Bridging The Discovery Gap In International Arbitration

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Unlike U.S. civil litigators, international arbitration practitioners do not base claims on "information and belief," nor do international proceedings allow for extensive discovery. Counsel frequently confront information gaps, or evidence that is unobtainable, unreliable, incomplete, or not conducive to analysis. The effort of hunting for the unknown can be lengthy and costly — contrary to one of the perceived benefits of arbitration. Forensic data analytics — the use of electronic data to prove and disprove factual assertions — provide a low-cost, highly efficient opportunity to overcome these obstacles. But how can international arbitration practitioners spot and seize those opportunities?

A Case In Point: Scraping The Web For Price Information

The Claim: A retailer alleged that a global distributor failed to provide best possible pricing, as required under a contract. The retailer asserted damages as the difference between the amount it paid to the distributor and product-specific prices of the distributor's competitors.

The Challenge: The retailer did not provide underlying detailed data to support the prices they used to quantify damages.

The Solution: Forensic data analytics experts designed a "Web scraper" to capture thousands of product prices from various distributor websites. They then built a database to enable transaction level analyses. The analytics revealed that the

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retailer had substituted discontinued-item liquidation prices for actual market prices, which counsel successfully leveraged to attack the retailer's damage claim.

Making The Impossible Possible And Practical

While the retailer's case is a powerful example of how forensic analytics can find needles in haystacks, counsel often wonder about how and when to employ forensic analytics. More specifically, in an international arbitration context, practitioners should consider forensic data analytics to:

- **Close information gaps;**
- **Identify anomalies, outlier transactions and business trends;**
- **Manage or analyze large or complex amounts of information or transactions;**
- **Elliminate repetitive manual steps;**
- **Modify format to allow for data analytics; and**
- **Assimilate disparate information sources (e.g., proprietary and counterparty; public and private; legacy systems).**

Since international arbitration cases — and the ways in which forensic analytics are used in these matters — can vary, here are some additional recent examples in which forensic analytics proved useful to counsel.

The Missing Smoking Gun

The Claim: A foreign government claimed that a defense contractor made hundreds of millions of dollars of payments to a sales agent in violation of the law of the foreign country. The sales contract allowed the foreign government to file an arbitration claim to recover the payments made to the sales agent. The foreign government had to prove that a portion of payments made under the contract inevitably were passed to the sales agent.

The Challenge: The foreign government did not possess bank statements to prove the flow of money between the supplier and the third party. Nor would it be able to obtain them under the limited discovery allowed under international arbitration. Instead, it had to prove a connection using circumstantial evidence, which involved processing millions of permutations of financial data.

The Solution: Data analytics experts built sophisticated algorithms to examine all possibilities and identified the missing connection through circumstantial evidence.

Old-Fashioned Time-Keeping

The Claim: A client of an international consulting firm alleged that the consultant inflated its invoices.

The Challenge: To arrive at an appropriate damages amount required a detailed understanding of labor/hour timesheet entries for more than 500 employees over a multi-year period. The data only existed in the form of weekly, hard-copy reports, which were in the consulting firm's possession.

The Solution: Forensic data analytics experts scanned the reports into an electronic format. They then developed "code" to: (1) open each weekly electronic file; (2) extract relevant data; and (3) insert the relevant data into a spreadsheet designed for nonforensic analytics experts to easily understand. The outcome was the creation of an electronic

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database that enabled counsel to perform all necessary reconciliations. When subsequent data was requested, forensic analytics experts needed only to slightly modify the computer code. The results were available in the database within minutes and supported the theory that the consulting firm had included unapproved overtime in its invoices.

The Impact of Seizing the Opportunity

Forensic data analytics infuses litigation with the power and efficiency of technology. Consider the Web scraper example. The retailer could have manually reviewed competitors' websites, but would never have made the attempt given the required time and costs. In cases in which data isn't available, such as in the example of the manufacturer, providing circumstantial evidence to support a theory would not otherwise have been possible. And, when manual review of hard-copy documents is required, the ability to create an electronic source from which to draw the data will always be a more efficient answer. In short, forensic analytics reduces time and costs to process important information; allows for the creation of databases, which can be leveraged to answer subsequent questions; and provides tangible findings for counsel to support various theories.

Conclusion

Legal professionals often face the challenge of overcoming information gaps. Advances in forensic data analytics enable counsel to achieve more convincing arguments, accelerate the attainment of results, prioritize review activities, develop more effective presentations and reduce costs. The techniques available through forensic data analytics offer significant opportunities to narrow the gaps even further in international arbitration matters in which evidence is often unavailable or not easy to obtain.

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