



Development of the Nuclear Damage Claim ADR

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I Introduction

The Nuclear Damage Claim Dispute Resolution Center (Center) was established in August 2011 as an administrative alternative dispute resolution institute under the Council for Nuclear Damage Dispute in order to handle the nuclear damage claims arising from the Fukushima Daiichi Nuclear Reactor accident of March 2011. Since then, the Center has handled and is still receiving many damage claims filed by claimant victims against Tokyo Electric Power Company (TEPCO).

I was involved in the establishment of the Center and operation thereof up to June 2014 as a member of the Secretariat of the Center, and since leaving the Secretariat I have been handling cases as a mediator.

In my previous article¹, I described the overview of the Center, its organization and characteristics, its activities, and its challenges. The article featured the Center's early days. At that time, the claims filed were increasing (400 to 500 cases were filed every month) and the backlog of cases was piling up. The Center was understaffed. To say that the Center's survival was under threat was an understatement.

However, it survived. During the years of 2012 and 2013, the number of mediators doubled (from approximately 130 to approximately 250) and the number of research clerks increased six-fold (from approximately 30 to approximately 180). The mediators and research clerks have accumulated experience in handling the nuclear damage claim cases.

In this article, I wish to share with the readers the cur-

rent state and the recent development of the Center².

II Current State of the Center

As of January 15, 2016, the Center has received 18,718 filings of claims and 16,039 cases were concluded either by settlement, withdrawal or discontinuation, 13,366 cases of which the parties reached settlements. With some fluctuation, the Center has been receiving an average 300 to 400 cases per month.

Various damages are sought for compensation by individual victims and business entities. Damages claimed for compensation are: evacuation expenses, life or bodily damage, non-economic damage (consolation money), business damages including lost profits (those arising from evacuation or interruption of the business, those caused by rumors of contamination), lost earnings, damage on assets (both real estate and movables), etc.

The average period from the filing of the claim to the proposal of settlement by the mediators is approximately 6 months.

As of December 2015, there were 279 mediators and 189 research clerks at the Center. In 2014, two real estate appraisers were appointed in order to support the evaluation of damage on assets.

III Proceedings

1 Panel

The mediation proceedings are conducted by a mediator or mediators assisted by a research clerk. Such mediator or mediators are called the "panel". Carrying out the proceedings is entrusted to the panel.

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¹ JCAA Newsletter No. 28, issued in September 2012.

² The activities and statistics of the Center are reported in its annual reports, which are issued and made public around March of the following year. (See the Center's webpage: www.mext.go.jp/a_menu/genshi_baisho/jiko_baisho/.../adr-center.htm).

Each panel handles the claims independently. The panels are also independent from the Council for Nuclear Damage Dispute and the General Committee of the Center. The panel is free from intervention from these upper bodies and has an ultimate responsibility and decision over the settlement of the damage claims it handles.

2 Typical Proceedings – From Filing To Settlement

I wish to lay out typical proceedings of a case from filing of the claim to the termination of the case.

(1) Filing

Filing is made in writing with the Tokyo office of the Center. If a claim is filed with one of the branch offices in Fukushima prefecture, it will immediately be transferred to the Tokyo office.

(2) Assignment to a panel

After the acceptance of the filing, the case is assigned to a panel, i.e., a mediator and a research clerk in charge are appointed after conducting a conflict check for both the mediator and research clerk.

(3) TEPCO's reply

A copy of the claim is forwarded to TEPCO for its reply. It is usually a month from the filing to the appointment of the mediator and the research clerk. It is usually 5 to 6 weeks from the filing until TEPCO files its reply.

(4) Research clerk's activities

After reviewing a claimant's claim, or after reviewing both the claimant's claim and TEPCO's reply, a research clerk may address questions to one or both of the parties (in many cases to a claimant) seeking clarification of the party's assertions as well as supporting evidence. As mentioned in my previous article, only 30 to 40% of the cases are represented by lawyers on the claimant side. As for cases not represented by lawyers, oftentimes it is necessary for a research clerk to contact a claimant for clarification.

(5) Panel conference

At this stage, in many cases, the mediator and the research clerk have a case conference, which is called the "panel conference". At the conference, the issues are identified and sorted out and case management policy is discussed, such as whether or not and when an oral hearing will be conducted, any further clarification, and any further supporting evidence to be provided. Sometimes the panel instructs a party or parties to provide further submissions and supporting evidence.

(6) Hearing

It is up to the discretion of the panel whether or not and when to conduct an oral hearing. In the majority of cases, an oral hearing is conducted, at which both parties or the parties' counsels appear before the panel to assert their positions and discuss settlement. Claimants living far from Tokyo can participate in the hearing through a telephone conference system or video conference system. It is also up to the panel's discretion how many oral hearings are conducted. It also depends on the nature of the case. I usually conduct a hearing only once and at the hearing I ask and encourage the parties to exhaust all arguments. Often at the hearing the mediator shares with the parties the mediator's tentative view and a settlement framework.

(7) Settlement proposal

The panel usually allows the parties to submit their opinions after the oral hearing based on the result of the hearing. After the submission of such opinions, the panel conference is conducted and a settlement proposal is given to the parties usually through the research clerk. In most cases, the settlement proposal is given orally with simple reasoning. The parties are requested to respond whether or not they accept the settlement proposal within a few weeks.

(8) Termination – settlement, withdrawal, discontinuation

If both parties accept the settlement proposal, a settlement agreement is prepared and executed. The case is closed by settlement. If not, the case is terminated by discontinuation or withdrawal. If the panel is of the opinion that it is difficult to find damage attributable to the nuclear power plant accident, it urges a claimant to withdraw or otherwise discontinue the proceedings.

3 Type of Mediation

The proceedings conducted at the Center are mediation proceedings, not arbitration. There are two types of mediation model, i.e., the facilitative model and evaluative model. Under the facilitative model, a mediator mainly focuses on encouraging the discussion among the parties and tries to modulate the difference between the parties. Under the evaluative model, the mediator gives the parties a settlement proposal based on the legal evaluation of the case. The proceedings at the Center can be characterized as an archetype of the evaluative model mediation.

The panel hears the claimant's assertions for damage allegedly caused by the Fukushima Daiichi nuclear reactor accident and reviews the evidence offered by the claimant. The panel also hears TEPCO's opinion on the causation and assessment of the damage amount³. As described above, the panel gives the parties its settlement proposal after the hearing (or shares its tentative view during the hearing). The settlement proposal is rendered in a "take-it-or-leave-it" fashion, and it is rather rare that the mediator tries to modulate the difference between the parties. In some cases, the parties submit opinions on the panel's settlement proposal, but it is rare that the panel changes the settlement proposal.

The panel's settlement proposal is a settlement proposal and legally it is up to the parties whether or not they accept such proposal. As a matter of practice, however, approximately 80% of the cases are closed by settlement, i.e., both the claimant and TEPCO accepted the panel's settlement proposal. Especially, it is rare that TEPCO does not ultimately accept the panel's settlement proposal⁴. Since the start of the Center, TEPCO has announced that it would respect the settlement proposal given by the panel⁵.

The proceedings conducted at the Center somehow resemble a one-sided mini-arbitration rather than mediation. This is partly because TEPCO accepts the settlement proposal in most cases, but also because the Center's proceedings are meant to be a "rule-oriented ADR" as characterized in my previous article. Facilitative method mediation often becomes time consuming and does not fit with the Center's priority that it must handle a lot of cases speedily.

IV Development

1 Supplemental Guidelines and General Standards

As mentioned in my previous article, the substantive rules governing the mediation at the Center are primarily the Interim Guidelines (*Chuukan-Shishin*) adopted by the Council for the Nuclear Damage Dispute⁶ as well as the General Standards (*Sokatsu-Kijun*) adopted by the General Committee⁷.

Since the initial Interim Guidelines were adopted in

August 2011, the Council has adopted four Supplements: (1) on damages associated with voluntary evacuation (in December 2011); (2) on damages associated with the revision by the government of evacuation areas (in March 2012); (3) on damages suffered by agricultural, fishery and food industries for rumor of contamination (in January 2013); and (4) damages associated with lengthening of the evacuation, etc. (in December 2013).

As for General Standards, fourteen General Standards have been adopted: (1) on consolation money pertaining to the second period of evacuation (in February 2012); (2) on the elements of increase of the amount of consolation money (in February 2012); (3) on detailed items for the damages associated with voluntary evacuation (in February 2012); (4) timing of damage compensation for assets in the evacuation areas (in February 2012); (5) on damage suffered by the tourism industry concerning foreigners for rumor of contamination (in March 2012); (6) on attorney's fees (in March 2012); (7) on "but-for" revenue in lost profit damage (in April 2012); (8) on no-deduction of revenues earned elsewhere from the lost salary or lost profit damage (in April 2012); (9) on undue delay of proceedings caused by a perpetrator and late payment interest (in July 2012); (10) on treatment of TEPCO's position taken in its direct compensation settlement discussion (in July 2012); (11) on consolation money for certain semi-evacuation areas (in August 2012); (12) on damage suffered by the tourism industry for rumor of contamination (in August 2012); (13) on assessment of reduced revenue and profit ratio (in November 2012); and (14) on early partial payment (in November 2012).

In addition to these official rules, the Center has accumulated settlements during the past four years, and through such accumulation, *de-facto* standards have been formed on many issues.

2 Increasing Mass Claims

One recent development worthy of special mention is an apparent increase of mass claims, i.e., claims in which a large number of claimants seek damages together. One of such mass claims involved several

³ As strict liability is provided for under the Nuclear Damage Compensation Law, TEPCO's fault or negligence is not an issue. Only causation and damage assessment will be the issues in the nuclear damage claims.

⁴ TEPCO sometimes has delayed its acceptance and/or submitted opinions seeking reconsideration. Such practice has been criticized by the Center a couple of times, e.g., the General Committee's comment of August 4, 2014 condemning such practice and requesting TEPCO to rectify.

⁵ It was announced in the joint business plan drafted and issued by TEPCO and the Nuclear Damage Compensation and Decommissioning Facilitation Corporation when TEPCO accepted public funding.

⁶ As explained in my previous article, the Center is established under the Council based on the Council's function to conduct mediation of the nuclear damage compensation disputes. The Council is given another function under the law that it prescribes general rules governing the resolution of nuclear damage compensation disputes. The Guidelines are drafted and adopted under the latter function of the Council.

⁷ The General Committee oversees all activities of the Center. One of its functions is to draft and adopt the General Standards, which are meant to paraphrase, break down or supplement the Guidelines.

thousand claimants. Many of them are represented by lawyers, but some are not.

In order to speedily proceed, certain generalized standards should be applied. By doing so, however, it naturally tends to be difficult to consider individual circumstances, which sometimes cause dissatisfaction on the side of claimants. In handling mass claims, the panel faces a difficult balancing act. Also, depending on the nature of the claims, it is often difficult to find a generalized standard. In such cases, mass claims involving 100 claimants are in reality 100 individual claims filed simultaneously.

In my previous article, I suggested employing the “champion claim” method emulating the practice in mass litigation. However, such method has not necessarily been found effective in every mass claim. The panels are still struggling with handling mass claims on a case by case basis. Mass claims, especially those not represented by lawyers, are themselves difficult to handle speedily, but at the same time they cripple the Center’s capacity to properly and speedily handle the cases. How to handle the mass claims is the most serious challenge the Center has faced recently.

3 Lengthening of evacuation and associated damages

In April 2012, the government reclassified evacuation areas into three areas: (1) areas in preparation for lifting of an evacuation order; (2) restricted living areas; and (3) no-return areas. As of the end of 2015, an evacuation order has been lifted for only three districts in area (1). More than one hundred thousand people are said to be still under evacuation.

For many people, evacuation is still continuing. Accordingly, the damages associated with the evacuation are accruing and should be compensated.

Should they be compensated until the time the evacuees return to their home land? Will the damage be aggravated by lengthening of the evacuation? The Interim Guidelines, Fourth Supplement, deal with these points generally. However, the panels at the Center are requested to focus on individual circumstances and decide to what extent the damages should be compensated on a case-by-case basis.

Also, the panels at the Center face difficult questions on the length of the period of the damage caused by rumor of contamination. Generally, such false rumor will be wiped out with the passage of time. A year or two is usually enough to eradicate the influence of such rumor. It is not always so, however. For example, agricultural produce and foods tend to suffer damage affected by rumor of contamination for a longer period.

4 Statute of limitation issue

The nuclear damage claim is a tort claim and it is subject to the statute of limitation for three years since a victim came to know of the damage and the identity of the perpetrator⁸. It was said that the nuclear damage claim would be extinguished as of March 2014, three years from the accident.

Two legislations were passed in 2013, i.e., Special Law on Interruption of Nuclear Damage Claim Statute of Limitation⁹ and Special Law on Nuclear Damage Claim Statute of Limitation¹⁰. Under the former legislation, the statute of limitation is interrupted retroactively to the claim in the ADR if a claimant initiates litigation within one month of a notice of discontinuation of the ADR. Under the latter legislation, the period of the statute of limitation for the Fukushima Daiichi nuclear damage claim has been extended to ten years.

⁸ Article 724 of the Japanese Civil Code.

⁹ Law No. 32 of 2013.

¹⁰ Law No. 97 of 2013.

Electronic Documents in International Arbitration: Recent Developments and Challenges

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I. Introduction

The widespread use of digital technology has increased the volume and proportion of documents created and stored in electronic form such as e-mails, instant messages, social media posts and mobile device communications. In the past decade, common law jurisdictions such as the United States and England and Wales have seen litigation time and costs increase due to the disclosure process of such electronic documents ('e-discovery' or 'e-disclosure'). By contrast, in civil law systems, including Japan, where there is generally no obligation to produce documents to the opposing party and the scope of document production, if any, is limited under the court's control, such problems do not in practice materialise in litigations.¹

In the field of international arbitration, the proliferation of electronic documents affects the fairness and efficiency of the arbitration process, which are distinct features of international arbitration as a dispute resolution mechanism.² The arbitration procedure can be jeopardized by the tedious process of locating, reviewing and producing large quantities of electronic documents. At the same time, various characteristics of electronic documents, such as the large amounts of data, multiple locations of relevant materials and the durability of electronic data, make it an extremely fertile and attractive source of potential evidence for parties to establish their case.³ New technologies that have been developed to manage electronic documents may also have an impact on the entire process, making it either cost-effective or worthless depending on whether such technologies are properly used under the specific circumstances of the case. In any case, both parties and arbitral tribu-

nals should be prepared to manage electronic documents in order to ensure the fairness and efficiency of the arbitration process.

Given these contemporary challenges in international arbitration, which have also been recognised by arbitration practitioners in Japan,⁴ this article first gives an overview of the available legal frameworks for electronic document production in international arbitration, particularly focusing on recently developed guidelines and protocols. In the next section, this article goes on to deal with specific procedural issues that may arise in relation to electronic documents and discusses practical challenges under the current frameworks. Finally, the article concludes that the best way to confront the challenges of electronic documents in international arbitration is to maximise the procedural flexibility of the parties and arbitral tribunals to manage the procedure.

II. Legal Framework of Electronic Documents in International Arbitration

A. No Specific Arbitration Rules Governing Electronic Document Production

In the context of litigation, the specific rules for the disclosure process of electronic documents have developed under existing civil procedural rules, for example, in the form of amendments to the U.S. Federal Rules of Civil Procedure in 2006 as well as changes to the Practice Direction Part 31 of the English Civil Procedure Rules in 2005.⁵ The rules of major international arbitration institutions, on the other hand, do not set out a process for electronic document production. Those rules instead take an approach that gives the arbitral tribunal wide discretion over the scope of document production,⁶ which

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1 See Nigel Blackaby and Constantine Partasides et al., *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 83-84. See also Hiroyuki Tezuka and Yutaro Kawabata, *The Dispute Resolution Review (Japan Chapter)* (4th edn, Law Business Research, 2012) 454.

2 See Jeff Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 846-847.

3 Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2368.

4 E.g., Aoi Inoue 'Disclosure of Electronic Documents in International Arbitration and the ICDR Guidelines for Arbitrators Concerning Exchanges of Information' (ICDR Young & International conference, Tokyo, 29 May 2013); Scott Warren 'Digital Evidence in International Arbitration' (Kluwer Law International Arbitration Summit, Tokyo 20 October 2015). See also Nils Eliasson, 'TOKYO: New trends in the taking evidence' (*Global Arbitration Review*, 14 June 2013) <<http://globalarbitrationreview.com/journal/article/31654>> accessed 22 February 2016.

5 Those disclosure rules for electronic documents have been further updated based on the recent practice in each jurisdiction: the Practice Direction 31B introduced in October 2010 (replacing the Practice Direction 31 to set out specific requirements for e-disclosure), and the amendments to the Federal Rules of Civil Procedure in December 2015 (changing key e-discovery provisions such as proportionality and sanctions).

6 See, e.g., Article 25(1) ICC Rules (2012), Article 22.1(e) LCIA Rules (2014), and Rule 50(4) JCAA Rules (2015).

the parties and the tribunal often exercise by adopting the IBA Rules on the Taking of Evidence in International Arbitration ('IBA Rules') as guidance to supplement the institutional rules.⁷ As will be discussed below in detail, the IBA Rules did not contain a reference to electronic documents until their revision in 2010.

In light of the fact that both the institutional rules and guidelines were silent on the production of electronic documents, there had been much debate among international arbitration practitioners on whether common law litigation rules and practices should be introduced into international arbitration. Remarkably, objections were raised not only by civil law practitioners who were highly reluctant to accept the importation of U.S.-style discovery practices.⁸ There were also skeptical common law lawyers who stressed the difference between international arbitration and domestic litigation.⁹

B. Recent Developments of Guidelines and Protocols

The importance of electronic document production eventually led to the introduction of relevant guidelines and protocols in the international arbitration community. For example, the Chartered Institute of Arbitrators published the 'Protocol For E-Disclosure in Arbitration' ('CIArb Protocol') in 2008, which was largely inspired by the 1999 version of the IBA Rules.¹⁰

In the same year, the International Centre for Dispute Resolution ('ICDR') issued the 'ICDR Guidelines for Arbitrators Concerning Exchanges of Information' ('ICDR Guidelines'), which cover electronic documents. Although the ICDR Guidelines, in principle, do not provide different requirements for the production of electronic documents versus paper documents, they do address a few practical considerations in relation to the production of electronic documents in an economical manner, in line with the revision to

the IBA Rules, as will be discussed below.¹¹

In 2009, the International Institute for Conflict Prevention & Resolution ('CPR') presented the 'CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration,' which provides four distinct modules for the disclosure of electronic documents, ranging from no document production at all (Mode A) to broad document production similar to that envisioned by the U.S. Federal Rules of Civil Procedure (Mode D).

Two additional initiatives to address electronic document production coincided involving arbitration practitioners from various backgrounds. Their respective outputs now provide the general legal framework for electronic document production in international arbitration.

(a) Revisions to the IBA Rules in 2010

In 2008, the IBA tasked the IBA Rules of Evidence Review Subcommittee ('IBA Review Subcommittee') with a review of the 1999 IBA Rules, recognising that 'documents in electronic form have become more important in international commerce and hence in dispute resolution'.¹² After intensive discussion on the subject, the revised 2010 Rules maintained the basic approach of document production adopted under the 1999 Rules, which by that time were widely accepted by both common law and civil law practitioners, especially with regard to specificity, relevance, materiality and proportionality. The revised 2010 Rules define 'Document' to include electronic evidence, and provide a single set of rules to govern the production of all types of documents, paper and electronic alike.¹³ The IBA Review Subcommittee also clarified that '(t)he revised Rules are neutral regarding whether electronic documents should be produced in any given arbitration'.¹⁴

From a practical perspective, there are a few provi-

⁷ In the recent survey targeted at users of international arbitration, 77% of respondents have seen the IBA Rules used in practice. Queen Mary University of London, School of International Arbitration and White & Case LLP, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration (2015) 33 <<http://www.arbitration.qmul.ac.uk/docs/164761.pdf>> accessed 22 February 2016.

⁸ Michael Schneider, 'A Civil Law Perspective: "Forget E-Discovery"' in David Howell (ed), *Electronic Disclosure in International Arbitration* (Juris 2008) 13-37.

⁹ Stephen Jagusch, 'E-Disclosure in International Arbitration' in Howell (n 8) 39-47.

¹⁰ For example, Section 4 of the CIArb Protocol (Request for disclosure of electronic documents) provides the similar requirements of document production request under the IBA Rules, i.e. specificity of the requested documents and relevance and materiality to the case.

¹¹ See Section 4 ICDR Guidelines (providing in general that (i) the party in possession of electronic documents may make them available in the form most convenient and economical for it and (ii) requests for electronic documents should be narrowly focused and structured to make searching for them as economical as possible). Those guidelines were later incorporated into the arbitration rules of ICDR in 2014. See Articles 21 and 22 ICDR Rules (2014).

¹² See IBA Review Subcommittee, *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration* (2010) 9 <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 22 February 2016. The IBA Review Subcommittee comprised of 22 leading practitioners representing different legal systems and cultural backgrounds.

¹³ Robert Smit, 'E-Disclosure Under the Revised IBA Rules on the Taking of Evidence in International Arbitration' (2003) 13(5) *Int'l Arb L. Rev.* 201, 203.

¹⁴ IBA Review Subcommittee (n 12) 9.

sions that address specific issues related to the production of electronic documents worth noting. For example, recognising that the production of electronic documents may be burdensome for the producing party, the revised 2010 Rules introduced a means for the parties to meet the requirement of specificity by identifying more precisely a narrow and specific requested category of documents maintained in electronic form, such as file name, specified search terms and individuals (Article 3(3)(a)(ii)).¹⁵ The revised 2010 Rules also provide that the default form of production of electronic documents shall be in the form most convenient or economical to the producing party that is also reasonably useable by the recipient (Article 3(12)(b)).

Another significant change reflected in the revised 2010 Rules was the introduction of the so-called 'meet and consult' approach, which can be understood as a response to the increased size and complexity of arbitrations and the evidentiary issues associated therewith.¹⁶ The new Article 2 requires the arbitral tribunal to consult with the parties 'at the earliest appropriate time in the proceedings' to discuss specific evidentiary issues, including 'the requirements, procedure and format applicable to the production of Documents' (Article 2(2)(c)). In line with this provision, it may be advisable for the parties and the arbitral tribunal to address any issues related to electronic document production at an early stage of the proceedings if they determine that taking evidence in electronic form would be conducive to the efficient, economical and fair taking of evidence.¹⁷

(b) ICC Commission Report on Managing E-Document Production ('ICC E-Document Report'¹⁸)

Almost simultaneously with the review of the IBA Rules, the ICC convened a Task Force on the Production of Electronic Documents in International Arbitration ('ICC Task Force') to analyse the issues raised by the production of electronic documents in interna-

tional arbitration.¹⁹ Following intensive discussions, the ICC Task Force produced the ICC E-Document Report, which identifies a host of issues raised by the production of electronic documents in international arbitration, including from both technical and legal perspectives. It also provides hands-on information to parties and arbitrators confronted with those issues.²⁰

The ICC E-Document Report generally endorses the approach taken by the revised IBA Rules that the general document production principles of specificity, relevance, materiality and proportionality apply to the production of both paper and electronic documents.²¹ The report also stresses the fundamental difference between international arbitration and common law traditions: namely, that in international arbitration there is no obligation to produce or right to request documents, including electronic documents.²²

Section 5 of the ICC E-Document Report identifies various techniques that parties and arbitrators can use to manage the production of electronic documents in international arbitration. Also, in line with the 2010 revision to the IBA Rules, as discussed above, the report recommends early consultation and cooperation between the parties on procedural matters and the resolution of such matters with the involvement of the arbitral tribunal at the case-management conference.²³ The report further provides many practical considerations for specific electronic document production issues, such as metadata, use of electronic tools and search methods, cost shifting, form of production and privilege.²⁴

III. Challenges Presented by Electronic Documents under the Current Legal Framework

In order to highlight particular issues arising from electronic documents that confront parties and arbitral tribunals in international arbitration, this section will consider three major topics that are connected with the management of electronic documents in the

¹⁵ *Ibid* 9.

¹⁶ *Ibid* 5.

¹⁷ *Ibid* 5-6. See also Smit (n 13) 204; Tobias Zuberbuhler and Dieter Hofmann et al., *IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration* (Sellier European Law 2012) 16.

¹⁸ The entire report is available at <<http://iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Managing-E-Document-Production>> accessed 22 February 2016.

¹⁹ ICC Task Force comprised of 60 members from 14 countries in both the civil law and common law jurisdictions. Loretta Malintoppi, 'The ICC Task Force on the Production of Electronic Documents in Arbitration—An Overview' in Alexis Mourre and Teresa Giovannini (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (Kluwer Law International 2009) 415-421.

²⁰ See ICC E-Document Report para 1.1.

²¹ ICC E-Document Report paras 2.1, 3.6, and 3.11-3.13.

²² ICC E-Document Report paras 5.6(a), 6.1 and preface.

²³ ICC E-Document Report paras 5.4-5.5.

²⁴ See ICC E-Document Report paras 5.11-5.12 (metadata), paras 5.13-5.17 (electronic tools and search methods), paras 5.20-5.23 (cost shifting), paras 5.24-5.26 (form of production), paras 5.27-5.29 (privilege).

arbitration process: (A) early consideration of issues, (B) use of new technologies, and (C) cost allocation. The following discussion will reveal practical challenges that can arise in the arbitration process and suggest how each issue can be managed under the current legal frameworks discussed in the preceding section.

A. Early Consideration of Issues Related to Electronic Documents

A number of users of international arbitration have expressed their belief that arbitration counsel could be better at working with opposing counsel to limit document production in order to reduce time and costs.²⁵ This concern becomes more acute when parties are confronted with the production of electronic documents. As both the revised IBA Rules and the ICC E-Document Report counsel, the parties' early consideration of the evidentiary issues and discussion with the arbitral tribunal is an indispensable step in managing the production of electronic documents. Section 4 of the CIArb Protocol, which lists matters for early consideration, may help parties to determine the scope of electronic document production and recognise the specific issues that may arise in relation to the management of electronic documents.

Early stage agreements reached between the parties and the tribunal are intended to limit additional costs and time throughout the remainder of the entire arbitration process. In reality, however, unresolved problems may materialise later in the process if the parties do not have a full understanding of the case at the time of the first case management conference.²⁶ A typical issue relates to search methods based on key words used to review electronic documents. In the course of the document production process, a producing party sometimes spots e-mails that it should have produced in response to the requesting party's document production request, thereby indicating that the initially agreed upon search terms were not sufficient to capture all relevant emails.²⁷ In such situations, the parties need to promptly cooperate to address the problem in a fair and efficient manner and, if necessary, consult with the tribunal, which will determine whether to allow additional document

production based on the new search terms in light of materiality and proportionality considerations. While Article 2 of the IBA Rules encourages the parties to 'meet and consult' only at the early stage, both the parties and the tribunal should fully engage in the resolution of such issues that arise at any time during the arbitration process.

A level playing field in the parties' respective capabilities to handle electronic documents during early issue consideration is of particular significance in international arbitration. Various factors, such as the parties' legal and business background and comfort with electronic documents and related technology, can create a disparity in their management of electronic documents. (Imagine, for instance, a case involving a U.S. company with prior experience in e-discovery and a Japanese company with neither such expertise nor an information management system that is equipped to handle electronic data.) The tribunal should be mindful about such disparities from an early stage and engaged in proactive case management to ensure fairness between the parties throughout the process.

B. Use of New Technologies

When the parties to an international arbitration agree to produce electronic documents, they should expect that the review process will be responsible for the vast majority of costs incurred during the arbitration procedure. In U.S. e-discovery, document review sometimes constitutes about 80% or more of total litigation costs. Thus, enormous savings can result from effective search strategies.²⁸ Depending on the forecasted volume of electronic documents, it might be sensible to try to agree on the use of electronic search tools at an early stage. As a general matter, however, electronic search software provided by IT service providers, while widely relied upon in regulatory investigations and U.S. litigation, plays a limited role in international arbitration; such tools are advantageous only in those cases involving a large volume of electronic documents in which the parties and arbitrators conclude that the benefits of such electronic searches outweigh their costs and burdens.²⁹

²⁵ In the 2015 International Arbitration Survey, 62% of respondents chose an option 'seek to work with opposing counsel to limit document production' in an answer to a question asking what arbitration counsel could do more or better to reduce time and cost of international arbitration. School of International Arbitration (n7) 30.

²⁶ Carole Malinvaud, 'Will Electronic Evidence and e-discovery Change The Face of Arbitration?' in Mourre and Giovannini (n 19) 373, 383.

²⁷ See Waincymer (n 2) 848 (pointing out that a key word search can never fully capture all relevant documents).

²⁸ Maura Grossman, 'Arbitration and E-discovery Overview: Potential Minefields and Dispute Resolution Strategies' in Daniel Garrie and Yoav Griver et al. (eds), *Dispute Resolution and e-Discovery* (2013 edn, LegalWorks 2013) s 7:5. See also Scott Warren (n 4) (presenting that the document review process accounts for 78.4% of the total costs of e-discovery).

²⁹ ICC E-Document Report para 5.17. It is more problematic in international arbitration to use predictive coding (also referred as technology assisted review ['TAR']) that involves machine-learning algorithms to determine the relevancy of documents, despite more frequent use of the system in US litigations. See Douglas Simmons 'Challenges of electronically stored information in international arbitration' (International Law Office Newsletter, 10 December 2015) <<http://www.internationalawoffice.com/Newsletters/Arbitration-ADR/International/KL-Gates/Challenges-of-electronically-stored-information-in-international-arbitration>> accessed 22 February 2016.

In international arbitration, this process is often accompanied by a language barrier, because internal e-mails are generally written in a language with which the other party (and the tribunal) is likely to be unfamiliar. One means of tackling this multi-language issue in international arbitration suggested by the ICC E-Document Report is to identify appropriate key words in each language;³⁰ in reality, this process is not so straightforward even when a multi-language tool is available. In a recent arbitration conference, one panelist with an e-discovery and language service provider background pointed out that search terms in English and those in Asian languages (especially Japanese, Korean, and Chinese) are not always interchangeable due to the loss of idioms in the process of converting one language to another.³¹ The parties and the arbitral tribunal should be cooperative and flexible in resolving such issues as quickly as possible in consultation with IT and/or linguistic experts.

Another example of new technology is a web-based facility called an 'electronic bundle' which has recently been used in international arbitration. Instead of paper-based bundles that are often prepared for hearings, documents are uploaded online and viewed on screen. This allows the parties and the tribunal immediate access to case materials; it is also possible to annotate documents and make notes through this system. While this tool can create significant savings of time and cost in certain types of cases with large volumes of electronic documents, it should be noted that preparation of such bundles involves an enormous amount of ongoing work for both parties (for example, scanning documents, numbering in chronological order, creating hyperlinks between documents, updating documents and indices, and so on). The benefits may likely be outweighed by the costs if the users are not accustomed to viewing documents on screen or the tribunal desires some or all of the materials to be printed out.³² Again, the parties and the arbitral tribunals should always be aware of the costs and benefits of using such technology and make a considered decision at the appropriate time to avoid undue costs and burdens inherent in the use

of such technology.

C. Cost Allocation

Under most arbitration rules, the arbitral tribunal has discretion to allocate the costs of arbitration, including the costs associated with document production.³³ As is confirmed in the latest ICC report 'Decisions on Costs in International Arbitration' in 2015 ('ICC Cost Report'), the allocation of costs is a means for the tribunal to incentivise efficient and cost-effective procedural conduct and sanction inefficient and improper conduct.³⁴ The findings of the report show that tribunals may take into account, as a factor in cost allocation, such improper conduct in document production as a failure to comply with directions on document production requests or a failure to preserve documents that have been properly requested.³⁵

In the context of electronic document production, cost allocation can be an effective tool for the arbitral tribunal to enhance efficiency and fairness in parties' management of electronic documents. For example, if one party fails to comply with an agreed order of the tribunal (including failure to produce requested documents or non-compliance with search method or form of production), the tribunal may take such improper conduct into account in the cost award.³⁶ In practice, once the parties have determined that there is a need for the production of electronic documents, the tribunal should inform the parties that any related improper conduct may be taken into account in deciding on the allocation of costs in the final award.

Another practical issue stemming from cost allocation in international arbitration is whether to permit 'cost-shifting' (i.e. requiring the requesting party to bear the expense of necessary reviews and production, thereby shifting such costs from the producing party). It is noteworthy that this practice evolved as a tool to protect the producing party from undue burden or expense as a result of e-discovery in U.S. litigation where (i) the scope of production is broad and (ii) parties ordinarily bear their own costs. This is somewhat different from the circumstances of international arbitration, where (i) the IBA Rules limit the scope of

³⁰ ICC E-Document Report para 4.12(b).

³¹ Tyler Mickelson, 'The Role of Technology in International Arbitration' (ICC Young Arbitrators Forum, London, 1 December 2015).

³² See Waincymer (n 2) 881-883; Gillan Lemaire 'Paperless Arbitrations – Where Do We Stand?' (Kluwer Arbitration Blog, 19 February 2014) <<http://kluwer-arbitrationblog.com/2014/02/19/paperless-arbitrations-where-do-we-stand/>> accessed 22 February 2016.

³³ See, e.g., Article 37(4) ICC Rules (2012), Article 34 ICDR Rules (2014), Rule 31.1 SIAC Rules (2013), and Rule 83(2) JCAA Rules (2015).

³⁴ ICC Cost Report para 103. The entire report is available at <<http://iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2015/Decisions-on-Costs-in-International-Arbitration-ICC-Arbitration-and-ADR-Commission-Report>> accessed 22 February 2016.

³⁵ ICC Cost Report paras 81-82.

³⁶ See Section 14 of the CI Arb Protocol; Article 34(g) ICDR Rules (2014).

document production and (ii) the arbitral tribunal can exercise discretion as to the allocation of costs.³⁷ Under the current framework of international arbitration, such undue burden or expense on the producing party (for example, when gathering the requested documents will likely impose significant burden and cost) should be considered as a primary factor of proportionality when the tribunals determine the scope and form of document production.³⁸ Cost-shifting thus would neither be required nor permitted in international arbitration unless extraordinary circumstances prevail, as suggested in the ICC E-Document Report,³⁹ which is very rarely the case.

IV. Conclusion

While recent developments in the arbitration community provide a general procedural framework for the production of electronic documents in international arbitration, these guidelines and protocols do not necessarily solve the practical issues arising from electronic documents. As illustrated above, parties

and arbitral tribunals must still carefully consider the issues confronting them and make appropriate decisions in light of the particular circumstances of the case.

As opposed to a domestic litigation with formalised rules and procedures, parties to international arbitration disputes can freely determine applicable procedures, and arbitral tribunals are given broad discretion over the process; parties and tribunals have 'flexibility' to design a procedure suitable for the particular case.⁴⁰ In the face of potential new issues related to electronic documents and associated new technologies, this procedural flexibility should be maximised since it constitutes one of the core advantages of international arbitration. Having practical guidance in the international arbitration community at hand, parties and arbitral tribunals should remain mindful of the issues that may arise on an ongoing basis and customise solutions to manage the procedure in a fair and efficient manner.

³⁷ ICC E-Document Report para 5.22.

³⁸ Article 9(2)(c)(c) IBA Rules (permitting the arbitral tribunal to exclude from production any documents which would be unreasonably burdensome to produce). See also Anke Meier 'The Production of Electronically Stored Information in International Commercial Arbitration' (2008) *SchiedsVZ* 179, 186.

³⁹ ICC E-Document Report para 5.23. See also Meier (n 38) 188; Zuberbuhler and Hoffman (n 17) 178-179.

⁴⁰ Blackaby and Partasides (n 1) 22-23. See also Article 19 UNCITRAL Model Law; Article 17(1)-(3) UNCITRAL Rules (2010). The IBA Rules also clarify that the provisions thereof are 'not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration' and that parties and tribunals are 'free to adapt' the rules to 'the particular circumstances of each arbitration' (Preamble 2).

Notes to Contributors for Article Submissions

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