How Technology Assisted Review Can Decrease the Cost of E-Discovery in Arbitrations

By Ignatius Grande and Joseph Lee

In recent years, corporations have been overwhelmed by the amount of data that they continue to create and receive. There are more than 3 zettabytes (1 ZB = 1 billion terabytes) of digital data stored around the globe—an approximate 50 percent increase from 2011. At this rate of growth, the global volume of stored digital data will reach 8 ZB by 2015.[1] This era of "Big Data" has challenged all companies to better manage the emails and other electronically stored information that they create and receive. The amount of data in existence has also made it increasingly difficult to manage the cost of litigation. The federal judiciary has taken note and in recent months has been pondering proposed changes to the Federal Rules of Civil Procedure that aim to rein in the costs of litigation by clarifying the requirements for a judge to issue sanctions and by placing increased emphasis on the concept of proportionality.[2] Another way that parties and attorneys have attempted to limit the costs of e-discovery is by pursuing arbitration as a dispute resolution method.

For many years, arbitration was perceived as a way to resolve disputes in which parties could avoid the costly discovery that was inherent in litigation. Surely that is still the case for certain categories of disputes that are not document or email intensive. However, for more complex arbitrations, it is nearly impossible to avoid some document review. Many in the arbitration world have viewed e-discovery with great trepidation.[3] Many think that there is no place for e-discovery in arbitrations, but the reality is that it is no longer possible to avoid Big Data, even in the arbitration world. Even though parties in an arbitration can agree to preemptively limit the scope of e-discovery by way of arbitration agreements,[4] there are many, many more documents and emails that need to be reviewed today to resolve a dispute than was the case several years ago.[5] A typical complex arbitration today may involve being faced with the scenario of sifting through countless emails and documents in order to even understand the case and then, later on, having to review large productions received from the other side. This is true even if the parties agree to exchange *no documentary discovery at all*, as each party will have large amounts of electronic data in its own files that it must review.

At the same time that the amount of data being created by companies has increased, new technologies have emerged to help manage that data in e-discovery. In recent years, law firms and corporations have increasingly made use of technology assisted review ("TAR") to aid in culling down the huge amounts of data at issue in large disputes. These tools have been available for several years, but it was only in 2012 that they received widespread acceptance thanks to a series of judicial opinions in which a number of courts approved of their use. TAR is an ideal tool to make use of in litigation and it is crucial that arbitrators and parties to arbitrations understand how it works.

There are different ways in which technology assisted review can be applied. However, TAR generally utilizes an algorithm to apply advanced analytics to cull through vast amounts of data to help the case team hone in on the most relevant information. TAR is faster and more accurate than manual review in which reviewers go through every document one by one (often referred to as "linear review"). TAR not only helps to prioritize a review, but since it does such a good job prioritizing, under certain circumstances, it may be possible to leave a large percentage of the document set unreviewed because the algorithm quickly pushes most of the responsive documents to the top of the review pile.

The most common application of TAR begins with a subject matter expert, who knows the ins and outs of the case, coding a seed set of documents which ordinarily are pulled as a random sample from the entire database. As the subject matter expert reviews documents, he or she is training and refining an algorithm, which after a certain point will be able to rank the documents in the data set in order of their likelihood of responsiveness. Needless to say, this process can create enormous efficiencies. As a result, the cost savings resulting from the use of TAR can be impressive. Clients often claim that they have been able to save 50% or even 80%[6] of the cost that it ordinarily would take to review a set of data with the use of TAR.

Between Big Data and TAR and the increasing complexities of e-discovery, attorneys can no longer feign ignorance when it comes to technology. Some arbitration rules have begun to note the importance of understanding technology in order to efficiently arbitrate a claim.[7] In addition, arbitrators and those arbitrating a matter who are attorneys, are now subject to ethics rules that make ignorance of TAR simply unacceptable. In 2012, the American Bar Association passed an amendment to Comment 6 to Model Rule 1.1, which states: "to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology." Further, the ABA Commission on Ethics noted the critical importance of this Comment given the growing importance of technology in modern practice. Whatever their role in a case, whether it be a litigation or an arbitration, attorneys have an affirmative duty to understand how technology affects

their case, whether TAR should be used and, if it is used, that it is used correctly.

The first judicial opinion to discuss technology assisted review in depth was *Da Silva Moore v. Publicis Groupe*.[8] In this opinion, Magistrate Judge Peck held that TAR "is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review."[9] Magistrate Judge Peck also emphasized the importance of using an appropriate process when deploying TAR. He noted that, "[a]s with keywords or any other technological solution to e-discovery, counsel must design an appropriate process, including the use of available technology with appropriate quality control testing, to review and produce relevant ESI."[10] *Da Silva Moore* has been followed by a series of court decisions[11] that have addressed different aspects of TAR and predictive coding, but the end result is that TAR is here to stay and it is already changing the way in which parties handle litigation and investigations.

The rules that govern arbitration have always dictated that the process of exchanging information be done in the most cost-effective and expeditious manner available.[12] If parties to arbitration and arbitrators work to find the most cost effective strategies in cases with significant e-discovery, they will have no choice but to consider TAR techniques. In the coming years, it will be incumbent upon all arbitrators to have an understanding of how TAR works so that they can help facilitate and encourage the use of TAR when its use will help save costs and the time required to review large amounts of data. TAR will not be the perfect solution for every matter or arbitration; arbitrations involving a small volume of data may not warrant an elaborate TAR review protocol. The cost of entry may be too high and the time to generate and refine a proper seed set may take too long. But certainly in matters that involve large volumes of data, TAR should be seriously considered by the parties.

Technology is a double-edged sword. It has caused an explosion of data, to be sure, but it has also provided us with the tools to manage and cull through it. Technology Assisted Review is an effective tool that can help to manage the time and costs spent in arbitration. Arbitrating parties and arbitrators alike must consider using this technology if they want to choose the least costly path to understanding the documentary evidence at issue in the arbitration. If arbitration is to be perceived as a more cost effective option to litigation, it is crucial that TAR be a consideration for all large complex matters.

Endnotes

1. IDC Predictions 2012: Competing for 2020, Volume: 1 Executive Information: Top 10 Predictions (as of December 2012, there were 2.7 ZBs of data).
2. See http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx (the public comment period to comment on the proposed changes to the Federal Rules of Civil Procedure ends on February 15, 2014).
3. Sherman Kahn, *E-Discovery Demystified for Arbitrators—Tips for How to Manage e-Discovery for Efficient Proceedings*, NYSBA New York Dispute Resolution Lawyer, Spring 2012, p. 32.
4. Forstadt, Joseph, Discovery in Arbitration, ADR & The Law (20th Ed., 2006) ("The source of information as to how extensive the discovery process will be in any particular arbitration is the arbitration agreement itself.").
5. Steven Seidenberg, I*nternational Arbitration Loses Its Grip: Are U.S. lawyers to blame?*, ABA Journal, April 2010, p. 53.
6. Relativity Analytics Client Testimonials, https://kcura.com/relativity/testimonials/law-firms, Alison B. Silverstein, Managing Director, Discovery and Dispute Services ("Through the use of Relativity Assisted Review, we were able to save our clients 80 percent of their typical review costs and meet extraordinary deadlines that were otherwise unachievable.").
7. International Institute for Conflict Prevention and Resolution, Rule 11 ("The Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the…desirability of making discovery expeditious and cost-effective; JAMS Recommended Arbitration Discovery Protocols For Domestic, Commercial Cases, Jan. 6, 2010 (JAMS arbitrators are trained to deal with the technological issues that arise in connection with electronic data).
8. *Da Silva Moore v. Publicis Groupe & MSL Group*, 11 Civ. 1279 (ALC) (S.D.N.Y. Feb. 24, 2012).
9. *Da Silva Moore*, 11 Civ. 1279 at 25.
10. *Id.* at 25-26.
11. *Global Aerospace v. Landow Aviation*, No. CL 61040 (Vir. Cir. Ct. Apr. 23, 2012); *Re: Actos (Pioglitazone) Products Liability Litigation*, No. 6:11-md-2299 (W.D. La. July 27, 2012); *EORHB, Inc., et al. v. HOA Holdings, LLC*, C.A. No. 7409-VCL (Del. Ch. Oct. 15, 2012); *Re: Biomet M2a Magnum Hip Implant Products Liability Litigation*, 3:12-md-2391-RLM-CAN (N.D.Ind. April 18, 2013).
12. *See* AAA Commercial Rules, Rule 21 (which states that arbitrators may "take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Commercial Cases"); *see also*, The Uniform Arbitration Act of 2000, Section 17, ("An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account…the desirability of making the proceeding fair, expeditious, and cost effective.").

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