Lee International IP & LAW GROUP

# E-discovery in arbitration: a wake up call for Korean co's


**By Bryan E Hopkins and Charles Choo**

Though changes in the US Federal Discovery Rules as well as case law such as Zubulake have escalated Electronically Stored Information (ESI) costs as it relates to Electronic Discovery ( e-discovery) in the US, many non-US companies, including Korean companies have remained relatively complacent regarding e-discovery issues such as preservation of ESI.. Even in light of headlining court cases such as the e-discovery spoliation ruling against Kolon in the Dupont case or Samsung Electronics in Mosaid, most Korean companies (including some that have experienced litigation in the US) have completely ignored ESI related issues or have tried to shield themselves from e-discovery obligations and costs through arbitration in hopes ESI documents would not have to be produced. Though many Korean corporations are aware of basic discovery rules applicable in US litigation, most have also failed to recognise the complexity of gathering, collecting and reviewing ESI for use in e-discovery. Though arbitration does decrease exposure to the burdensome and ballooning demands of ESI rules in the US, it does not completely protect companies from ESI requirements and e-discovery obligations. This article will discuss the ramifications of e-discovery obligations as they relate to Korean companies involved in international arbitration.

**E-discovery impact on international arbitration**

For Korean companies facing international arbitration under ICC Arbitration Rules (the Rules), the prospect of having to produce ESI documents is quite real. Practitioners know that discovery and therefore e-discovery opportunities are not as great in ICC arbitration as in US Federal Courts, but there are circumstances in which discovery itself is or maybe warranted.

Though the ICC Arbitration Rules do not specifically mention the production of ESI documents and e-discovery obligations, Article 15 (2) of the Rules requires the arbitral tribunal to "ensure that each party has a reasonable opportunity to present its case". It appears that the arbitrators and parties to ICC arbitration must themselves decide how to handle ESI including how many documents and under what circumstances such documents should be produced to establish the case as needed.

There is no doubt that e-discovery has become a major problem for non-US companies as well as US companies when litigation takes place in the US. Because of the expansive nature of 'discovery in the US', foreign companies involved in US litigation face not only the costly and time consuming burden of providing some form of ESI documents in accordance with the US Federal Rules of Civil Procedure or case law, but also the associated data privacy issues that normally follow such broad discovery requests.

Korean companies may also have a difficult time dealing with the scope of required ESI documents in arbitral proceedings. For example, if arbitration is held in the US in accordance with the law of a particular state such as NY, the odds are US licensed lawyers shall either sit on the arbitral proceedings or shall represent the parties in the dispute, those US lawyers being more familiar with the 'expansive discovery process'. Such arbitrators or arbitration lawyers may demand or expect numerous ESI documents.

In either case, Korean companies are now at a crossroads. Not only should Korean companies prepare for ESI and ESI demands from opposing counsel but they should also realise they must also demand ESI documentation in arbitration. Evidence is all about document exchange, including ESI. This is true in arbitration as it is in litigation. Therefore, e-discovery in international arbitration may be the key to success.

Moreover, to mitigate the legal costs associated with cross-border litigation or arbitration, it is highly recommended that Korean companies implement a sound e-discovery plan that locates, collects and indexes ESI records and data that may be relevant in future arbitrations as well as litigation. Otherwise, Korean companies face the same fate as Samsung Electronics or Kolon and a host of other companies in the US and elsewhere which failed to consider the implications of ESI in today's highly technical and electronically communicative world.

**Lee International IP & Law Group**
Poongsan Bldg. 23, Chungjeongro, Seodaemun-gu
Seoul 120-837, Korea
Tel: (82) 2 2279 3631
Fax: (82) 2 2279 5020
**Email: choo@leeinternational.com**
**bryan.hopkins1986@gmail.com**
**www.leeinternational.com**