

# Hong Kong High Court Procedure E-Discovery: Practice Direction Effective September 1, 2014

August 28, 2014

## Mandatory application of e-Discovery

- **Mandatory** application of e-Discovery to cases:
  - commenced in or transferred to the Commercial List after 1 September 2014; and
  - the claim or counterclaim exceeds HK\$ 8 million; and
  - there are at least 10,000 documents to be searched for the purposes of discovery.
- For the Commercial List, see Practice Direction SL1.1 – in practice, cases assigned to the commercial list include trade disputes, financing disputes and bank–customer disputes for commercial and private banking.

## Non-mandatory application of e-Discovery

- Non-mandatory application of e-Discovery to:
  - new Commercial List cases (commenced or transferred after 1 September 2014) whenever the parties agree - for whatever amount in dispute and no matter how many documents are involved<sup>1</sup>;
  - old Commercial List cases (commenced or transferred on or before 1 September 2014), but which have not reached the discovery stage;
  - new Commercial List cases that do not meet the thresholds of HK\$ 8 million for the claim or counterclaim and at least 10,000 documents to be searched for the purposes of discovery; and
  - cases in any other Court List regardless of the monetary amount in dispute and the number of documents involved (although in practice e-Discovery will more likely be used in cases meeting the thresholds of HK\$ 8 million and at least 10,000 documents).
- The Practice Direction indicates an expectation that e-Discovery will only apply to cases involving at least HK\$ 8 million and at least 10,000 documents. However, we expect that the court will direct the application of e-Discovery in appropriate cases where those thresholds are not met (and not necessarily just on the basis of the cases being exceptional<sup>2</sup>).

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<sup>1</sup> In principle, it seems to us that a party having originally consented can change its position and apply to the court for disapplication of e-Discovery, which in principle the court may direct where the court concludes that the application of e-Discovery is clearly inappropriate.

<sup>2</sup> For example, if the amount in dispute exceeded the HK\$ 8 million threshold but a party could only demonstrate that 9,750 documents needed to be searched for discovery purposes. Or if the amount in dispute was less than HK\$ 10 million but there were many documents more than 10,000.

## Types of documents

- It is expected that the documents will normally be electronic documents, but in principle the definition is wider than electronic documents.
- It is expected that the documents will normally be e-mails.
- However, it would certainly also include other electronically stored information such as spreadsheets, word documents, calendar entries, instant messaging logs, and voice logs – each conversation, entry, or log to be treated as one document.
- It would also include other forms of documents, e.g. contract notes, statements of account, images and videos saved in mobile phones and deleted data stored in back-up systems.

## Timing of an application

- The timing for an application is not stipulated.
- However, in practice, agreement must be reached, or an application to court made, no later than shortly after close of pleadings.
- Clearly, consideration should be given to agreement to, or an application for, an e-Discovery application at the earliest possible opportunity and in particular at the time of pleadings. Specifically, the parties are required to serve the Electronic Documents Discovery Questionnaire (EDDQ) in draft form together with their pleadings, starting with the Plaintiff at the time of service of the Statement of Claim and/or the Defendant at the time of service of the Defence (and Counterclaim, if any).
- In the first place, the party proposing e-Discovery should write to the other side to try to agree upon the precise scope of e-Discovery.
- The Practice Direction requires the parties to discuss the use of technology for Electronic Documents for the purposes of e-Discovery before the 1<sup>st</sup> Case Management Conference (CMC). As described further below, the parties' e-Discovery discussion should cover key issues including the sources of electronic data, relevant custodians, the scope and form of production and search methodologies.

## Primary objective and benefit of e-Discovery: discovery normally limited to directly relevant documents

- When the Hong Kong Judiciary reformed its civil justice procedure, it declined to narrow the scope of discovery, so that the default position is that discovery must be produced by parties on the basis of the *Peruvian Guano* test, i.e. not merely documents directly relevant to the issues in dispute but also documents indirectly relevant, including documents that could lead the other party on a chain of inquiry that could end up helping their own case or damaging the other party's case. However, a new rule was introduced, RHC Order 24, rule 15, that gave the court power to limit the scope of discovery, which in practice has been relatively rarely used.
- Under e-Discovery, the default position is that a search only needs to be made for **directly relevant** documents.
- Under e-Discovery, a party requiring more than directly relevant documents to be provided, must (in the absence of the agreement of the other party) apply to court and persuade the court that discovery on a wider basis is appropriate.
- Such an application for background discovery can **normally** only be made after discovery on a direct basis, and the exchange of all other factual and expert evidence. It will need to be supported by an affidavit demonstrating why wider discovery is **"necessary" (not merely desirable)** to resolve the real issues in dispute and identifying the likely cost of the discovery.

- Exceptionally, an application can be made earlier.

#### A “reasonable search”

- The Practice Direction also limits the search for Electronic Documents to a “reasonable search”, taking into account the number of documents, the nature and complexity of the case, the significance of the documents, the availability of the documents from other sources, and the relative ease and expense of retrieving any particular Electronic Document.
- As to ease and expense of retrieving any particular Electronic Document, the Practice Direction lists the following factors:
  - accessibility (a key factor – see below);
  - location;
  - likelihood;
  - cost, if not readily available<sup>3</sup>;
  - cost of disclosure; and
  - likelihood of material alteration in recovery, discovery or supply.

#### e-Discovery search of Electronic Documents to be limited to “reasonably accessible” documents

- A core concept underlying a party’s e-Discovery obligations is “*reasonably accessible data*”. The Practice Direction stipulates that: “*The primary source of discovery of Electronic Documents is normally reasonably accessible data*”. Electronic data stored on the party’s “computer systems, servers, back-up systems and other electronic devices and media” are generally considered “reasonably accessible”, depending in part on any alterations or developments of the party’s hardware or software systems.

#### Searches limited to time periods or to be conducted in stages

- The Practice Direction contemplates that searches of electronic storage systems may be limited, in appropriate cases, to specified time periods, or categories of documents or sources, or may be conducted in stages, e.g. limited in the first place to certain categories, and subject to further searching if required.

#### Keyword searches

- The Practice Direction touches very lightly on the topic of key word searches:
  - Ideally, there will be a full review of Electronic Documents.
  - However, a key word search may be appropriate, if a full review of the Electronic Documents would be “unreasonable”.
  - Although keyword searches may not work – either missing documents or not being selective enough.
  - So additional / other approaches may be better – Concept Searching; Data Sampling.

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<sup>3</sup> Cost does not appear to be a relevant factor if documents are readily available. There is scope for argument as to what is “readily available”.

**Metadata**

- Documents collected through the e-Discovery identification and retrieval process should if possible be provided in native format, preserving metadata.
- However, where not produced in native format, the documents should usually be provided in searchable Optical Character Recognition (“OCR”) format.
- Where not provided in native format, the court will only require production of metadata relating to documents if the relevance and materiality of the metadata is justified by the party seeking it relative to the time and cost involved.
- Note, there is no obligation to allow the other party to go behind the documents actually produced pursuant to the e-Discovery process. Obviously, if the other party thinks that something has gone wrong with the process, and much less is being produced than should be, then they are entitled in principle to make applications for further and better discovery or specific discovery in the normal way, although in the first place they would be expected to seek to resolve the matter through correspondence.

**Expected potential aspects of discovery of electronic documents to be discussed on or before the 1<sup>st</sup> CMC**

- The following aspects of e-Discovery are expected to be discussed by the parties:
  - sources and categories of electronic documents within the parties’ control;
  - the scope of a reasonable search;
  - appropriate specific limits on searching, e.g. time periods, custodians, categories of documents;
  - search techniques;
  - use of software;
  - identifying duplicate electronic documents;
  - dealing with privileged documents;
  - staged discovery;
  - preservation of electronic documents pre-trial;
  - lists of documents (format of listing, and use of metadata to list);
  - formats for providing documents (ordering; attachments);
  - exchanging electronic documents;
  - redacting documents;
  - special technology to access electronic documents;
  - the costs involved and sharing the costs;
  - whether to digitize paper documents as well; and
  - presenting documents to the court at trial, including formatting.
- We advise clients also to consider and discuss parameters regarding anticipated e-discovery in a foreign jurisdiction, and the potential obstacles to export and/or disclosure of electronic data under local laws (e.g., data privacy and state secrecy laws).

## **EDDQs**

- Parties are required to serve the EDDQ in draft form together with their pleadings, starting with the Plaintiff at the time of service of the Statement of Claim and/or the Defendant at the time of service of the Defence (and Counterclaim, if any).
- Whilst a draft EDDQ must be served at the time of service of pleadings, a signed (final) version must be filed with the Court at least 7 days before the 1<sup>st</sup> CMC.
- The Information Sheet for the 1<sup>st</sup> CMC must contain a summary of matters relating to the discovery of electronic documents on which the parties agree and on which they disagree.

## **Verification of final EDDQ by statement of truth**

- The signed EDDQ must be verified by a statement of truth.
- The person providing the statement of truth may be:
  - a party;
  - any employee; or
  - an external electronic discovery specialist or technical specialist in electronic documents.

As is already the case with pleadings, the party cannot delegate the verification to the party's solicitors; it must be as directly as possible a representative of the party.

- The requirement to verify by a statement of truth had previously been confined to pleadings. It appears that the judiciary consider it is important that the EDDQ be similarly verified given that the contents will control and shape the scope and nature of discovery, discovery is a critical aspect of the litigation process, and the discovery process has historically been prone to abuse in Hong Kong litigation.
- One protection is that there is no such requirement for draft EDDQs.
- However, care will obviously need to be taken with the verification of the final version of the EDDQ.
- Note 4 to the standard form EDDQ states:
  - “Further facts and matters may come to the parties’ attention over the course of the proceedings which affect the answers to the EDDQ. Where detailed information is not yet available at the time the EDDQ is first answered, parties should give such information as they can, and supplement or amend their answers when further information is available. Answers should be updated by notifying other parties and the Court without undue delay, and in any event before each CMC at which discovery is likely to be considered.”
- In our view, particularly bearing in mind this note, parties would be well advised to include a qualifying statement at the beginning of the EDDQ that will have the effect of qualifying the statement of truth.
- Further, in our view, all of the questions can, and normally should, be subject individually to qualifications.

## **Privileged documents - inadvertent disclosure – “clawback agreements”**

- The practice direction recognizes the e-Discovery brings with it an increased risk of inadvertent disclosure of privileged documents. Parties are therefore expected to reach “clawback agreements” to give parties an opportunity to retrieve such documents.

## Document preservation notices

- The practice direction for the first time codifies best practice, i.e. the dissemination of a document preservation notice “as soon as litigation is contemplated”. In practice, this may occur well before a party is served with process. For example, litigation can be deemed contemplated when an opposing party orally communicated an intention to bring suit, well before a claim is filed in court.
- Parties should carefully consider the scope and wording of any document preservation notice, so that it strikes the right balance between satisfying your e-Discovery obligation and minimizing disruption to the business. Issues to consider include: (i) who within your organization may have relevant documents and should receive the notice; (ii) how much to disclose in the preservation notice about the underlying litigation; (iii) requiring recipients to maintain confidentiality regarding the notice and only discuss questions with designated contact persons (e.g., in-house counsel).
- Potentially controversially the practice direction (question 7 of the EDDQ) requires production of a copy of any document retention policy or at least an outline of the policy. It is recommended that an outline be produced rather than a copy and that, for regular litigants, a standard form outline be prepared for use generally.

## Recommended immediate practical steps

- Prepare / review standard form document preservation notice.
- Prepare an outline of the document retention policy.
- Reviewing existing / anticipated litigation to identify which cases may be or are likely to be subject to the practice direction.
- Review electronic storage / retrieval processes with a view to anticipating potential, likely challenges in complying with the practice direction and in particular preparing an EDDQ.
- Anticipate the need to provide a statement of truth to verify the final version of the EDDQ:
  - who is likely best placed to sign the statement of truth; and
  - what qualifying language is likely to be needed to be incorporated into an EDDQ?
- Build into budgeting process the cost of preparation of an EDDQ at the time of preparation of the first pleading.

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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