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BRIEFING

ELECTRONIC DISCOVERY IN HONG KONG
PRACTICE DIRECTION SL1.2
OCTOBER 2015

- HONG KONG'S PRACTICE DIRECTION SL1.2 CAME INTO EFFECT ON 1 SEPTEMBER 2014
- THIS BRIEFING DISCUSSES THE APPLICATION OF THE "PD" AND ITS IMPLICATIONS



Hong Kong's Practice Direction SL1.2 ("PD") came into effect on 1 September 2014, with the aim of establishing a framework for reasonable, proportionate and economical e-discovery.

When does the PD apply?

The PD applies to commercial cases in the High Court on or after 1 September 2014, where:

- The claim or counterclaim exceeds HK\$8m (slightly more than US\$1m) **and** there are at least 10,000 documents to be searched for the purposes of discovery; or
- The parties agree to be governed by the PD; or
- The Court directs the parties to follow the PD.

The PD will be applied in non-commercial cases, upon the parties' application or on the Court's own motion.

Parties may expect costs sanctions if the PD is not applied when it should be, or not applied properly.

"THE PD APPLIES TO COMMERCIAL CASES IN THE HIGH COURT ON OR AFTER 1 SEPTEMBER 2014..."

“THE DEFINITION OF ‘ELECTRONIC DOCUMENTS’ IN THE PD REFERS TO ANY ELECTRONICALLY STORED INFORMATION...”

What electronic documents does the PD cover?

The definition of “electronic documents” in the PD refers to any electronically stored information, including for example images, sound recordings, and instant messaging, stored on any device¹.

Importantly, it expressly encompasses metadata and electronically stored information that is deleted but not yet overwritten. The PD defines “Metadata” as “*data about data*”, i.e. embedded information about an electronic document, for example, the date and time of creation or modification of the document.

Scope of e-discovery

The usual requirements for discovery (i.e. relevance, necessity, privilege) will also apply² to electronic documents. However:

- Only directly relevant electronic documents are discoverable in the first instance³.
- In the absence of exceptional circumstances, discovery of electronic documents that form part of a “*train of inquiry*” may only be sought after the exchange of factual and expert evidence.
- Requests for discovery of metadata must demonstrate the relevance and materiality of that metadata, and should justify the costs and burden of producing that metadata.

“Reasonable search”

E-discovery does not necessarily mean reviewing each and every document available on a party’s electronic database – the extent of the search undertaken is restricted to a “reasonable search”.

Factors determining what search is “reasonable” include the:

- Number of electronic documents involved;
- Nature and complexity of the proceedings;
- Ease and expense of retrieving any particular electronic document;
- Availability of electronic documents or their contents from other sources; and
- Significance of any electronic document which is likely to be located during the search.

Searches may therefore be limited to specific keywords, time periods, or categories of documents or sources. Searches can also take place in stages, with search categories to be later extended or constrained depending on the initial search results. For example, conducting a first search on the primary witnesses’ email accounts, before considering whether to search other peripheral accounts⁴.

“E-DISCOVERY DOES NOT NECESSARILY MEAN REVIEWING EACH AND EVERY DOCUMENT AVAILABLE ON A PARTY’S ELECTRONIC DATABASE...”

¹ Note that scanning hard copy documents into PDFs in the course of discovery, to expedite the process, will probably not render the process e-discovery – see *Smailes v McNally* [2015] EWHC 1755 (Ch) at [58].

² For a useful summary see *Chinacast Education Corporation v Chan Tze Ngon* [2014] 5 HKC 277 at [16]. At [28] the High Court states other considerations specific to e-discovery, which provide useful guidance notwithstanding that the case pre-dates the PD coming into force.

³ PD, paragraph 5(1). Presumably for the reasons enunciated in *Surface Stone v Tay Seng Leon* [2011] SGHC 223 at [1], [8-9].

⁴ As alluded to in *Chinacast Education Corporation v Chan Tze Ngon* [2014] 5 HKC 277 at [28(g)]. See also the similar approach in Singapore in *Deutsche Bank v Chang Tse Wen* [2010] SGHC 125 at [39].

“ONCE LITIGATION IS CONTEMPLATED, THE PD MANDATES THAT CLIENTS BE NOTIFIED OF THE NEED TO PRESERVE DISCOVERABLE DOCUMENTS, INCLUDING ELECTRONIC DOCUMENTS.”

Note that:

- Where the search includes the use of OCR (Optical Character Recognition) technology, it is important to spot-check the OCR process. If the OCR process does not properly convert the source document to searchable text, that may then lead to the inference that relevant documents would remain un-discovered (and so the disclosure obligation has not been achieved⁵).
- It appears undertaking a “reasonable search” does not mean that all the search results are automatically to be disclosed – parties may screen the results e.g. for relevancy and privilege⁶.

Preservation of electronic documents

Once litigation is contemplated, the PD mandates that clients be notified of the need to preserve discoverable documents, including electronic documents.

Note that “native” electronic documents (i.e. in the original form created by a computer software programme) must be preserved regardless of whether that document is also available in another format (e.g. hard copy files).

Privilege

The PD recognises that privileged documents may be inadvertently disclosed in the e-discovery process. Parties are encouraged (but not mandated) to agree that e-discovery is without prejudice to the right to subsequently assert privilege over discovered electronic documents which have been discovered.

The discussion requirement

The PD **requires** parties to discuss e-discovery early in the litigation process, and substantially before the first Case Management Conference⁷. On areas where agreement cannot be reached, parties must then seek directions “*at the earliest practical date*”.

If e-discovery is given by a party without such prior discussion, and further e-discovery is subsequently required, a wasted costs order may be made against that party.

Matters for discussion, and agreement if possible, will include:

- The use of technology in the e-discovery exercise.
- Identification of categories of electronic documents within parties’ control, and the locations where such electronic documents may be found.
- Preservation of electronic documents.
- Format in which electronic documents and metadata is to be disclosed.
- Scope of e-discovery, and methods to reduce its cost, e.g. agreeing on keywords, a particular search technology (perhaps, to automatically identify duplicates or privileged electronic documents), or e-discovery in stages.
- Whether hard copy documents should be digitised and included in the e-discovery exercise.

⁵ See *Smailes v McNally* [2015] EWHC 1755 (Ch) at [31-37], [64-97], albeit not strictly an e-discovery case.

⁶ *Breezeway Overseas Ltd v UBS AG* [2012] 4 SLR 1035 (HC) at [33-34]; *Global Yellow Pages v Promedia Directories* [2013] 3 SLR 758 (HC) at [71-73].

⁷ This usually follows parties’ filing of a questionnaire indicating proposed/agreed directions for the conduct of the proceedings, which in turn follows 28 days after the close of pleadings. However the PD requires the parties to state their positions on e-discovery when filing the Statements of Claim and Defence respectively. See the next section, “*The requirement for an Electronic Documents Discovery Questionnaire*”.

“REGARDLESS OF WHETHER PARTIES REACH ANY AGREEMENT ON E-DISCOVERY, THE COURT RETAINS ITS DISCRETION TO GIVE FURTHER DIRECTIONS ON E-DISCOVERY, ON APPLICATION, OR OF ITS OWN ACCORD.”

Regardless of whether parties reach any agreement on e-discovery, the Court retains its discretion to give further directions on e-discovery, on application, or of its own accord⁸.

The requirement for an Electronic Documents Discovery Questionnaire (“EDDQ”)

An EDDQ is a standard form questionnaire, covering information on, *inter alia*, the scope (e.g. date range, custodians) and databases on which a party intends to carry out e-discovery. This information is intended to help determine what a “reasonable search” is, and includes consideration of the ease and expense of retrieval of electronic documents, their availability, and the significance of electronic documents that may be located by the search.

Where the PD applies, parties are required to serve a draft EDDQ with their first pleading (i.e. with the Statements of Claim and Defence respectively).

Parties are then required to file a completed EDDQ, verified by a Statement of Truth, at least seven days before the first Case Management Conference.

At the same time, parties are also required to file an Information Sheet, summarising matters on which there is agreement (or not) in respect of e-discovery.

SOME PRACTICAL TIPS

Reducing search parameters

To reduce cost and streamline the e-discovery process, if possible, it is helpful to restrict the scope of e-discovery, not only via keywords, but also, as mentioned above, in stages, or by elimination of certain categories of documents (e.g. by reference to date range, storage device) or any combination thereof.

For example, where the concern is that technical drawings may not be caught by keyword searches, a proportional approach may involve⁹ (1) identifying such drawings by searches for image file formats, file names, and file creation / modification dates, (2) manually reviewing those specific search results, and (3) thereafter excluding such file formats entirely from the keyword searches.

Selecting appropriate keywords

Start with selecting specific keywords, instead of broader search terms. Examples of specific keywords would include¹⁰ (1) unique reference numbers (e.g. client account number), (2) project or product names, (3) words identifying key witnesses (e.g. email addresses, contact numbers, initials), and (4) significant events (e.g. location of an important meeting or short-hand reference to an event). Words common in daily usage or industry parlance should obviously be avoided.

⁸ See also *Surface Stone v Tay Seng Leon* [2011] SGHC 223 at [93], where it was said that the Court could override the parties’ agreement not to have an e-discovery protocol.

⁹ By analogy with *Surface Stone v Tay Seng Leon* [2011] SGHC 223 at [95].

¹⁰ See *Global Yellow Pages v Promedia Directories* [2013] 3 SLR 758 (HC) at [55]. Interestingly at [63] it was said that where keywords are disputed the Court should “endeavour to aid the party seeking discovery by giving more weight to his proposed keywords... because if the party from whom discovery is sought complies with the court order for discovery by way of particular keywords, that will discharge his discovery obligations at that stage.”

For a party from whom discovery is sought, a simple way to determine if a keyword search requested is insufficiently specific is to run the search and note and assess the number of hits¹¹. That information will also inform arguments on whether the discovery requested is proportional and/or necessary.

Fully utilising tools

The features of the search tools available should be fully utilised. For example, depending on the technology available, searches used may not be restricted to simply keywords "X Y Z". Instead, Boolean searches such as "X w/5 of Y" (i.e. "X" within 5 characters of "Y") may be considered.

Professional e-discovery platforms will include tools such as:

- De-duplication.
- Tag systems – these allow document reviewers to attach various "tags" to documents – for example, a "privileged" tag, or a "hot" tag for "smoking gun" documents.
- Multi-level reviews – these allow different document reviewers to cross-check the exercise performed, with comments from each reviewer preserved. The tools may be configured such that, for example, the second-level reviewers only check a particular segment of the documents (perhaps those marked with an "unclear" tag).

Conclusion

E-discovery is now a feature of the disputes landscape. Properly managed, e-discovery offers parties, their solicitors and the court involved in the dispute an efficient and accessible platform for the production and access of documentation. Aside from missing these opportunities, those who ignore e-discovery can expect to face costs penalties.

¹¹ See *Global Yellow Pages v Promedia Directories* [2013] 3 SLR 758 (HC) at [61].

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.



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