

## An Argument for Uniform E-Discovery Practice in Cross-Border Civil Litigation

Daniel B. Garrie

Daniel K. Gelb

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# An Argument for Uniform E-Discovery Practice in Cross-Border Civil Litigation

## INTRODUCTION

THIS ARTICLE ADDRESSES ELECTRONIC EVIDENCE AND DISCOVERY (“e-discovery”) and its associated electronically-stored information (“ESI”) in complex cross-border litigation. Since businesses across the world employ computer technology in their respective daily operations, the challenges businesses confront are often uniform with respect to the collection, review, production, and overall management of e-discovery – irrespective of the forum or national venue. E-discovery is a subject that transcends national borders. This globalizing trend will undoubtedly continue as the utilization of cloud-based computing replaces traditional local hard drive-based infrastructures. The forum of a litigant’s information technology and data schematics should not impede that party’s access to cost-effective and efficient resolution of a legal dispute.

The international business community confronts significant obstacles in the differing parameters relating to ESI across the various major legal forums, such as the United States and the European Union, including divergent rules governing the use and pretrial exchange of that data, whether in a litigation or an arbitration context.<sup>1</sup> The following article suggests a rapidly growing need for the global legal community to uniformly implement a process for handling ESI in order to

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\* Daniel B. Garrie, Esq. is a partner at Law & Forensics ([www.lawandforensics.com](http://www.lawandforensics.com)) in Seattle, Washington with offices all over the country and abroad. Mr. Garrie works with large and small companies in complex forensic investigations, electronic discovery dispute resolution, and serving as advising clients on e-discovery proceedings. Prior to joining Law & Forensics LLC, Mr. Garrie was the worldwide Director of Information & Governance with Charles Rivers Associates with offices worldwide. Mr. Garrie received his B.A. and M.A. in Computer Science from Brandeis University; J.D. from Rutgers School of Law; and was the lead author of the treatise *E-Discovery & Dispute Resolution* published by Thomson & Reuters in 2011.

\*\* Daniel K. Gelb, Esq. is a partner at the trial law firm of Gelb & Gelb LLP ([www.gelbgelb.com](http://www.gelbgelb.com)) in Boston, Massachusetts. Mr. Gelb represents clients in general and white collar criminal defense matters, complex civil litigation focusing on business and securities, as well as in arbitrations and regulatory proceedings. Prior to joining Gelb & Gelb LLP, Mr. Gelb was an Assistant District Attorney with the Norfolk County District Attorney’s Office in Massachusetts. Mr. Gelb received his B.A. in English from Tufts University; J.D. from Boston College Law School; and M.B.A. from the Boston College Carroll School of Management.

1. For a list of the member nations of the European Union, see *Countries*, EUROPA, [http://europa.eu/about-eu/countries/index\\_en.htm](http://europa.eu/about-eu/countries/index_en.htm) (last visited Apr. 4, 2012) (providing general information on all European Union member countries).

effectively build confidence in a modern global market where disputes arise between foreign parties on a daily basis.

## OVERVIEW

Section I introduces the subject matter and evolution of e-discovery and ESI.<sup>2</sup> Section II presents an overview of the manner in which several of the world's legal forums handle e-discovery.<sup>3</sup>

Modern commercial litigation demands guidelines to specifically direct parties how to uniformly collect, review, and exchange ESI consistent with best practices such as the methodology presented by the *Electronic Discovery Reference Model* (“EDRM”)<sup>4</sup> and *The Sedona Conference International Principles on Discovery, Disclosure & Data Protection: Best Practices, Recommendations & Principles for Addressing the Preservation Discovery of Protected Data in U.S. Litigation* (“The Sedona Principles”).<sup>5</sup> There is an apparent need for communalizing the international exchange of ESI in both judicial and alternative dispute resolution proceedings. Therefore, Section III suggests a potential uniform approach to cross-border e-discovery, including methodologies such as “predictive coding” and leveraging central data repositories in order to mitigate inconsistent forum-dependent regulatory complications.<sup>6</sup>

### I. E-DISCOVERY AND ELECTRONICALLY STORED INFORMATION

Historically, litigators were guided principally by case law relative to how ESI should be handled during civil litigation.<sup>7</sup> Notably, the *Zubulake* line of cases<sup>8</sup> is informative, and makes unequivocally clear that a major area of discovery peril is the spoliation of electronic evidence, which can be fatal to a litigant's case.<sup>9</sup> The exponential growth of e-discovery in the United States drove courts across the country to interpret The Sedona Principles and other legal precedent to address

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2. See *infra* Part I.

3. See *infra* Part II.

4. THE ELECTRONIC DISCOVERY REFERENCE MODEL, <http://www.erdm.net> (last visited Apr. 6, 2012).

5. AMOR A. ESTEBAN ET AL., *THE SEDONA CONFERENCE INTERNATIONAL PRINCIPLES ON DISCOVERY, DISCLOSURE & DATA PROTECTION: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING THE PRESERVATION & DISCOVERY OF PROTECTED DATA IN U.S. LITIGATION* (European Union ed. Dec. 2011) [hereinafter *The Sedona Principles*], available at <https://thesedonaconference.org/download-pub/495>.

6. See *infra* Part III.

7. See *infra* notes 8–9 and accompanying text (detailing a line of cases that examined the allocation of costs of e-discovery to litigants and the dangers of spoliation of electronic evidence during discovery).

8. See *Zubulake v. UBS Warburg LLC (Zubulake I)*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC (Zubulake II)*, 230 F.R.D. 290 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC (Zubulake III)*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422 (S.D.N.Y. 2004).

9. This text was originally published in Daniel K. Gelb, *Understanding the E-discovery Obligations Before Making a Certification*, *DIGITAL DISCOVERY & E-EVIDENCE*, Oct. 1, 2007, at 1–2, 1 n.3–4. The author's content contained herein, however, is unrelated to his previously published work.

concepts such as such as form of production, spoliation of evidence, and cost-shifting.<sup>10</sup>

With the growing interpretation of The Sedona Principles and the development of common law legal precedent on e-discovery, the American federal judicial system identified a need for dedicated rules of civil procedure addressing ESI in civil litigation.<sup>11</sup> Therefore, the federal government promulgated certain provisions amending the Federal Rules of Civil Procedure (“FRCP”) concerning the pretrial exchange of ESI.<sup>12</sup>

In the United States, the most notably impacted area in civil litigation has been the incorporation of discovery plans for the exchange of ESI into courts’ pretrial scheduling orders by the Court (FRCP 16) in accordance with parties’ obligations to meet and confer to propose the context of such plans to the court (FRCP 26).<sup>13</sup> In addition, rules governing civil litigation discovery tools such as interrogatories (FRCP 33), document requests (FRCP 34), and third-party subpoenas (FRCP 45) have arguably been among the most widely addressed by courts since the December 1, 2006 amendments.<sup>14</sup>

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10. See e.g., *Zubulake I*, 217 F.R.D. at 320 n.61 and accompanying text, 321 n.67 and accompanying text (citing The Sedona Principles to support a distinction between “accessible” and “inaccessible” data and to urge specificity in e-discovery requests); *Zubulake III*, 216 F.R.D. at 290 n.81 (discussing privilege as it relates to ESI); *Zubulake IV*, 220 F.R.D. at 271 n.22 and accompanying text (citing The Sedona Principles in stating that “a party need not preserve all backup tapes even when it reasonably anticipates litigation”); *Zubulake V*, 229 F.R.D. at 440 (highlighting *The Sedona Principles* as “very useful guidance on thorny issues relating to the discovery of electronically stored information”). See also *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, No.502003CA005045XXOCAI, 2005WL 679071, at \*7 (Fla. Cir. Ct. Mar. 1, 2005) (granting plaintiff’s motion for adverse inference instruction due to Morgan Stanley’s destruction of e-mails), *rev’d on other grounds sub nom.* *Morgan Stanley & Co., Inc. v. Coleman (Parent) Holdings, Inc.*, 955 So.2d 1124 (Fla. Dist. Ct. App. 2007); Press Release, Fin. Indus. Regulatory Auth., Morgan Stanley to Pay \$12.5 Million to Resolve FINRA Charges that it Failed to Provide Documents to Arbitration Claimants, Regulators (Sept. 7, 2007), available at <http://www.finra.org/PressRoom/NewsReleases/2007NewsReleases/P037071> (announcing a “first of its kind” settlement for Morgan Stanley’s failure on numerous occasions to provide emails to claimants in arbitration proceedings).

11. See, e.g., Memorandum from Myles V. Lynk, Chair, Discovery Subcomm., Judicial Conference of the U.S., and Richard Marcus, Special Reporter, Advisory Comm. on Civil Rules, Judicial Conference of the U.S. to Participants in the February 2004 Fordham E-Discovery Conference 2–3 (Jan. 27, 2004), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/E-Discovery\\_Conf\\_Agenda\\_Materials.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/E-Discovery_Conf_Agenda_Materials.pdf) (detailing the history of consideration of the need for dedicated e-discovery rules).

12. See *infra* notes 37–40 and accompanying text.

13. See FED. R. CIV. P. 26(f)(1) (“the parties must confer as soon as practicable—and in any event at least 21 days before ... a scheduling order is due under Rule 16(b)”); FED. R. CIV. P. 16(b)(3)(B)(iii) (a scheduling order may “provide for disclosure or discovery of electronically stored information”); FED. R. CIV. P. 6(f)(3)(C) (the parties must develop a discovery plan, which “must state the parties’ views and proposals on . . . any issues about disclosure or discovery of electronically stored information, including the forms in which it should be produced”).

14. See FED. R. CIV. P. 33(d) (dealing with interrogatories); FED. R. CIV. P. 34 (dealing with production of documents, electronically stored information, and tangible things); FED. R. CIV. P. 45 (dealing with subpoenas to non-parties). See also Emily Burns et al., *E-Discovery: One Year of the Amended Federal Rules of Civil Procedure*, 64 N.Y.U. ANN. SURV. AM. L. 201, 203 (2008) (discussing courts’ focus on 2006 amendments within the first year of the new rules’ promulgation).

The FRCP relating to e-discovery and the development of ground-breaking legal precedent concerning preservation and identification of relevant ESI<sup>15</sup> are arguably borne from a desire in the United States for systemic adoption of “best practices” in handling the collection, review, and production of ESI in civil litigation. For example, over the past several years, the legal profession has collaborated with ESI experts to cultivate the EDRM.<sup>16</sup> Therefore, in civil litigation matters, there is a codified requirement for parties to identify, review and produce ESI related to the underlying case and controversy pending before the court—with a proposed model of conduct to follow.<sup>17</sup>

The rules address the importance of handling e-discovery with diligence at the federal level, and resources such as The Sedona Principles provide practical guidance on how to handle ESI. In addition, at the state level, state court trial judges are guided (but not bound) by The National Center for State Courts’ *Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information* (“*Guidelines*”), approved by the Conference of Chief Justices (“CCJ”) in August 2006.<sup>18</sup> The CCJ’s approval of the *Guidelines* is the product of the deliberation of issues relating to e-discovery at the state court level nationwide. Notably, like the *Zubulake* cases, the *Guidelines* also reference The Sedona Principles.<sup>19</sup>

Accumulation of discovery costs coupled with the added exposure of regulatory penalties in e-discovery mishaps only further aggravate the already uncertain and expensive nature of complex business litigation, and this applies internationally as well as in the United States. However, before addressing the need for a dedicated set of rules to address cross-border e-discovery, it is important to understand nuances of the most predominant legal systems around the world.

The majority of the United States, the United Kingdom, Canada, and India, as well as Australia, New Zealand, Ireland, Singapore, Hong Kong, and numerous other countries possess common law systems.<sup>20</sup> The common law and court of equity are systems of law being continually built by decisions in cases by the judiciary.<sup>21</sup>

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15. See, e.g., *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F.Supp.2d 475, 496–97 (S.D.N.Y. 2010) (holding that investors’ duty to preserve evidence was triggered by the filing of a complaint with the British Virgin Islands’ Financial Services Commission, and ordering sanctions against investors whose failure to preserve evidence amounted to gross negligence and also against other investors whose failure to preserve evidence amounted to negligence).

16. *Frequently Asked Questions*, THE ELEC. DISCOVERY REFERENCE MODEL, <http://www.edrm.net/> (last visited Apr. 4, 2012).

17. *EDRM Model Code of Conduct*, THE ELEC. DISCOVERY REFERENCE MODEL, <http://www.edrm.net/resources/mcoc> (last visited Apr. 4, 2012).

18. CONFERENCE OF CHIEF JUSTICES, *GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION*, at vii (2006), available at <http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf>. This paragraph’s text was originally published in Daniel K. Gelb, *Understanding the E-discovery Obligations Before Making a Certification*, *DIGITAL DISCOVERY & E-EVIDENCE*, Oct. 1, 2007, at 2.

19. *Id.* at 6, 11.

20. *The World Factbook*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html> (last visited Apr. 10, 2012).

21. See, e.g., Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 *CARDOZO L. REV.* 43, 65 (1993) (discussing stare decisis and judicial decisions).

Alternatively, civil law can be contrasted with the common law system. Unlike the common law framework, civil law courts are not necessarily based on judicial decisions that establish precedential authority derived from prior decisions.<sup>22</sup> Civil law courts typically do not utilize juries, with the exception of certain criminal matters.<sup>23</sup> Examples of civil law systems include most of the European Union states, China, Japan, Brazil, Mexico, Russia, Argentina, and Ethiopia.<sup>24</sup> Notably, the European Union Court of Justice takes somewhat of a hybrid approach to civil law and the common law practice of placing importance on case law.<sup>25</sup> It is also important to note that common law countries typically have a more litigious approach to arbitration than civil law countries – when in fact an alternative dispute resolution is accessible to the parties.<sup>26</sup>

Islamic law is one of the three major worldwide legal systems in addition to common law and civil law.<sup>27</sup> Islamic law (also known as Sharia law) governs such Islamic countries as Saudi Arabia and Iran.<sup>28</sup> Lastly, there are a few countries that still employ socialist law in their legal systems.<sup>29</sup> Most socialist law courts are judiciaries established by dictatorship-style governments and consist of judges that control the trials and are not independent from the fact-finding process.<sup>30</sup>

Understanding the dynamics of the various international legal systems is important when analyzing the role discovery – and particularly e-discovery – will play in a particular geographical setting. Most importantly, counsel must appreciate the extent and nature of the roles judges take in different countries and the likelihood litigants will be able to rely on legal precedent – as opposed to a decision-making process with less structure – when handling and litigating issues concerning ESI.

Given that e-discovery has become extremely expensive in litigation generally, parties have proactively contracted to resolve international commercial litigation in

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22. See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 144 (1969).

23. JAMES G. APPLE & ROBERT P. DEYLING, *FED. JUDICIAL CTR., A PRIMER ON THE CIVIL-LAW SYSTEM* 26 (1995).

24. *The World Factbook*, *supra* note 20.

25. See, e.g., Paul Lefebvre et al., *Legal Professional Privilege: Comparing Different Approaches Within the United States and the European Union*, 79 DEF. COUNS. J. 49, 54–65 (2012) (exploring the role of case law in the European Union Court of Justice through case study).

26. See generally Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law Civil Law Divide in Arbitration*, 18 ARB. INT'L 1, 3 (2002) (discussing differences in how documentation is handled by common law and civil law in arbitration).

27. See Gamal Moursi Badr, *Islamic Law: Its Relation to Other Legal Systems*, 26 AM. J. COMP. L. 187, 187 (1978) (characterizing Islamic law as one of three “major world legal systems”).

28. Michael Gallagher, *The Many Faces of Sharia*, BBC NEWS (Jun. 21, 2000, 9:04 AM), <http://news.bbc.co.uk/2/hi/Africa/621126.stm>.

29. See Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LITERATURE 285, 288 (2008) (discussing former and current socialist law countries).

30. See, e.g., Michael Rosenfeld, *Comparing Constitutional Review By the European Court of Justice and the U.S. Supreme Court*, 4 INTL. J. CONST. L. 618, 629 (noting that the European Court of Justice relies heavily on civil law judges, but functions like a common law court in regards to its constitutional jurisprudence).

alternative dispute resolution forums (“ADR”).<sup>31</sup> This is particularly the case where common law litigation style is more akin to the procedures employed by the Arbitral Tribunal, which presides over the London Court of International Arbitration (“LCIA”).<sup>32</sup> Additional components to international commercial disputes are language barriers which have the ability to create additional burdens and costs during the international e-discovery process.<sup>33</sup>

The Arbitral Tribunal is empowered to govern e-discovery by virtue of Article 22 of the LCIA Arbitration Rules.<sup>34</sup> Discovery in LCIA proceedings focuses on the relevance of documents, and that focus narrows the scope of discovery.<sup>35</sup> Litigants in the United States, by comparison, appear to broaden the scope of discovery of ESI, losing focus on requesting specific documents and becoming engrossed in overbroad categorical requests.<sup>36</sup> This approach makes e-discovery more expensive than necessary, turning the process into “discovery litigation” rather than a pursuit of justice.<sup>37</sup> The LCIA has become increasingly more involved in the pre-hearing exchange of ESI by promulgating standards specifically pertaining to the process.<sup>38</sup> Certain ADR providers have followed suit – both in the United States and abroad – making ADR more attractive than judicial process in matters involving high-volume e-discovery.<sup>39</sup>

The concept of “electronic” evidence is now commonplace in civil litigation. In fact, in 1970, the Federal Rules of Civil Procedure were amended to incorporate “data compilations” as discoverable items.<sup>40</sup> The Advisory Committee Notes for the

31. See QUEEN MARY, UNIV. OF LONDON, SCH. OF INT’L ARBITRATION & PRICEWATERHOUSECOOPERS, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 10 (2006), [http://www.pwc.com/en\\_BE/be/publications/ia-study-pwc-06.pdf](http://www.pwc.com/en_BE/be/publications/ia-study-pwc-06.pdf) (stating that ninety-five percent of in-house counsel include dispute resolution clauses in cross-border contracts, and sixty-two percent include international arbitration clauses as a matter of practice).

32. London Court of International Arbitration Rules (2011), available at <http://www.lcia.org>. Absent the parties’ consent, the LCIA Arbitration Rules require that the arbitrator be of a nationality other than that of either of the parties when the parties are from different countries. *Id.* art. 6.1.

33. See *id.* art. 17 (detailing procedures to be taken in situations where language barriers exist).

34. This authorizes the Tribunal to order the production of documents and other materials and to set rules for the exchange of those materials. *Id.* art. 22.1(d)–(f).

35. *Id.* art. 22.1(e).

36. ADVISORY COUNCIL FOR THE U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, AN E-DISCOVERY MODEL ORDER 2 (2011), available at [http://www.cafc.uscourts.gov/images/stories/the-court/Ediscovery\\_Model\\_Order.pdf](http://www.cafc.uscourts.gov/images/stories/the-court/Ediscovery_Model_Order.pdf).

37. *Id.*

38. See London Court of International Arbitration Rules, art. 21(d)–(f) (2011) (detailing the Tribunal’s control over the discovery process).

39. See, e.g., INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION, CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION 6 (instructing arbitrators to keep “the high cost and burdens associated with compliance with requests for the disclosure of electronic information” in mind when making discovery rulings). *Cf.* *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 359 (D. Md. 2008) (“The failure to engage in discovery as required by Rule 26(g) is one reason why the cost of discovery is so widely criticized as being excessive—to the point of pricing litigants out of court.”). Rule 26(g) is designed to prevent over-burdensome discovery requests. FED. R. CIV. P. 26(g) advisory committee’s note.

40. See Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 527 (1970); see also *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94CIV2120 (LMM) (AJP), 1995 WL 649934, at \*1 (S.D.N.Y. Nov. 3, 1995) (acknowledging computerized data compilations can be discoverable). Much of

1970 amendments acknowledge that the intent of the revision was to bring the discovery process more in synch with evolving technology.<sup>41</sup> The United States was not alone in this effort.<sup>42</sup>

Over the past decade, there have been further attempts to keep e-discovery on pace with technological advances,<sup>43</sup> as reflected in such cases as *McPeck v. Ashcroft*,<sup>44</sup> *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*,<sup>45</sup> and *Zubulake v. UBS Warburg, LLC*.<sup>46</sup> These cases have led to corporations being ordered to preserve and “produce, sometimes at considerable expense, computerized information, including email messages, support systems, software, voicemail systems, computer storage media and backup tapes and telephone records.”<sup>47</sup> On December 1, 2006, the federal courts responded to the growing demands and complexities of e-discovery by amending the Federal Rules of Civil Procedure to address discovery and ESI issues.<sup>48</sup> These rules have been further amended in certain areas, but continue to maintain that e-discovery is inherently embedded into modern legal disputes.

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the text and accompanying footnotes in the next three paragraphs were originally published in Daniel B. Garrie & Daniel K. Gelb, *E-discovery in Criminal Cases: A Need for Specific Rules*, 43 SUFFOLK U. L. REV. 393, 396–97, 396–97 n.15–20 (2010).

41. See Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. at 527.

42. See, e.g., *infra* text accompanying notes 51–53.

43. Daniel B. Garrie, “*Criminal Case Gone Paperless*”: *Hanging With the Wrong Crowd*, 47 SAN DIEGO L. REV. 521, 525–26 (2010).

44. 202 F.R.D. 31 (D.D.C. 2001). The *McPeck* court used a “marginal utility” approach to order the producing party to restore a limited number of backup tapes containing emails that may have been pertinent to the case. *Id.* at 34. The court held that there was enough likelihood of finding responsive emails in backup tapes created over a one year period to justify imposing the costs of the search on the producing party. *Id.* The court further ordered the producing party to keep a record of its costs so the parties could argue whether the search results would justify further backup tape restoration. *Id.* at 35.

45. 205 F.R.D. 421 (S.D.N.Y. 2002). In *Rowe*, a producing party moved for a blanket protective order precluding discovery of email stored on backup disks and other media. *Id.* at 423–26. The court held that while there was no justification for a blanket protective order, the costs associated with restoring and producing the emails should be shifted to the requesting party. *Id.* at 428, 433. In doing so, the court created and applied an eight-factor cost-shifting test. *Id.* at 429.

46. 217 F.R.D. 309 (S.D.N.Y. 2003). In a gender discrimination suit against her former employer, the plaintiff requested that the defendant produce “[a]ll documents concerning any communication by or between UBS employees concerning plaintiff.” *Id.* at 312 (internal quotations omitted). The defendant produced 350 pages of documents, including approximately 100 pages of emails. *Id.* at 312–13. The plaintiff knew that additional responsive emails existed because she, in fact, had produced approximately 450 pages of email from her own correspondence. *Id.* at 313. The plaintiff then requested that the defendants produce the additional email from archival media. *Id.* Claiming undue burden and expense, the defendant urged the court to shift the cost of production to the plaintiff, citing the *Rowe* decision. *Id.* at 317. The court noted that the application of *Rowe*'s eight-factor, cost-shifting test may result in disproportionate cost-shifting away from large defendants. *Id.* at 320. It then modified the test to include only seven factors. *Id.* at 322. Applying the modified test, the court ordered the defendant to produce, at its own expense, all responsive email existing on its optical disks, active servers, and five backup tapes selected by the plaintiff. *Id.* at 324. Discovery of emails stored on the additional eighty-nine backup tapes remained contingent upon a successful initial search of the first five tapes. *Id.*

47. Peter Brown, *Developing Corporate Internet, Intranet, and E-mail Policies*, 520 PLI/PAT 347, 364 (1998) (citing *In re Brand Name Prescription Drugs Antitrust Litigation*, No. 94C897, 1995 WL 360526 (N.D. Ill. June 15, 1995)); see also FED. R. CIV. P. 34 (requiring parties to produce and permit inspection of ESI).

48. See FED. R. CIV. P. 16(c)(2)(F) (controlling and scheduling discovery, including discovery of ESI); *Id.* 26(a)(1)(A)(i) (duty to disclose ESI); FED. R. CIV. P. 33(d) (allowing the use of ESI to answer interrogatories);



The amended Federal Rules of Civil Procedure defined ESI and set out a series of requirements for parties to identify ESI at the start of litigation.<sup>49</sup> Specifically, amended Rule 34(a) defines ESI as “other data or data compilations . . . stored in any medium from which information can be obtained directly or, if necessary, after translation by the responding party into a reasonably usable form.”<sup>50</sup> Courts have applied the amended rules by requiring both corporate and individual parties to preserve, identify, disclose, and produce, on pain of monetary and other sanctions, relevant information on any electronic device.<sup>51</sup>

Other foreign jurisdictions promulgated rules pertaining to ESI. For example, shortly after the advent of the internet, in 1995, the European Union (“EU”) developed its Data Privacy Directive (“EU Directive”).<sup>52</sup> Notably, the EU Directive caused great concern for civil and criminal liability in cross-border disputes, leading the EU to further promulgate regulations amending the EU Directive.<sup>53</sup> As reflected on the EU’s website, the following are aspects of the recently announced amendments which will likely streamline the accessibility and transferability of ESI for international litigants:

*A ‘right to be forgotten’ will help people better manage data-protection risks online. When they no longer want their data to be processed and there are no legitimate grounds for retaining it, the data will be deleted.*

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*See id.* 34 (procedures governing the production of ESI); FED. R. CIV. P. 37 (rules about failure to make disclosures or to cooperate in discovery); FED. R. CIV. P. 45 (addressing subpoenas for ESI).

49. *See* FED. R. CIV. P. 34(a)(1)(A) (defining broad scope of ESI); *see also supra* note 41 (detailing various pre-trial ESI requirements).

50. FED. R. CIV. P. 34(a)(1)(A). This definition is intended to be neither precise nor limiting, as the rule is “expansive and includes any type of information that is stored electronically.” *Id.* 34(a) advisory committee’s note. Thus, the term has a “broad meaning.” *Id.* 26(a) advisory committee’s note.

51. *See, e.g.,* Arista Records LLC v. Usenet.com, Inc., 608 F. Supp. 409, 442–44 (S.D.N.Y. 2009) (imposing attorneys’ fees, costs, and adverse inference sanction for defendant’s failure to preserve data); Fox v. Riverdeep, Inc., No. 07-13622, 2008 U.S. Dist. LEXIS 101633, at \*18–20 (E.D. Mich. Dec. 16, 2008) (sanctioning defendant for failure to preserve evidence, including emails, upon receiving cease-and-desist letter); Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc., 244 F.R.D. 614, 636–67 (D. Colo. 2007) (imposing monetary sanctions and awarding costs where defendant failed to identify and preserve relevant ESI); Amersham Biosciences Corp. v. PerkinElmer, Inc., 2007 WL 329290 (D.N.J. 2007) (dealing with the inadvertent disclosure of privileged emails during discovery); Gordon Partners v. Blumenthal, 244 F.R.D. 179 (S.D.N.Y. 2007) (imposing adverse inference spoliation sanction in securities fraud action because defendant corporation had the practical ability to obtain documents it needed from a non-party corporation and defendant corporation’s failure to preserve relevant email was grossly negligent).

52. Council Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31.

53. *See* Press Release, Eur. Comm’n, Commission Proposes a Comprehensive Reform of the Data Protection Rules to Increase Users’ Control of Their Data and to Cut Costs for Businesses (Jan. 25, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/46&format=HTML&aged=0&language=EN&guiLanguage=en>. *See also* Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), COM (2012) 11 final 1 (Jan. 25, 2012) (legislative proposal by the European Commission for a General Data Protection Regulation).

*Whenever consent is required for data processing, it will have to be given explicitly, rather than be assumed.*

*Easier access to one's own data and the right of data portability, i.e., easier transfer of personal data from one service provider to another.*

*Companies and organisations will have to notify serious data breaches without undue delay, where feasible within 24 hours.*

*A single set of rules on data protection, valid across the EU.*

*Companies will only have to deal with a single national data protection authority – in the EU country where they have their main establishment.*

*Individuals will have the right to refer all cases to their home national data protection authority, even when their personal data is processed outside their home country.*

*EU rules will apply to companies not established in the EU, if they offer goods or services in the EU or monitor the online behaviour of citizens.*

*Increased responsibility and accountability for those processing personal data.*

*Unnecessary administrative burdens such as notification requirements for companies processing personal data will be removed.*

*National data protection authorities will be strengthened so they can better enforce the EU rules at home.<sup>54</sup>*

In the United States, the amended Federal Rules of Civil Procedure direct litigants on what subject matters are in the purview of the Court to rule upon; however, the rules themselves do not provide explicit guidance on how to physically *handle* ESI.<sup>55</sup> As a result, the American system has recognized a limited safe harbor from sanctions arising from the loss of ESI due to the “routine, good faith operation of an electronic information system.”<sup>56</sup> However, the application of this rule requires that the producing litigant demonstrate that it tried to preserve in good faith evidence it knew or should have known to be relevant to reasonably anticipated or commenced litigation.<sup>57</sup> In addition, the amended rules address digital spoliation by recognizing that it can occur in various ways and can result in

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54. EUR. COMM'N, WHY DO WE NEED AN EU DATA PROTECTION REFORM?, [http://ec.europa.eu/justice/data-protection/document/review2012/factsheets/1\\_en.pdf](http://ec.europa.eu/justice/data-protection/document/review2012/factsheets/1_en.pdf) (emphasis removed). See also *Commission Proposes New Data Protection Rules for the Digital Age*, EUR. COMM'N (Jan. 25, 2012), available at <http://ec.europa.eu/justice/data-protection/minisite/index.html>.

55. See *supra* note 48.

56. FED. R. CIV. P. 37(e). The text accompanying notes 55–57 was originally published in Daniel B Garrie & Daniel K. Gelb, *E-discovery in Criminal Cases: A Need for Specific Rules*, 43 SUFFOLK U. L. REV. 393, 397–98 (2010).

57. See FED. R. CIV. P. 37 advisory committee's note (indicating that the safe harbor rule applies where there is a duty to preserve evidence, but noting that this duty must be carried out in good faith for the litigant to take advantage of the rule). See also Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2022 (2011) (discussing the duty to preserve).

varying penalties depending upon the facts and legal context in which the claim arises.<sup>58</sup>

While this article is not advocating for the same rules as the EU Directive, the lack of uniformity on accessing and transferring ESI will continue to drive-up expenses and complicate cross-border litigation as ESI becomes further ingrained into disputes. In a world where businesses are becoming more reliant on “the cloud” for hosting and transferring ESI, parties to cross-border disputes (both litigation and ADR) can only benefit from uniformity in preservation of ESI. For example, the proposed amendments to the EU Directive will protect personal data everywhere in the EU as well as *outside* the EU.<sup>59</sup>

Preservation is a component to the EU Directive amendments; however, the obligation of preservation is much more lenient pre-anticipated litigation than the EU counterpart which requires preservation by statute. As a result, a lack of uniformity between countries handling the same ESI between the EU and elsewhere creates the risk of spoliation and other complications, which could undermine one’s claim or defense.<sup>60</sup> In fact, the advent of e-discovery in cross-border disputes has impacted the manner in which a case may proceed altogether.<sup>61</sup> There are many areas of the law—such as trade secrets and intellectual property—where the provision of evidence by litigants is not uniformly handled.<sup>62</sup> Therefore, if trade secrets (or technology subject to trade secret law) are at issue in a cross-border dispute, the manner in which the ESI is accessed in one country may be illegal in another.<sup>63</sup>

## II. OVERVIEW OF HOW E-DISCOVERY IS HANDLED IN VARIOUS FORUM COUNTRIES

Global companies often have operational nuclei in various countries in order to leverage the local economies.<sup>64</sup> Although the physical operations may be spread

58. For example, note that “the good faith requirement of Rule 37(e) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.” FED. R. CIV. P. 37 advisory committee’s note. Nonetheless, this requirement is not explicit. FED. R. CIV. P. 37(e).

59. DIRECTORATE-GENERAL FOR JUSTICE, EUR. COMM’N, TAKE CONTROL OF YOUR PERSONAL DATA (2012), available at [http://ec.europa.eu/justice/data-protection/document/review2012/brochure/dp\\_brochure\\_en.pdf](http://ec.europa.eu/justice/data-protection/document/review2012/brochure/dp_brochure_en.pdf).

60. See Marissa L. P. Caylor, Comment, *Modernizing the Hague Evidence Convention: A Proposed Solution to Cross-Border Discovery Conflicts During Civil and Commercial Litigation*, 28 B.U. INT’L L.J. 341, 342–43 (2010) (discussing potential conflicts of cross jurisdiction discovery of ESI).

61. See *id.* (positing that international conflicts in discovery rules could in some cases lead to “dismissal of claims in U.S. courts under *forum non conveniens* due to . . . extra time and expense”).

62. See DAVID LATHAM & SAHIRA KHWAJA, HOGAN LOVELLS, STUDY ON TRADE SECRETS AND PARASITIC COPYING (LOOK-ALIKES) 3–4 (2011), available at [http://ec.europa.eu/internal\\_market/iprenforcement/docs/trade/Study\\_Trade\\_Secrets\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/trade/Study_Trade_Secrets_en.pdf) (noting the effect of varying trade secret law among European Union member states on the provision of evidence for use at trial).

63. See *id.* at 3–4, 40 (noting that some EU states allow defendants to withhold incriminating documents and that civil search orders, which might need to be resorted to in order to get evidence of misappropriation of a trade secret, may be impossible to obtain in some European countries).

64. As a consequence, data will be transferred across jurisdictional boundaries. See Caylor, *supra* note 60, at 341–42 (discussing the ESI-related effects of international business operations).

broadly in a geographical sense, some multinational corporations centralize their technology operations in a series of data centers that may not be optimized for the nuanced and complex issues of cross-border e-discovery.<sup>65</sup> This inevitably means that many large companies are assuming substantial compliance risk and exposure to future litigation costs which, understandably, may not have been contemplated years ago when the companies deployed their technological infrastructures.<sup>66</sup>

The type of legal system employed in a particular country also impacts how discovery—and thus e-discovery—is likely to be addressed. For example, an important nuance between common law and civil law systems is the importance placed on discovery.<sup>67</sup> In many common law jurisdictions, such as the United States and the United Kingdom, automatic discovery is required.<sup>68</sup> This is the case in the United Kingdom irrespective of whether the producing party intends on using the substantive content of the discovery production at the actual hearing or trial on the merits.<sup>69</sup> Moreover, companies must also balance not only the cost-benefit relationship, but also the potential criminal issues that might arise in complex cross-border disputes.<sup>70</sup> Below is an analysis of several countries and the legal frameworks that govern e-discovery.

65. For example, Reed Smith LLP has consolidated most of its technology operations into two data centers in the United States and Europe as a means of supporting its international growth, increasing collaboration, and improving the company's service to its employees. CISCO SYSTEMS, LAW FIRM INTERCONNECTS GLOBAL OFFICES 1 (2009), available at [http://www.cisco.com/en/US/prod/collateral/voicesw/ps6788/vcallcon/ps556/case\\_study\\_c36-552199.pdf](http://www.cisco.com/en/US/prod/collateral/voicesw/ps6788/vcallcon/ps556/case_study_c36-552199.pdf). For more on the challenges of e-discovery within big companies, see generally Jason Fliegel & Robert Entwisle, *Electronic Discovery in Large Organizations*, 15 RICH. J.L. & TECH. 1 (2011).

66. Despite this challenge, the United Nations Commission on International Trade Law ("UNCITRAL") created rules as early as 1976 to lessen discrepancies in document production among the various nationalities. See Rep. of the Comm'n on Int'l Trade Law, U.N. Doc. A/31/17; GAOR, 31st. Sess., Supp. No. 17, reprinted in [1976] 7 Y.B. Comm'n on Int'l Trade L. 22.

(2) The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defense.

(3) At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

*Id.* See also Rep. of the Comm'n on Int'l Trade Law, Jun. 21–July 9, 2010, U.N. Doc. A/65/17; GAOR, 65th Sess., Supp. No. 17, at 79 (2010) (updating the UNCITRAL Arbitration Rules, including article 27, which is quoted above).

67. KUO-CHANG HUANG, INTRODUCING DISCOVERY INTO CIVIL LAW, at xxvi (2003). This holds true not only in official trials and hearings, but also in alternative dispute resolution. See Steven C. Bennett, *E-Discovery Issues: What Parties and Their Counsel Need to Know in Anticipation of and During Arbitration*, 64 DISP. RESOL. J. 20, 25 (2009) (noting that the use of discovery in arbitration may vary significantly between common and civil law jurisdictions).

68. See, e.g., FED. R. CIV. P. 26(a); Civil Procedure Rules, 1998, S.I. 1998/3132, P.31.3 (U.K.) (noting that opposing parties have a right to inspect any documents, the existence of which have been disclosed to them).

69. See Civil Procedure Rules, 1998, S.I. 1998/3132, P.31.6 (U.K.) (defining the requirements of "standard disclosure" to include not only documents on which a party "relies," but also those that adversely affect any party's case or support another party's case).

70. See, e.g., Gary A. Adler et al., *The Evolving State of EU/U.S. Discovery Conflicts*, in ELECTRONIC DISCOVERY GUIDANCE 2009: WHAT CORPORATE AND OUTSIDE COUNSEL NEED TO KNOW 77, 82–83 (2009) (discussing blocking statutes, which provide criminal sanctions for the disclosure and use of certain data in some circumstances).

### A. Australia

This section considers recent changes to discovery rules in Australia to address e-discovery.<sup>71</sup> On January 29, 2009, Chief Justice Black issued the Federal Court of Australia's revised Practice Note 17.<sup>72</sup> That Practice Note has since been re-issued as Practice Note CM 6 – Electronic Technology in Litigation Rules (“the Practice Note”).<sup>73</sup> Sections 1.1 and 1.2(b) of the Practice Note permit the court to order discovery in electronic format where “the use of technology in the management of documents and conduct of the proceeding will help facilitate the quick, inexpensive and efficient resolution of the matter.”<sup>74</sup>

The Practice Note amends the existing procedural rules to account for the complexity of the digital world in which corporations and individuals operate.<sup>75</sup> The Practice Note is intended to provide to litigants and the courts a robust framework to address e-discovery issues.<sup>76</sup> With this in mind, the Practice Note attachments are buttressed by checklists, sample protocols, and a glossary to provide valuable tools for practitioners.<sup>77</sup> One of the attachments to the Practice Note is a pre-discovery conference checklist, which instructs litigants how to consider, among other things:

- *The scope of discovery;*
- *Strategies for conducting a reasonable search for discoverable documents;*
- *The management of documents that are privileged; and*
- *The establishment of a document management protocol.*<sup>78</sup>

These considerations, of course, vary in accordance with the facts of the dispute before the court. However, parties, by utilizing the framework provided by the court, will be able to more effectively consider, in particular, the cost and time implications of discovery processes when seeking and making orders for

71. Prior to these changes, the need and ways to reform Australia's discovery rules had been subject to debate. See B.C. Cairns, *An Evaluation of the Function and Practice of Discovery*, 61 AUSTL. L. J. 79, 84 (1987) (discussing the need for study into the cost of discovery and interrogatories in Australia, with an eye toward reform); AUSTL. LAW REFORM COMM'N, *MANAGING JUSTICE: A REVIEW OF THE CIVIL JUSTICE SYSTEM* 31–34 (2000), available at <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC89.pdf> (discussing problems with and fixes for Australian discovery processes).

72. FED. COURT OF AUSTL., PRACTICE NOTE NO. 17: THE USE OF TECHNOLOGY IN THE MANAGEMENT OF DISCOVERY AND THE CONDUCT OF LITIGATION (2009), replaced by, FED. COURT OF AUSTL., PRACTICE NOTE CM 6: ELECTRONIC TECHNOLOGY IN LITIGATION (2011), available at [http://www.fedcourt.gov.au/how/practice\\_notes\\_cj17\\_old2.html](http://www.fedcourt.gov.au/how/practice_notes_cj17_old2.html).

73. FED. COURT OF AUSTL., PRACTICE NOTE CM 6: ELECTRONIC TECHNOLOGY IN LITIGATION (2011), available at [http://www.fedcourt.gov.au/pdfsrtfs\\_p/practice\\_notes\\_cm6.rtf](http://www.fedcourt.gov.au/pdfsrtfs_p/practice_notes_cm6.rtf).

74. *Id.* § 1.2(b).

75. See *id.* § 2.1 (noting that the rule aims to “encourage and facilitate the effective use of technology in proceedings before” the Federal Court of Australia).

76. *Id.*

77. *Id.* § 11.1.

78. FED. COURT OF AUSTL., PRACTICE NOTE CM 6: PRE-DISCOVERY CONFERENCE CHECKLIST 1–2 (2011), available at [http://www.fedcourt.gov.au/pdfsrtfs\\_p/practice\\_notes\\_cm6\\_checklist\\_predisc.rtf](http://www.fedcourt.gov.au/pdfsrtfs_p/practice_notes_cm6_checklist_predisc.rtf).

discovery.<sup>79</sup> While not discussed in detail by the Practice Note, the intent is to compel parties engaged in e-discovery, that is, in good faith, and attempt to “agree[] upon a practical and cost-effective discovery plan” that is reasonable—mindful of the issues and cost dynamics and other problems that can plague e-discovery.<sup>80</sup>

Key to the execution of any of these components is communication among the parties, the technology stakeholders, and the courts. What is critical for global companies operating in Australia is to be mindful of the specific obligations respective to preservation, search, and production that are unique to Australia. In summary, although the costs of e-discovery in Australia are not at the exorbitant levels that litigants often see in the U.S., the costs if not done properly are substantial.

### *B. New Zealand*

This section considers recent changes to discovery rules in New Zealand. In 2010, the New Zealand High Court Rules Committee, in recognition of these complex issues, recommended changes to the discovery rules.<sup>81</sup> These changes are embodied in the High Court Amendment Rules (No 2) 2011 (the new discovery rules), which make significant changes to the existing High Court Rules for discovery and inspection, such as the introduction of new principles of cooperation and proportionality.<sup>82</sup> Associated with these principles are new duties that require the preservation of documents, often before proceedings are commenced, and the duty of disclosure of documents when pleadings are filed.<sup>83</sup> The High Court Amendment Rules provide a discovery checklist which parties must consult and, depending on the specific scenario, which may require parties to make standard or tailored

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79. See AUSTL LAW REFORM COMM'N, DISCOVERY IN FEDERAL COURTS 90 (2010), available at <http://www.alrc.gov.au/sites/default/files/pdfs/publications/Whole%20Discovery%20CP.pdf> (stating that parties that follow the Practice Notes' guidance about discovery plans should have better estimates “of the cost associated with discovery and a timetable for carrying out the proposed discovery process”).

80. *Id.* at 92. See also James Evers, *Chief Justice Keen to Get to the Point*, AUSTL FIN. REV. (Feb. 19, 2010, 11:31 AM), [http://afr.com/p/markets/dealbook/legal/chief\\_justice\\_keen\\_to\\_get\\_to\\_the\\_KzlbP40b8I1GgmpyDSiIBN](http://afr.com/p/markets/dealbook/legal/chief_justice_keen_to_get_to_the_KzlbP40b8I1GgmpyDSiIBN) (noting that Chief Justice Patrick Keane of the Federal Court of Australia believes that discovery orders could force lawyers to think more deeply about their cases and could focus and shorten litigation).

81. See N.Z. HIGH COURT RULES COMM., PROPOSALS FOR REFORM OF THE LAW OF DISCOVERY INCLUDING ELECTRONIC DISCOVERY AND INSPECTION (2010), available at [http://www.courtsofnz.govt.nz/about/system/rules\\_committee/consultation/Consultation-paper-on-discovery-2010.pdf](http://www.courtsofnz.govt.nz/about/system/rules_committee/consultation/Consultation-paper-on-discovery-2010.pdf) (recommending changes to discovery rules).

82. See Schedule 2, rule 8.2 of the Judicature Act 1908, as substituted by High Court Amendment Rules (No 2) 2011, SR 2011/351, reg 4 (N.Z.) (requiring that parties “co-operate to ensure that the processes of discovery and inspection are proportionate to the subject matter of the proceeding and facilitated by agreement on practical arrangements”).

83. *Id.* rules 8.3–4 (requiring preservation of documents “as soon as a proceeding is reasonably contemplated” and disclosure of certain documents after filing a pleading).

discovery.<sup>84</sup> The High Court Amendment Rules also introduce a new listing and exchange protocol with inspection to take place by way of electronic exchange.<sup>85</sup>

The new High Court Rules were designed with the intent of reducing the disproportionate costs and delays that can be caused by discovery.<sup>86</sup> In addition, the Rules seek to restrict the use of discovery as a tactical tool. The key changes contained in the Rules may be summarized by the following nine observations:

1. “Parties must co-operate to ensure that . . . discovery [is] proportionate . . . and facilitated by agreement on practical arrangements.”<sup>87</sup>
2. Once litigation is “reasonably contemplated . . . prospective part[ies] must take all reasonable steps to preserve documents that are, or are reasonably likely to be, discoverable . . . .”<sup>88</sup>
3. Parties must make initial disclosure of documents referred to in a pleading or used when preparing the pleading.<sup>89</sup> The disclosure must be made at the time that the pleading is served.<sup>90</sup>
4. “Parties must . . . discuss and endeavour to agree on an appropriate discovery order” prior to the first case management conference.<sup>91</sup> The discovery order must address the matters set forth in the new discovery checklist in the rules.<sup>92</sup>
5. At the case management conference, the judge may dispense with the discovery, or order either standard or tailored discovery.<sup>93</sup> Where standard discovery is required by the judge, it entails the production of documents that the party relies upon and documents that adversely affect that party’s or another party’s case or support another party’s case.<sup>94</sup>
6. Tailored discovery is presumed to apply instead of standard discovery in the following situations:
  - a. When the costs of standard discovery are disproportionate to the matters at issue;

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84. *Id.* rules 8.6–10 (defining standard and tailored discovery and the circumstances under which either type of discovery should be undertaken).

85. *See* Schedule 2, Schedule 9, Part 2 of the Judicature Act 1908, as added by High Court Amendment Rules (No 2) 2011, SR 2011/351, Schedule 1 (N.Z.) (listing and exchange protocol requiring parties to exchange documents electronically).

86. N.Z. HIGH COURT RULES COMM., *supra* note 81, at 3.

87. Schedule 2, rule 8.2 of the Judicature Act 1908, as substituted by High Court Amendment Rules (No 2) 2011, SR 2011/351, reg 4 (N.Z.).

88. *Id.* rule 8.3.

89. *Id.* rule 8.4(1).

90. *Id.*

91. *Id.* rule 8.11(1).

92. *Id.*

93. *Id.* rule 8.12(1).

94. *Id.* rule 8.7.

- b. When either party makes allegations of fraud or dishonesty;
- c. Where the sums at issue exceed \$NZ 2.5 million dollars; and
- d. Where the parties agree to tailored discovery.<sup>95</sup>

Tailored discovery can involve more or less discovery than standard discovery.<sup>96</sup> In addition, tailored discovery requires discovery to proceed by document category or through a method “that facilitates the identification of particular documents.”<sup>97</sup>

- 7. Parties have a statutory obligation to conduct a reasonable search for discoverable documents.<sup>98</sup>
- 8. “Documents must be exchanged in accordance with a new listing and exchange protocol set out in Part 2,” Schedule 9 of the Rules, unless the parties agree otherwise.<sup>99</sup>
- 9. Inspection of documents occurs by way of an electronic exchange of documents, unless the court orders otherwise.<sup>100</sup> This means that paper documents must be scanned electronically so that electronic copies can be exchanged.

In addition to the aforementioned nine observations, the Rules impose additional upfront costs on parties, relating to the parties’ preservation of documents and requirements to engage in dialog sufficient to reach agreement on discovery and inspection issues.<sup>101</sup> These additional cost burdens imposed by the Rules are predicated on the assumption that by requiring these actions early on, the parties will realize substantial savings later in the course of the proceedings.<sup>102</sup>

### C. Singapore

This section considers recent changes to discovery rules in Singapore. Singapore’s new electronic discovery rules, introduced in 2009 as part of Practice Direction 3 (“PD 3/2009”), have facilitated “the gradual development and clarification of the rules of discovery as applied to electronic documents.”<sup>103</sup> The practice direction creates a framework for parties to request discovery of electronically stored

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95. *Id.* rule 8.9.

96. *Id.* rule 8.8.

97. *Id.* rule 8.10.

98. *Id.* rule 8.14(1).

99. *Id.* rule 8.27.

100. Schedule 2, Schedule 9, Part 2 of the Judicature Act 1908, as added by High Court Amendment Rules (No 2) 2011, SR 2011/351, Schedule 1 (N Z.).

101. Schedule 2, rules 8.2–.3, .11 of the Judicature Act 1908, as substituted by High Court Amendment Rules (No 2) 2011, SR 2011/351, reg 4 (N Z.).

102. See N Z. HIGH COURT RULES COMM., *supra* note 81, at 3 (noting that “[d]elay and cost can be reduced by moving to an electronic discovery regime, while the efficiency of the discovery process, and the ability to achieve a just outcome can be improved”).

103. *Electronic Discovery and Inspection of Compound Documents*, RAJAH & TANN LLP 1 (Nov. 2011), <http://eoasis.rajahtann.com/eoasis/gn/pdf/2011.11%20Electronic%20Discovery.pdf>.



information.<sup>104</sup> PD 3/2009 does not automatically apply, but either party may opt in by requesting its application, or both parties can agree to adopt the new rules.<sup>105</sup> The court can also order compliance.<sup>106</sup>

Under PD 3/2009, the scope of discovery is similar to that found in the United Kingdom, where “a party is required to disclose only those documents on which he relies, and the documents which adversely affect his own case or another party’s case, or which support another party’s case.”<sup>107</sup> Such documents need only be indirectly relevant to be discoverable, however: in *Surface Stone Pte Ltd v Tay Seng Leon and another* [2011] SGHC 223, the Singapore High Court examined how to determine when documents are part of a “train of inquiry” leading to relevant documents and are thus discoverable, and outlined considerations for ordering discovery and inspection of compound documents, such as storage media containing numerous distinct documents.<sup>108</sup>

### III. MAKING E-DISCOVERY UNIFORM ACROSS BORDERS

The concept of legal international uniformity—both substantively and procedurally—is seen in the context of enforcement of international arbitration awards for those nations that are party to the Convention on the Enforcement of International Arbitral Awards, to which 146 countries are parties and 24 are signatories.<sup>109</sup> Upon review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“The Convention”), it is clear the proliferation of international business disputes over the past half century created a demand for harmonizing cross-border enforcement of arbitration awards.

Many of the participating countries to The Convention have extremely different legal systems. For example, the Ukraine, Israel, and Jordan are four of the 24 signatories, and the United States is a party to The Convention.<sup>110</sup> The United States and Israel have common law systems; however, the Ukraine and Jordan have civil law systems, and all four countries’ legal systems diverge from one another in important ways.<sup>111</sup> Nevertheless, all four jurisdictions “bought into” The Convention.<sup>112</sup>

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104. THE SUPREME COURT OF SING., REVIEW OF DISCOVERY IN CIVIL LITIGATION 8 (2011), available at <http://app.supremecourt.gov.sg/data/doc/ManageHighlights/3026/Discovery%20Consultation%20Paper.pdf>.

105. *Id.*

106. *Id.*

107. *Id.* at 82. Note the similarity that Singapore and the United Kingdom also share with New Zealand. See *supra* text accompanying note 95.

108. *Surface Stone Pte Ltd v Tay Seng Leon et al.* [2011] S.G.H.C. 223, P 8-15, 47-95 (Sing.), available at <http://www.litiedge.com/images/pdf/surfacestone.pdf>.

109. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518. A list of current signatories and parties, including the numbers of each, can be found at *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXII/XXII-1.en.pdf> (last visited Apr. 10, 2012).

110. *Id.*

111. See *The World Factbook*, *supra* note 20 (describing the legal systems of countries worldwide, including those of the Ukraine, Jordan, Israel, and the United States). Compare Elizabeth R. Sheyn, *A Foothold for Real*

Notably, all of the aforementioned four jurisdictions have their national languages available in Microsoft Word.<sup>113</sup> Technologically, the Microsoft Office productivity software works similarly across languages, and therefore, it is pragmatic for national jurisdictions using the same software to unify their approach to inter-party exchange of the ESI. Arguably, there is no reason why the same concept applied to unifying the enforcement of arbitral awards could not also be applied to the initiation of uniform e-discovery practices as it relates to best practices and procedures in business litigation. This unification could be adopted via a powerful international benchmark such as The Convention or another popular international legal instrument governing legal proceedings between citizens of different national origins.<sup>114</sup>

The reality is ESI will be involved in nearly all such proceedings, and the participants need guidance and resources in both the arbitration and judicial litigation contexts. For example, Article 27 of the United Nations Commission on International Trade Law's ("UNCITRAL") Model Rules states that "[t]he arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."<sup>115</sup> Simply because the litigants are citizens of different countries does not mean the technology that produced the ESI to be exchanged has to be treated any differently depending on the national forum where the legal dispute is pending. Should an issue concerning the handling of ESI arise in a respective country, the parties can

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*Democracy in Eastern Europe: How Instituting Jury Trials in Ukraine Can Bring About Meaningful Governmental and Juridical Reforms and Can Help Spread These Reforms Across Eastern Europe*, 43 VAND. J. TRANSNAT'L L. 649, 651, 685 (2010) (noting, among other things, the lack of jury trials in the Ukraine and the presence of a unified system of lower courts but only one court of constitutional jurisdiction), with Fahed Abul-Ethem, *The Role of the Judiciary in the Protection of Human Rights and Development: A Middle Eastern Perspective*, 26 FORDHAM INT'L L.J. 761, 763–64 (2003) (noting the Jordanian Constitution's division of Jordanian courts into special courts, religious courts that have jurisdiction in certain cases involving Christians or Muslims, and civil courts with jurisdiction over most criminal and civil cases) and The Honorable Amnon Straschnov, *The Judicial System in Israel*, 34 TULSA L.J. 527, 527 (1999) (noting that while the American and Israeli legal systems each derive from the English common law system, Israel does not have a written constitution or a jury system).

112. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518.

113. See *Office Language Packs 2010 FAQ*, MICROSOFT OFFICE, <http://office.microsoft.com/en-us/language-packs/office-language-packs-2010-faq-HA101828857.aspx?CTT=5&origin=HA010354264> (listing the languages supported by Microsoft Office, including Ukrainian, Hebrew, Arabic, and English).

114. See, e.g., Protocol on Arbitration Clauses, *opened for signature* Sept. 24, 1923, 27 L.N.T.S. 158, *reprinted in* II REGISTER OF TEXTS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW 8 (1973); Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301, *reprinted in* II REGISTER OF TEXTS AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW 13 (1973); European Convention on International Commercial Arbitration, *opened for signature* Apr. 21, 1961, 484 U.N.T.S. 349; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 575 U.N.T.S. 159; U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, U.N. Sales No. E.08.V.4 (2008); and the updated UNCITRAL Arbitration Rules, Rep. of the Comm'n on Int'l Trade Law, Jun. 21–July 9, 2010, U.N. Doc. A/65/17; GAOR, 65th Sess., Supp. No. 17, at 79 (2010).

115. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, at 16–17, U.N. Sales No. E.08.V.4 (2008).

seek guidance from the judicial authority in the controlling jurisdiction as a party would do in the aforementioned example under UNCITRAL's Model Rules.<sup>116</sup>

Just as unifying procedural rules relating to ESI could simplify cross-border e-discovery, hosting of the data in a common repository dedicated to cross-border disputes would ease the cost and anxiety of regulatory compliance that so often accompanies multi-national litigation.<sup>117</sup> For example, the regulations surrounding the export of private personal data from a substantial portion of Europe greatly differ from those in parts of the Asia-Pacific region.<sup>118</sup> The precise genre of private information accessible in one part of the world may differ drastically from another part.<sup>119</sup> Therefore, the manner in which e-discovery is conducted by way of collection and review can be impacted greatly depending upon the regulatory and legal environment in which a particular litigation proceeds.

### CONCLUSION

Technology is as intertwined with cross-border litigation as it is with domestic disputes.<sup>120</sup> The demand for uniformity in e-discovery in international legal proceedings is arguably greater where data compliance protocols are more stringent. Inasmuch as technology has become uniform across borders, so should the manner in which litigants handle the evidence derived from the technology. With different countries operating differing judicial systems, the path of least resistance to finding commonality is on an information technology level. If the international community can buy into the major software applications and operating systems, the same community can invest into a mutual approach to the

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116. See, e.g., Alan S. Rau, *Understanding (and Misunderstanding) "Primary Jurisdiction,"* Symposium, *Arbitration and National Courts, Conflict and Cooperation*, 21 AM. REV. INT'L ARB. 47, 51 n.14 (2010) (discussing legislation empowering local courts to assist in taking evidence); Alan S. Rau, *Evidence and Discovery in American Arbitration: The Problem of "Third Parties,"* 19 AM. REV. INT'L ARB. 1, 26–27 (2008) (describing Article 27 not as an explicit "grant of power to the arbitrator" but as an expectation that a state court would assist in the enforcement). See generally Michael F. Hoellering, *UNCITRAL Model Law on International Commercial Arbitration*, 20 INT'L L. 327, 331 (1986) (discussing expansive power given to arbitrators under the Model Law, including determining the admissibility of evidence under Article 19 and requesting court assistance in taking evidence).

117. See, e.g., Press Release, Eur. Comm'n, *supra* note 53.

118. Compare Clay G. Wescott, *E-Government in the Asia-Pacific Region*, 9 ASIAN J. OF POL. SCI. 2, 6–8 (2011), with Seth Berman, *Cross-Border Challenges for E-Discovery*, 11 BUS. L. INT'L 2, 125 (2010) (explaining challenges associated with European data protection rules with respect to e-discovery) and Jonathan I. Blackman et. al., *International Litigation*, 42 INT'L L. 415, 435–39 (Jennifer Toole ed., 2008) (discussing concerns regarding obtaining discovery from nations that have legislated greater privacy protection than exists in the United States). See also Moze Cowper & Amor Esteban, *A Recent French Supreme Court Decisions Has Implications for E-Discovery Abroad*, 17 A.B.A. SECTION OF LITIGATION COMM. ON PRETRIAL PRACTICE & DISCOVERY 1, 14 (2008); Peter Ashford, *Documentary Discovery and International Commercial Arbitration*, 17 AM. REV. INT'L ARB. 89, 130–31 (2006) (analyzing European case law regarding the confidentiality of arbitration); Jan W. Bolt, *Private Rules for International Discovery in U.S. District Court The U.S.-German Example*, 11 UCLA J. INT'L L. & FOREIGN AFF. 1, 6 (2006) (comparing both procedural and substantive aspects of privacy, privilege, and culture in the discovery context).

119. See, e.g., Erica M. Davila, *International E-Discovery: Navigating the Maze*, 8 PITT. J. TECH. L. & POL'Y, 2008, at 6–11 (detailing the consequences of various nations' privacy laws on e-discovery).

120. See *supra* Introduction.

harvesting, review, and production of the information. Such an endeavor does not stop with trial counsel and litigants themselves, but also requires the participation and support of the judicial systems across the globe. Every legal community—regardless of geography— must give special consideration to the preservation, review, and production of ESI. Courts must embrace the evolving nature of e-discovery and the advancement of modern-day document review methodology. The various international forums which tend to attract complex civil litigation must continually work towards building confidence in a global approach to e-discovery—irrespective of legal venue or political system.