fall within the page limit. Also, knowing appellate and local rules is important when determining the length of your brief and how to



comply with those requirements. These rules often exempt certain sections of your brief from the page count and may allow you to use a word limit instead of a page limit in certain circumstances. Sometimes, local rules allow smaller font for footnotes than that required in the text.

After such review, it is time for sharp editing if your brief is still over the page limit. Have you used short citations when appropriate? Have you eliminated passive voice? Can you edit your three-line headers to two lines? Are you unnecessarily quoting cases, statutes, or record excerpts? Are all of your footnotes necessary to your argument? Have you gone a little crazy with string citations? If you have edited your argument as sharply as possible, then it is time to evaluate the necessity of portions of your arguments or discussion to bring your brief within the page limit. You also should evaluate the possibility of filing a request for additional pages.

Final Steps

After your draft brief is complete, it is time to fill in the other required components, including the table of contents and authorities, and statement on oral argument. I do not recommend adding page numbers to your table of contents and authorities until your brief is in its absolute final form as you will simply have to redo all of the tables.

Once all of the necessary components are finished and the argument is complete and edited, it is time to hand your brief over to those who need to review, edit, and approve the brief. Be sure to hand the draft over long before the deadline for filing. Appellate briefs usually require strict printing and formatting that can take several days for a printing company to complete. Obviously, check with who you are reporting to and know when they expect the brief. Also, be cognizant of the potential for substantial revisions and the necessity of printing requirements.

Printing and Filing

In my experience, state and federal courts vary in their requirements of filing briefs, but all courts consistently have strict and specific requirements for filing. For example, the weight of paper may be specified. Additionally, these rules may govern the type and location of binding, the cover color and type, the number of copies, the use of recycled paper, and other such requirements. Complying with these rules can be confusing and time-consuming. Do not overlook this important step only to find yourself without enough time or appropriate arrangements for compliance with the brief-filing requirements. You also should pay very close attention to whether the deadline for your brief is the deadline for filing or serving your brief.

Conclusion

Although appellate briefing is a different beast from drafting memoranda and argument at the trial-court level, with the requisite knowledge going into the process, awareness of applicable rules of procedure, appropriate planning, and sharp editing, your first brief-writing experience can and should be an intellectually stimulating, satisfying, and successful one.



[Haley Maple](#) is an equity partner at Forizs & Dogali, P.A. in Tampa, Florida. In the Section of Litigation, Haley is a member of the Marketing & Membership Committee and is editor-in-chief of [The Woman Advocate](#).

Keywords: young lawyer, appeal, notice, standard of review, page limit, printing, filing

E-Discovery: Getting to the Starting Gate

By James Worthington and Mor Wetzler

We live in an era of electronic discovery (e-discovery), as virtually all business information and communications are digital. Indeed, so much information is electronically stored that it is only a matter of time before e-discovery swallows all of discovery. How do you handle e-discovery at the start of a case? Prepare as much as possible, know the issues, and try to ask the right questions or at least ask lots of questions (and keep asking them throughout the discovery process).

Electronic What?

Electronically stored information (ESI) is “any information created, stored, or best utilized with computer technology of any type.” This includes the more traditional “documents,” such as word-processing files, spreadsheets, presentations, graphics, animations, images, emails, and instant messages (including attachments). It also includes audio, video, and audiovisual recordings, voicemails stored on databases, and structured/transactional data in a variety of forms. To consider just some of the more common examples, ESI can reside in networks; computers and computer systems; servers; archives; backup or disaster-recovery systems; compact discs; diskettes; hard drives; flash drives; tapes; printers; the Internet; and on BlackBerry devices (and other PDAs), handheld wireless devices, cellular telephones, pagers, fax machines, and voicemail systems. The list of ESI can go on virtually endlessly and seemingly grows more complex with every new development; cloud computing is only the latest in a long line of technologies that have added complexity to the litigator facing e-discovery challenges.

Why Does the “E” Matter So Much?

As in discovery more broadly, e-discovery issues fundamentally involve the process of locating, reviewing, and producing non-privileged materials that are responsive to discovery requests. But, electronically stored information poses challenges beyond traditional discovery. ESI can be voluminous and difficult to locate; it also frequently includes metadata, which is information about a document or file that the computer stores but that may not be accessible to the ordinary user. In addition, ESI easily is modified or deleted, and information systems, including systems that frequently are automated and can modify, delete, and overwrite it (absent timely intervention). Moreover, ESI’s dynamic character easily can lead to the pitfalls of spoliation,

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which is the inadvertent or intentional destruction of relevant evidence after a duty to preserve it has attached. Spoliation is a rapidly developing area of law that is of vital and growing significance to judges and parties. Cases can be won and lost based on preservation, collection, and production failures. E-discovery sanctions motions can complicate a case and can reach not only parties but also their outside and in-house counsel. The costs of e-discovery can be enormous, particularly at the stage when ESI must be processed, loaded onto a review tool, reviewed, and produced. However, proper and timely analysis and an understanding of the constantly developing technologies and methodologies can reduce or mitigate many of these costs and risks.

Is It All Bad?

Not necessarily. ESI can be easier to store, produce, review, and use than traditional non-digital forms of data storage. For example, “boxes” of documents can be stored online, retrieved with a few keystrokes, and produced on a single ROM (read-only memory) device such as a DVD or a hard drive or even uploaded to an online depository. Large volumes of material can be searched for concepts or keywords, and archived data can be tabulated, modeled, or analyzed. Unlike paper documents, ESI is far more persistent; for example, drafts of documents and other temporary materials that in the past may have been shredded or destroyed are now routinely preserved. For better or for worse, even ostensibly “deleted” ESI can linger in the form of backup tapes; archives, removable media; erased and fragmented data; metadata; and other such spectral forms. All of this can add up to a more complex but (in the right circumstances) arguably richer data environment for the litigator.

Getting a Handle

Early on in litigation or investigation, it is critical to analyze your client’s data. You should have an understanding of what it is; who created it; how it is structured; where and how it is stored; and analyze potentially difficult data sources before they cause problems down the road. At the very outset, you will want to analyze preservation issues; you should evaluate the universe of data and documents that your client is under a duty to preserve and take appropriate measures. You also should identify key documents and subject matters, key players (both for the client and the other side), and any other information that will assist you in targeting your discovery efforts. Particularly, if electronic keyword filters will be employed, you should start analyzing early on the language that the key players (both friendly and opposition) use to discuss the critical subject matters at issue.

In litigation, you also will want to conduct an early offensive analysis to try to have an understanding of the data and documents you might expect (and want) from the other side. This frequently is conducted through analysis of your client’s documents and communications with the opposing party (because you likely won’t yet have access to discovery). This involves identifying the substantive topics that will be central to the matter, whether it is litigation or investigative. In addition, you should identify key variables that likely are to define the scope of



discovery, including subject matters and/or custodians. This picture likely is to evolve as the case progresses, but early analysis is crucial.

As you develop your preliminary understanding (both offensive and defensive) of relevant data sources and types, you should consider the likely magnitude of the e-discovery effort for your client and for the opposing party. Projects of different scales can demand very different solutions. Identify your key custodians and data sources, and analyze the outer boundary limits to the universe of potentially (or marginally) relevant custodians, databases, and repositories of standalone documents such as shared drives. Consider the point at which discovery costs will become disproportionate to the scale of the matter, and develop arguments (preferably supported by quantitative measures) to support your view as to the reasonable limits to discovery.

Initial Conference and E-Discovery Agreements

Much of the preparation listed above will assist parties in the initial conference and discovery meet-and-confer sessions. Depending on the jurisdiction, parties may have to disclose early on sources of ESI, custodians, and their plans with respect to ESI production from the other party. At the conference, parties should try to agree on various e-discovery topics, such as the scope of e-discovery (time periods, custodians, sources of standalone data, and metadata are frequent issues for discussion); the process for identifying, reviewing, and producing responsive documents; and the form of electronic production (e.g., handling metadata and native production). Other issues to consider at this stage include whether to use filtering, manual review, or a combination of the two; what opportunities or duties that the parties will have to supplement or revise their agreed procedures as discovery progresses; and what will happen if privileged or trial-preparation materials are inadvertently disclosed (a subject that continues to require analysis and discussion between the parties, even with the passage of Federal Rule of Evidence 502). The specifics of filtering alone can occupy many rounds of negotiation in complex cases, and it is frequently advantageous to test early and often to support your positions regarding the appropriate and inappropriate approaches to discovery in the case.

Early agreement on these issues always is useful to clarify the parties' obligations, and it is frequently easiest to reach agreement before problems arise rather than after problems occur. In more complex cases, discussions between the parties likely will continue throughout the discovery process, and courts increasingly expect a level of communication between parties that would have been unusual in the era of paper discovery (*see, e.g., William A. Gross Constr Assoc. v. Am. Manuf. Mut. Ins. Co.*, 256 F.R.D 134 (S.D.N.Y. Mar 19, 2009) ("This opinion should serve as a wake-up call to the bar of this District about the need for careful thought, quality control, testing and cooperation with opposing counsel in designing search terms or 'keywords' to be used to produce emails or other electronically stored information.")) or the [Sedona Conference Cooperation Proclamation](#).

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With the ever-increasing role of ESI in discovery, it is critical to stay informed. You should look into your jurisdiction's ESI guidelines and discovery rules, as many jurisdictions have become increasingly specific in the guidance that they provide to parties concerning e-discovery issues (see, e.g., the [Delaware Court of Chancery Guidelines for Preservation of ESI](#), or the District of Kansas's [particularly detailed directives](#), which include a list of 50 suggested questions for the Rule 26(f) conference). Review existing case law, such as the *Zubulake* and *Pension Committee* decisions, and cases in your jurisdiction. See, e.g., *Micron v. Rambus*, 2011 WL 1815975 (Fed. Cir. May 13, 2011) and a companion case, *Hynix v. Rambus*, 2011 WL 1815978 (Fed. Cir. May 13, 2011); *Zubulake v. UBS Warburg*, No. 02 Civ. 1243 (SAS), 2004 U.S. Dist. LEXIS 13574, 2004 WL 1620866 (S.D.N.Y. July 20, 2004) or the other *Zubulake* decisions; *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, No. 05 Civ. 9016, 2010 U.S. Dist. LEXIS 4546, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010) (as amended May 28, 2010). Also, stay abreast of broader resources, such as [materials published](#) by the Sedona Conference.

[James Worthington](#) and [Mor Wetzler](#) are associates with Paul, Hastings, Janofsky & Walker LLP in New York, New York.

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Obtaining and Collecting on a Judgment

By Ryan J. Works

As a young associate, you may be asked to do a variety of work relating to judgments. The groundwork for obtaining an enforceable judgment begins even before the case is filed. Below are various steps you can expect to follow in the process.

Asset Analysis

Proceeding to judgment can be a wonderful feeling. You were prepared and skilled enough to successfully prove your case. However, the truly rewarding part comes in collecting and enforcing the judgment. If your judgment is uncollectable, the joy and excitement of obtaining the judgment will be lost forever. Accordingly, prior to obtaining a judgment, and sometimes even before filing the complaint, you should conduct an exhaustive asset analysis to determine what, if anything, your client will be able to enforce the judgment against.

Prejudgment Writ of Attachment

Sometimes the opposing party may begin depleting assets during the course of the case. You should determine whether seeking an attachment before obtaining a judgment is appropriate and necessary.



Obtaining a Judgment

Whether it is a default judgment, a summary judgment, or a declaratory judgment, all your hard work and effort has finally paid off and you can now move forward to enforce the judgment.

Filing the Judgment

Upon a verdict by a jury, or by decision of the court, the clerk or court will enter a judgment. Generally, a written decision memorializing the court's findings of fact and conclusions of law will be presented for signature and filing.

Filing the Notice of Entry of Judgment

In some states, you must give notice to the opposing party that judgment has been entered. Filing and serving a written notice of the entry of judgment, upon the judgment debtor and everyone else entitled to notice, will begin the clock in many cases for filing a motion for trial de novo, altering or amending the judgment, or filing an appeal. Failure to file a notice of entry may in some instances prohibit execution of the judgment.

Automatic Stay

Enforcement of a judgment may be stayed in some instances for a time after entry and notice are given. This period should be strictly obeyed.

Calendaring the Applicable Limitations Periods

Often overlooked, certain deadlines exist for challenging a judgment. Upon the entry of the judgment and notice of the same, certain limitations periods begin to run, including the time for moving the court for a new trial, moving to amend the judgment, or filing a notice of appeal. Upon the expiration of these periods, you are free to pursue your judgment debtor.

Calendaring the Duration of the Judgment

Judgments do not last forever, and in most states you must take affirmative action to enforce the judgment, record the judgment, or take some other action on the judgment; otherwise, it expires by operation of law. Upon successfully filing the judgment and, if required, notice of entry of judgment, you should calendar the expiration date of the judgment. Additionally, calendar periodic reminders, prior to the expiration date, so you have sufficient time to prepare and successfully file for renewal of the judgment, if necessary.

Recording the Judgment

To obtain leverage in enforcing your judgment, you should record a certified copy of the judgment in the local or county recording office where the judgment debtor may own or obtain property. The recording of the judgment is a lien against all nonexempt real property then owned, or acquired thereafter, by the judgment debtor. If the judgment debtor owns, or is likely to acquire, real property in other states, you can record your judgment lien in multiple jurisdictions. For further information on this topic you should consult the [Uniform Enforcement of Foreign Judgments Act](#).



Calendaring the Duration of the Judgment Lien

After recording the judgment lien, you should immediately calendar your state's applicable limitation period on the effectiveness of the judgment lien. Whether it is six years, seven years, ten years, or longer, having a judgment lien expire on your watch is embarrassing, and worse, could subject you, as counsel, to potential liability. Also, limitation periods of this duration can be easy to lose track of. You should create periodic reminders of the looming expiration deadlines and any additional deadlines that may be required in your state (e.g. filing an affidavit with the court clerk 90 days prior to the expiration deadline), so that renewing the judgment lien takes place in sufficient advance of the drop-dead date.

Renewal of the Judgment or Judgment Lien

If you do meet a looming expiration date, renew your judgment and/or judgment lien at the court and with the local recording office(s). Often, certain steps must be taken well in advance of the expiration date, so plan accordingly.

These are just a few of the ways by which you can properly take and enforce a judgment against your adversary. If your judgment debtor has secreted assets, or hidden nonexempt property during the proceedings, whether in violation of a court order, prejudgment writ of attachment, or otherwise, you should consider applying to the court for permission to take a judgment debtor's examination. Alternatively, if the judgment debtor is in violation of a court order, you may seek to hold the judgment debtor in contempt. Taking it to the extreme, if your debtor is still unmoved, having the court issue a bench warrant (order of attachment and commitment) with a sizeable bail amount, will certainly garner the attention of most pesky judgment debtors.

Of course, always consult your local, state, and/or federal rules to determine the proper way to proceed toward successfully obtaining and executing on your judgment. Good luck!

[Ryan J. Works](#) is an associate with McDonald Carano Wilson, LLP in Las Vegas, Nevada.

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NEWS & DEVELOPMENTS

Law Firms Support LGBT Youth Through It Gets Better Project

A number of national law firms and their attorneys have created videos that provide words of support for lesbian, gay, bisexual, and transgender (LGBT) youth and adults. The videos were inspired by the It Gets Better Project, which was started in September 2010 by syndicated

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columnist and author Dan Savage in response to the suicides of several LGBT teens who were bullied at school. The project's [website](#) features over 10,000 user-created videos by individuals, organizations, companies, and other entities that offer words of encouragement to those who are coping with harassment and uncertainty.

Shearman & Sterling, LLP's, video features members of Sterling Pride, the gay-affinity group at the firm, speaking about their experiences as LGBT youth. They discuss the bullying they encountered and the paths they eventually took to find happiness as adults. The video is available on the project's website and on [YouTube](#). In the video, one speaker said that one of his greatest fears was telling his mother that he is gay because he thought "it would be the end of his world." But, he was wrong. Another speaker said: "When I got to college, it was a completely transformative experience . . . The perception that people had of me also changed because I accepted myself."

Littler Mendelson, P.C., created two videos, which are on the project's website and You Tube. One video is designed for [professionals](#) and the other video is designed for [youth](#). The videos feature firm employees who are LGBT or straight allies discussing their personal experiences and expressing positive support for LGBT individuals. For example, one man said that when he was growing up, he "did not think that there was anyone else in the world that was gay." He told viewers: "It is an amazing time to be gay, it is an amazing time to be progressing towards understanding who you are, understanding what the possibilities are for you as an individual, as a professional, regardless of what you decide to do with your life. You can be and do anything you want." A woman encouraged youth to stay strong, stating: "You matter. You matter today, and you matter tomorrow and in the future. If you're having a hard time, stick with it. There are lots of resources."

Three LGBT lawyers from the law firm of Morrison & Foerster, LLP, shared an encouraging message with viewers in their [video](#). One man explained that he and his colleagues "lead open lives surrounded by colleagues who respect who we are and who welcome the important people in our lives into theirs." Another attorney encouraged young people who are not safe to reach out for help. She encouraged those youth who are safe to stay in school and receive an education. She also noted that while it might not be easy and those youth "might feel completely alone," there are people "who love you, who care about you, and want to help you get through this." She encouraged youth to contact the Trevor Project at thetrevorproject.org, which is an organization that provides crisis and suicide prevention for LGBT youth through a 24-hour nationwide hotline and other programs.

— *Christina Plum, Milwaukee, WI*



FAA Preempts Rule Classifying Class-Action Waivers Unconscionable

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___ (Apr. 27, 2011), the U.S. Supreme Court held 5–4 that the Federal Arbitration Act (FAA) preempts California's rule classifying most class-action waivers in consumer arbitration agreements as unconscionable. The holding suggests that most consumer contracts that require complaints to be arbitrated individually and not as part of a class action are enforceable under the FAA.

The plaintiffs in *AT&T Mobility* entered into an agreement for the sale and servicing of cellular phones with AT&T. The contract provided for arbitration of all disputes between the parties and required all claims be brought in an individual capacity rather than as part of a class action. The plaintiffs sued AT&T, in the U. S. District Court for the Southern District of California, alleging that AT&T engaged in false advertising and fraud by charging them \$30.22 in sales tax for phones advertised as free. The lawsuit was then consolidated with a putative class action.

Both the district court and the U.S. Court of Appeals for the Ninth Circuit held that the arbitration provision was unconscionable under the California Supreme Court's decision in *Discover Bank*, which prohibited class-action waivers in arbitration agreements "in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." The courts further held that the *Discover Bank* rule was simply a refinement of the unconscionability analysis applicable to contracts generally and was not preempted by the FAA.

The Supreme Court reversed and held that the *Discover Bank* rule interferes with the "principal purpose" of the FAA to enforce private arbitration agreements. Accordingly, the arbitration agreement was upheld. It remains to be seen what impact *AT&T Mobility* will have in other contexts, including employment and civil-rights class actions.

— [Matthew Passen](#), *Passen Law Group, Chicago, IL*

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