



## INTERNATIONAL INSTITUTE OF CONSTRUCTION ARBITRATORS (IICArb)

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### **E-DISCOVERY**

#### **What does it mean for legal practitioners in SA?**

We are living in a society where technology and the digital realm thereof is fast progressing and, as a result, infiltrating the daily lives of South Africans, often quicker than regulation and the legal profession can keep up. Due to the impact of digitization on the justice system, the concept of eDiscovery is now finally being adopted, which at first can be very challenging but extremely beneficial to all legal practitioners.

In essence, eDiscovery entails electronically obtaining evidence or data from various digital sources and platforms such as email, electronic messages, instant and social media. In essence, it relates to the access and collection of any form of communication in a digital format. We foresee that eDiscovery will become a preferred method of obtaining digitized evidence, information or data because electronically retrieved (in the form it was initially created) and therefore more reliable than hard copy documents which change the nature of the data or the source thereof. This is and has historically been problematic from an authenticity point of view and often lead to adverse outcomes on matters or severe delays. As a rule of thumb, we know as legal practitioners that the result of a matter is often dependent on the quality of the evidence.

When speaking about reliability and the authenticity of evidence and data, we need to talk about Metadata. Metadata is the information generated within a piece of electronic data and is 'data about data. It exists within every digital item stored on physical devices, such as your computer and smartphone. The information contained within metadata can include the user who created it, creation date, history, and document software used to make it. These devices may also collect metadata about your usage, building a digital footprint. These properties may be automatically generated by your operating system or the application you are using.

Access to and a better understanding of digital information, data, and Metadata could be a powerful tool to enhance efficiency in the justice system and save practitioners time to go through volumes of data and only after dealing with authenticity. However, it is worth mentioning that although there are clear benefits to eDiscovery, it does come with its challenges.

Considering that e-Discovery is becoming the new norm, legal practitioners need to ensure that they familiarize themselves with legislation regulating electronic information, such as the Electronic Communications and Transactions Act 25 of 2002, Protection of Personal Information Act 4 of 2013 and Cybercrimes Act 19 of 2020 - the rules and implications relating to eDiscovery.

So, the challenge is to transition into a new way of working and dealing with electronic evidence. To understand its nature, what makes it authentic or unauthentic and how to use the available tools. It enables attorneys to access (reliably and more conveniently) electronic data easily and to practice law more efficiently. Furthermore, because technology is not necessarily a lawyer's field of expertise, it is essential that legal practitioners work closely with IT teams to ensure that eDiscovery is easy to navigate and understand.