

Hong Kong's new electronic discovery procedures

By Ronald Yu and Paul Taylor

Introduction

Asian countries have trailed behind their counterparts in the common law jurisdictions regarding the development of procedures for the acquisition and disclosure of electronic documents. This is slowly changing. The introduction of a new Practice direction (PD) in July 2014, which implements a pilot scheme for the discovery and inspection of electronically stored documents in the Commercial List, is the most significant electronic evidence-related development in Hong Kong over the past two years.

Singapore was the first common law jurisdiction in Southeast Asia to introduce formal procedures for the disclosure of electronic documents with its Practice Direction 3 of 2009 (PD3). PD3 was issued by the Singapore Supreme Court in October 2009, and subsequently amended in 2012. The practice direction originally provided for either an 'opt-in' framework to which parties could agree, or allowed the Supreme Court to order discovery. Two and a half years after its introduction, PD3 was amended by Singapore's Supreme Court through its Practice Directions Amendment No. 1 of 2012, which took effect on 1 March 2012, that gave the court the power to apply the PD3 framework whenever appropriate, without consent of the parties, particularly in relation to certain categories of cases listed in the practice direction. Amendment No. 1 also included other updates, such as nomenclature changes, a 'Checklist of E-discovery Issues' and an updated test of proportionality and economy.¹

Hong Kong became the second jurisdiction to issue a practice direction, with recently introduced Practice Direction SL1.2² (PD SL1.2) which implements a pilot

scheme for the discovery and inspection of electronically stored documents in the Commercial List. Other Asian countries, notably South Korea and Japan are still considering the formal implementation of electronic discovery regimes. Although PD SL1.2 went into effect on 1 September 2014, it was already referenced in the August 2014 case of *Chinacast Education Corporation v Chan Tze Ngon*.³

Several explanations have been put forth for the slow introduction of similar practice directions or regulations among Asian countries. For instance, some have attributed Japan's delays to a cultural reluctance to litigate,⁴ which limits demand for such services. Other jurisdictions have shortages of trained experts,⁵ or are reluctant to adopt new discovery technologies, such as technology-assisted review (for instance, predictive coding), which are still controversial, even in other common law jurisdictions, particularly ones that are dependent on the efficacy of the technology in handling Asian languages.

The challenges of Asian language

Asian languages bring about particular challenges for software code. For a time, many popular tools, such as EnCase,⁶ lacked support for a full set of Asian languages.

Support for Asian languages, at a minimum, requires the appropriate character sets, which is sometimes more complex than it might initially seem. For

Commercial List', available at <http://legalref.judiciary.gov.hk/doc/npd/eng/PDSL1.2.htm> .

3 *Chinacast Education Corporation & Ors. v Chan Tze Ngon & Ors.*, HCA1062/2012

4 Guest Comment by David Sannar, '2014 and Beyond – Ediscovery in Japan & South Korea' *Legal Insider*, 25 February 2014, <http://www.legaltechnology.com/latest-news/guest-comment-2014-and-beyond-ediscovery-in-japan-south-korea/> .

5 Regional Asia Pacific Information Security Standards Forum Proceedings, Recent Security Development, 88, <http://raiseforum.org/pdf/ITU-T%20Update-Cybercrime%20Law-S5.pdf> .

6 EnCase version 4 introduced support for Unicode in 2004, for which see Guidance Software, EnCase Forensic Edition User Manual (Version 4, 2004), 309 – 324. The 'Customer Supported' languages offered in EnCase Version 5.2 included Chinese, Japanese and Korean but no other Asian languages, for which see EnCase® eDiscovery v5.2 Administration Guide, (2007-2013), 154.

1 Significant Modifications to Singapore E-Discovery PD3 of 2009, <http://litigationedge.asia/2012/03/14/modifications-to-singapore-e-discovery-pd3/>. See also Summary of Amendment No. 1 of 2012 to the Supreme Court Practice Directions, <http://app.supremecourt.gov.sg/data/doc/ManagePage/4122/Summary%20of%20amendments%20to%20Part%20IVA%20of%20the%20PD.pdf> .

2 The full title is 'PRACTICE DIRECTION – SL1.2, Directions made by the judge in charge of the Commercial List pursuant to Order 72, R 2(3) of the Rules of the High Court, Pilot scheme for discovery and provision of electronically stored documents in cases in the

instance, Hong Kong Chinese language documents and publications typically employ Traditional Chinese scripts. However, Hong Kong has trade links with China and Taiwan. China uses Simplified Chinese script, and Taiwan uses Traditional Chinese. This means that any electronic discovery system for Hong Kong should be able to handle both Traditional and Simplified Chinese character sets. For completeness, there also should be support for the Hong Kong Supplementary Character Set (香港增補字符), a supplemental set of 5,009 characters added to the Traditional Chinese character set.⁷

When analyzing Asian language documents, systems must also be able to manage the following:

1. Different character orientations, mixes of both ideographic and alphabetic characters (as is the case with Japanese).
2. Multiple languages; for instance, text in Japanese and Chinese publications may be oriented vertically or horizontally and may include foreign words in different orientations.
3. Segmentation of text: There are variances in the use of (or lack thereof) characters to segment text among different languages. For example, in the Thai language, words in a sentence are written contiguously with no separators between them.⁸ The reduction of a word into a number of segments is another potential challenge, because there are usually several ways to segment words in a sentence.⁹
4. Systems must also deal with different languages that use the same or similar scripts. For example, although they are different

⁷ Office of the Government Chief Information Office, The Government of the Hong Kong SAR, Common Chinese Language Interface FAQ, www.ogcio.gov.hk/en/business/tech_promotion/ccli/faq/#what_included_hkscs

⁸ In English, words are usually separated by a space character, but words in Chinese, Japanese and Thai often have no separator (sometimes referred to as a 'delimiter') between words. In addition, there are no sentence delimiters in Thai. For additional information please see: Nomura and T. Nakamura, *Machine Translation by Contextual/Discourse Information Processing* available at <http://www.dumbo.ai.kyutech.ac.jp/nomura-ken/mt-e.html> and Oracle: *International Language Environments Guide for Oracle Solaris 11.1* available at: http://docs.oracle.com/cd/E26502_01/html/E29214/glmag.html#glmcx.

⁹ Somnuk Sinthupuan and Surapong Auwatanamongkol, *Thai Sentence Parsing using Genetic Programming*, available at <http://www.ist.cmu.ac.th/intech/paper/InTech0370.pdf>.

languages, the Urdu alphabet is derived from, and looks similar if not identical, to Arabic script.

5. Then there is the need to support the appropriate Asian character sets (including Chinese, Japanese and Korean (called 'CJK' languages) double-byte (32-bit) character sets) and also a number of character coding standards. For example, while ISO 10646 and Big-5 coding standard are both used in Hong Kong, the GB (Guo Biao) coding standard is used in mainland China, and the CNS Code and Big-5 coding schemes are used in Taiwan.¹⁰

Content search challenges

Content searching techniques must also be appropriately adapted for Asian languages. For instance, the numbers of available character sets and standards involved may complicate context searching. In Japanese, for example, it might be necessary to search among six different character sets: half-size English, full-size English, full-size Kanji, full-size Hiragana, full-size Katakana and half-size Katakana. These in turn can be represented using JIS, shift-JIS, EUC and Unicode standards making for 24 potential matches for every single letter and word being searched.¹¹

Compound words present additional challenges. In some languages, individual words can take on different meanings when combined, or the same English word can be represented with different combinations of characters. For instance, 'computer' is often represented in Chinese speaking areas as 电脑 (pronounced in Mandarin as 'diàn nǎo'), which literally translates to 'electric brain'. The word 'computer' can also be translated as 計算機 (pronounced 'jìsuànjī'), which could be translated as 'meter count machine' or 'calculate machine'.¹²

¹⁰ Office of the Government Chief Information Office, The Government of the Hong Kong SAR, Common Chinese Language Interface FAQ, www.ogcio.gov.hk/en/business/tech_promotion/ccli/faq/#what_included_hkscs.

¹¹ John Bace, 'Cope With Complex Asian Issues Affecting E-Discovery By Using A Full-Service Provider,' *The Metropolitan Corporate Counsel*, 18 April 2013, <http://www.metrocorpccounsel.com/articles/23319/cope-complex-asian-issues-affecting-e-discovery-using-full-service-provider>.

¹² It should be noted that the Chinese use a different set of words for 'calculator' (計算器).

Grammar must also be considered – for instance, in Japanese, the negative is typically placed at the end of the sentence. This means that a proper analysis must evaluate complete sentences to ensure that the meaning of the content is correctly conveyed.

The implications for content searching are significant. A document analysis, whether performed manually or with an automated tool (such as Technology Assisted Review), must not only account for the different compound terms, but also grammatical rules or the implications of, for example, an omission of a single character or, in the case of ideographic languages, the omission of one or more strokes or the inclusion of an extra stroke, that can profoundly change the meaning of the extracted content.

Finally, spoken Asian languages present challenges for automated audio analysis systems, which must distinguish between different tones (Cantonese Chinese, for instance, has six tones and the mishearing of a tone could change the meaning of a word) and cope with different word usages, slang, and different accents.

Data format differences

Not only are there multiple character representation and input standards to contend with, but also different data formats. For instance, e-mail collected in the U.S. is almost universally from either a Microsoft Exchange (.PST) or Lotus Notes (.NSF) environment. However, e-mail collected in Asian countries, particularly those where Chinese, Hangul (Korean) or Japanese characters are used, could be stored in formats that are not familiar to some electronic discovery systems.¹³

To further complicate matters, there are currently no agreed upon standards specific to such technologies.¹⁴ Yet the rising volumes of data in electronic form and continuing improvements to automated tools have added pressure on governments for the need for formal procedures regarding the disclosure of electronic documents.

¹³ *Comprehending the Challenges of Technology Assisted Document Review: Predictive Coding in Multi-Language E-Discovery*, (Ubic White Paper, 2013), http://www.ubicna.com/en/marketing/PDFs/WhitePaper_2013-07-03.pdf.

¹⁴ Mathieu van Ravenstein and Jon Shaman, 'Multilingual Review in the eDiscovery Process' *Today's General Counsel*, 25 October 2013, 28 – 29, <http://digital.todaysgeneralcounsel.com/Vizion5/viewer.aspx?issueID=21&pageID=30>.

Hong Kong's new Practice Direction

Development

In September 2013 the Hong Kong Judiciary revealed that it was engaged in creating a pilot scheme for the discovery and inspection of electronically stored documents in the Commercial List,¹⁵ which is governed by Hong Kong Practice Direction – SL1.1. After several months of study, including the review of similar initiatives in other common law jurisdictions, notably England and Wales, Australia¹⁶ and Singapore, and discussions with legal and technical experts over questions such as whether to place limits in terms of numbers of document, data volumes or both, data formats and language issues, PD SL1.2 was officially published in July 2014.

Application and definitions

Practice Direction SL1.2 aims to provide a framework for reasonable, proportionate and economical discovery and supply of Electronic Documents under Order 24 of the Rules of the High Court (RHC).¹⁷ In addition to the main text, it includes four schedules:

- I. Guidance Notes on Discovery of Electronic Documents
- II. Electronic Documents Discovery Questionnaire ('EDDQ')
- III. Guidance Notes on the EDDQ
- IV. Sample Protocol for Discovery of Electronic Documents

The Practice Direction applies to all actions started in or transferred to the Commercial List where the claim or counterclaim exceeds HK\$8 million, and there are at least 10,000 documents to be searched for the purposes of discovery; or where the parties agree to be bound by the Practice direction or where the court directs the parties to follow PD SL1.2.¹⁸ The Practice Direction broadly defines 'document' to mean

¹⁵ 'Electronic Discovery & Records Management – Tip of the Month: E-Discovery Developments in Singapore and Hong Kong', Mayer Brown Newsletter, 27 September 2013, <http://www.mayerbrown.com/Electronic-Discovery--Records-Management---Tip-of-the-Month-E-Discovery-Developments-in-Singapore-and-Hong-Kong-09-27-2013/>.

¹⁶ Which issued its Practice Note CM 6 – Electronic technology in litigation in September 2009.

¹⁷ Para 2 PD SL1.2.

¹⁸ Para 1 PD SL1.2.

'anything upon which data, information or evidence is recorded in a manner intelligible to the senses or capable of being made intelligible by the use of equipment and includes 'electronic documents' in its definition.¹⁹

'Electronic documents', in turn, are defined as any data or information held in electronic form that are stored on any device, including portable devices, memory sticks, mobile telephones, computer systems, electronic devices and media, servers and back-up systems. The definition covers e-mails²⁰ and other electronic communications such as text messages and voicemail, word-processed documents and files, images, sound recordings, videos, web pages, databases, metadata²¹ and other embedded data not typically visible on screen or in a print out. More importantly, the definition also includes data or information held in electronic form that has been deleted but not yet overwritten.²²

Prevention and other obligations

As soon as litigation is contemplated, the parties' legal representatives must notify their respective clients of their preservation obligations (for instance, that discoverable documents, including electronic files that might be deleted either in accordance with a document retention policy or in the ordinary course of business, must be preserved²³), and advise them to issue appropriate instructions to employees or any other custodians. Legal representatives should also advise their clients to maintain a well-organized and

readily searchable system and filing management of electronic documents for the purposes of discovery.²⁴

Electronic documents need to be preserved in their native formats, that is in the original form in which the electronic documents were created by a computer software program,²⁵ in a manner which preserves the associated metadata such as the date of creation of each electronic document,²⁶ even if those same documents are later disclosed in another format.²⁷

The Practice Direction recognizes the possibility that metadata or other useful information relating to documents may not be stored within the documents.²⁸ Where a party requests the discovery of metadata or forensic image copies of electronic documents that are disclosed – for example in relation to a dispute concerning authenticity – the party making the request must demonstrate the relevance and materiality of the requested metadata and justify the cost and burden of producing it.²⁹

Where electronic documents are subsequently disclosed in another format, they should be rendered in such a way as to include any pertinent information (for instance, 'track changes', 'comments and mark-up', 'speakers notes', 'hidden rows', 'hidden columns', 'hidden worksheets', etc.) and information should be rendered in colour where colour is present and material to the comprehension of the content.³⁰ Furthermore, where the court has directed, or the parties have agreed not to provide the electronic documents in their native format, the parties should provide searchable optical character recognition (OCR)³¹ versions of the disclosed electronic

19 Para 3(3) PD SL1.2.

20 PD SL1.2 notes that there are various types of e-mail system (for example, Outlook, Lotus Notes, web-based accounts), whether stored on personal computers, portable devices or in web-based accounts (for example, Yahoo, Hotmail, Gmail). See Footnote 17, PD SL1.2.

21 PD SL1.2, 3(7) defines Metadata' is data about data. In the case of an Electronic Document, Metadata is typically embedded information about the document, in addition to the user generated content, some of which is not readily accessible once the Native Electronic Document has been converted into an electronic image or a paper document. It may include, for example, the date and time of creation or modification of a word-processing file, or the author and the date and time of sending an e-mail. Metadata may be created automatically by an operating system, or manually by a user.' It is suggested that this should read '...the *purported* date and time of creation or modification of a word-processing file, or the *purported* author and the *purported* date and time of sending an e-mail ...'.

22 Para 3(4) PD SL1.2. This is, more or less, the definition proffered by Burkard Schafer and Stephen Mason in Stephen Mason, *Electronic Evidence* (3rd edn, LexisNexis Butterworths, 2012), 2.03.

23 Para 7 PD SL1.2.

24 That is, to ensure that potentially relevant electronic documents, which might otherwise be deleted in the ordinary course of business or under a document retention policy, are preserved until the final determination of the litigation. Sch. 1 Para 7 PD SL1.2.

25 Para 3(8) PD SL1.2.

26 Para 27 PD SL1.2.

27 Para 7 PD SL1.2.

28 Footnote 7 PD SL1.2.

29 Para 25 PD SL1.2.

30 Para 28 PD SL1.2.

31 PD SL1.2 defines Optical Character Recognition (OCR) as 'the computer-facilitated recognition of printed or written text characters in an electronic image in which the contents cannot otherwise be searched electronically. See: Para 1(9) PD SL1.2. Except in the case of redacted information, parties should not unnecessarily alter the OCR text, which they maintain within their system at the time of production or discovery. A party should ensure that the OCR of a redacted section of a document is not provided, but that the OCR of the remainder of the document is provided. Footnotes 10,12 PD SL1.2.

documents, unless there is a good reason not to do so.³²

Case management conference

Prior to the first Case Management Conference (CMC), the parties need to discuss how they will use technology, both in the management of electronic documents and the conduct of proceedings, to:

1. Create lists of electronic documents to be disclosed,
2. Conduct the actual process of discovery by the provision of documents and information about electronic documents, and
3. Present documents and other materials at trial.

The parties can choose to adduce evidence at trial in the format of electronic documents, but may need to bring along their own devices equipped with any necessary software or specialised technology for presentation to the court.³³

Electronic document lists

The Practice Direction allows parties to agree to provide document lists in an electronic file in .csv (comma-separated values) or other agreed format. Documents should be listed individually. If a party already possesses data relating to the documents that make this possible, such as type of document and date of creation, this may be acceptable, providing each electronic document is given a unique reference number so far as is possible. The parties also may list documents in an order other than date order where a different order would be more convenient,³⁴ but must be consistent in the way they list electronic documents with consistent column headings repeated on each page of the list. Discovery list numbers used in any supplemental lists of electronic documents should be unique and should run sequentially from the last number used in a previous list.³⁵

³² Para 29 PD SL1.2.

³³ Para 32 PD SL1.2.

³⁴ But attachments should immediately follow their parent document even where the date of the attachment differs from that of the parent document.

³⁵ Para 26 PD SL1.2.

Privileged documents and the process of discovery

In their discussions prior to the first CMC, the parties also need to identify privileged or other non-disclosable documents (for instance, those involving trade secrets), identify areas of agreement and disagreement, and discuss discovery-related procedures, methodologies and scope. The Practice Direction suggests such discussions cover:

1. The categories of electronic documents within the parties' control, the computers, storage systems, devices and media on which any relevant electronic documents may be found. Note that PD SL1.2 envisages that the primary source of discovery is normally 'reasonably accessible data'. While a party may request specific discovery of electronic documents that are not reasonably accessible, it must demonstrate that the relevance and materiality of these documents and justify the cost and burden of retrieving and producing them.³⁶
2. Document retention policies.
3. The scope of the reasonable search (as required by Order 24, rule 15A of the RHC).
4. The use of tools and techniques to reduce the burden and cost of electronic discovery, including:
 - a. The use of agreed keyword searches,³⁷ concept searching,³⁸ data sampling,³⁹ technology assisted review or other technologies or software tools. PD SL1.2 encourages parties to use keyword searches and other automated search techniques where a full review of each and every electronic document would be

³⁶ Under Order 24, rules 7 or 15A RHC See Para 21 PD SL1.2.

³⁷ Defined in PD SL1.2 as 'a software-aided search for words across the text of an Electronic Document'. Para 3(6) PD SL1.2.

³⁸ Defined in PD SL1.2 as 'a technological tool or method that uses sophisticated statistical and linguistic models to understand the meaning behind search terms by identifying word patterns and occurrences in Electronic Documents which are then translated into concepts to be used to search information stored electronically which matches the translated concepts'. Para 3(1) PD SL1.2.

³⁹ Defined in PD SL1.2 as 'the process of checking data by identifying and checking representative individual Electronic Documents.' Para 3(2) PD SL1.2.

unreasonable. It also accepted that such search techniques can be supplemented with other technologies where such automated methods of searching are insufficient. The PD warns parties to consider the limitations of such tools with certain types of files – for example document images from scanners or electronic facsimile transmissions, photographs, videos and audio recordings are not readily text searchable – and that the injudicious use of automated search techniques may result in failure to find important electronic documents which ought to be discovered; and may result in the retrieval of excessive numbers of irrelevant electronic documents, which if discovered would place an excessive burden in time and cost on the party to whom discovery is given.⁴⁰

b. Confining the discovery of electronic documents or certain categories of electronic documents to specific date ranges, custodians, locations, categories or types.⁴¹

c. Methods of identifying duplicate electronic documents.

d. Dividing the discovery process (what PD SL1.2 calls a 'staged approach') with discovery first being limited to specific categories of documents with the categories subsequently broadened or limited depending on the results initially obtained. Where electronic documents are best viewed using technology not readily available to the party entitled to discovery, and that party reasonably requires additional access facilities, PD SL1.2 specifies that the party making discovery shall

co-operate in making available to the other party such reasonable additional facilities to obtain access to those electronic documents.⁴²

5. Methods used to:

a. Identify privileged and other non-discoverable electronic documents,

b. Redact electronic documents where appropriate,⁴³ and

c. Deal with privileged or other documents which have been inadvertently disclosed.⁴⁴

6. The preservation of electronic documents particularly to prevent their loss prior to trial.

7. The formats in which electronic documents are to be provided and the methods to be employed. The parties may agree, or be required by the court, to convert the electronic documents into file formats recognised by the computer or audio visual facilities available in court.⁴⁵

8. The basis of charging for or sharing costs regarding the provision of electronic files and whether such arrangements are final or are subject to re-allocation in accordance with any subsequent order for costs.

9. Whether paper documents should be scanned for discovery and the format in which these scanned documents should be exchanged (e.g. as a text-searchable pdf document).

10. Agreement on the exchange of data in an electronic format using agreed fields.⁴⁶

42 As may be appropriate in accordance with Order 24, rule 15A of the RHC. See Para 31 PD SL1.2.

43 If a party wishes to redact or make alterations to an electronic document or documents, that party must inform the other party that redacted or altered versions are being supplied and must ensure that the original un-redacted and unaltered version is preserved, so that it remains available if required. However, this does not apply where the only alteration made to the document is an alteration to the metadata as a result of the ordinary process of copying or obtaining access to the document. Para 30 PD SL1.2.

44 Parties are encouraged to enter into 'claw back' agreements setting out detailed protocols to deal with the inadvertent disclosure of electronic documents and to provide details of any such agreement to the court as part of the Information Sheet for the first CMC. Footnote 3 PD SL1.2.

45 Para 33 PD SL1.2.

46 Paras 8, 9, 20 PD SL1.2.

40 Footnote to Para 9(3), paras 22, 23, 24 PD SL1.2.

41 Para 19 PD SL1.2 states: Depending on the circumstances, it may be reasonable to search all of the parties' electronic storage systems, or to search only part of those systems. For example, it may be reasonable to decide not to search for electronic documents which came into existence before a particular date, or to limit the search to electronic documents in a particular place or places, or to electronic documents falling into particular categories.

Court interventions

Parties failing to reach an agreement regarding the discovery of electronic documents ought to seek directions from the court at the earliest practical date.⁴⁷ Should a party give discovery of electronic documents without prior discussion with the other parties as to how to plan and manage such discovery, the court may require that that party conduct further searches, repeat any steps it has carried out and may further consider making a wasted costs order.⁴⁸

The court can also provide direction in relation to discovery on its own, or on application by a party if it considers that the parties' agreement in relation to the discovery of electronic documents to be inappropriate or insufficient. A court can further order that the parties complete and exchange a revised and updated Electronic Documents Discovery Questionnaire (EDDQ), including providing answers to any additional questions that arise, within 14 days or such other period as the court may direct.⁴⁹

The Electronic Documents Discovery Questionnaire (EDDQ)

In a similar manner to its counterpart in England and Wales under Practice Direction 31B (the Electronic Documents Questionnaire), the EDDQ provides a means for the parties to obtain and exchange the requisite information in a structured manner. The questionnaire is designed to help the parties reach agreement on a proportionate and cost-effective manner of effecting discovery and the supply of electronic documents with regard to the underlying objectives under Order 1A of the RHC.⁵⁰ The EDDQ allows parties to propose limiting the search to specific date ranges in addition to other proposals regarding the extent of the search.

Questions are included to provide relevant information about the various issues that are relevant to the parties' electronic documents, communications and database systems (this includes document management systems); data formats for electronic documents (whether the document was stored as a Microsoft Word or equivalent, Microsoft Excel or

equivalent, document image or some other format), document retention policies, past instructions, if any, to preserve electronic documents, the use of encrypted files, and data custodians.

The parties can also identify problematic geographical locations of files (such as locations that might hamper the collection of data) and legacy application systems that may contain potentially relevant data.

Service obligations

The parties must serve a draft EDDQ when they serve their respective pleadings with a view to reaching agreement on the scope and extent of the discovery exercise and tools to be used. A signed, completed EDDQ verified by a statement of truth⁵¹ must be filed with the court, together with the Information Sheet for the first CMC,⁵² no later than seven days before the first CMC.⁵³

An important evolutionary step

Practice Direction SL1.2 represents an important step in the evolution of the Territory's discovery regime. Hong Kong, whose legal system included rules of the court is based on English common law, significantly updated its Rules of the High Court to implement the Civil Justice Reforms (CJR).⁵⁴ As part of the CJR, Hong Kong had sought to update its discovery regime, moving it away from the broad train of enquiry basis

⁵¹ The person signing the statement of truth must be available to attend the hearing of the first CMC and any interlocutory applications relating to discovery. That person may be a party, its employee or an electronic discovery specialist or digital evidence specialist. Para 14 PD SL1.2.

⁵² The Information Sheet submitted to court should include a summary of the matters on which the parties agree and on which they disagree in relation to the discovery of electronic documents (including agreements on orders and protocols for the discovery and supply of electronic documents). Para 16 PD SL1.2.

⁵³ Schedule 1, Para 10 PD SL1.2.

⁵⁴ The CJR, which came into effect in April 2009, reformed the civil proceedings of Hong Kong's High Court and District Court, except for specialist lists to which the application of the new rules are determined by the judges concerned, and updated some of the rules and procedures of the Hong Kong Lands Tribunal and the Family Court. The underlying objectives of the CJR include increasing the cost-effectiveness of any practice and procedure to be followed in relation to civil proceedings before the court, ensuring cases are dealt with as expeditiously as is reasonably practicable, promoting a sense of reasonable proportion and procedural economy in the conduct of proceedings, ensuring fairness between parties, facilitating the settlement of disputes and ensuring the fair distribution of court resources. See Civil Justice Reform <http://www.civiljustice.gov.hk/eng/home.html>.

⁴⁷ Para 10 PD SL1.2.

⁴⁸ Para 12 PD SL1.2.

⁴⁹ Para 11 PD SL1.2.

⁵⁰ Schedule 1, Para 4 PD SL1.2.

set under *Peruvian Guano*,⁵⁵ towards a test of direct relevance, more in line with the position in England and Wales. In particular Order 24 RHC, which governs discovery, was amended to permit the High Court to replace traditional broad discovery with a more limited regime.

However, Hong Kong chose to retain the *Peruvian Guano* principles because of, among other things, practitioners' arguments that the failure to disclose validly requested documents was more of a problem than not producing sufficient documents, and because of fears that narrower obligations might facilitate the unscrupulous hiding of material documents.⁵⁶ Thus, in a further move towards a test of direct relevance, the new Practice Direction explicitly mentions that it is limited to electronic documents 'directly relevant to an issue arising in the proceedings ... which are likely to be relied on by any party to the proceedings or which support or adversely affect any party's case'⁵⁷ and that 'background' or other electronic documents that might lead to a 'train of enquiry' need not be discovered.⁵⁸ This is also reflected in the stated aims of PD SL1.2 to provide a framework for reasonable, proportionate and economical discovery and supply of electronic documents under Order 24 RHC and also aims to encourage and assist the parties in reaching an agreement in relation to the discovery of such documents in a proportionate and cost-effective manner.⁵⁹

Reasonable search

The wording of the Practice Direction emphasizes the efficient management of electronic documents, the use of technology to ensure document management activities are undertaken effectively and efficiently, and that the cost of discovery of electronic documents must be proportionate to the amounts claimed in the proceedings.⁶⁰ This is reflected in the provision in PD SL1.2 that unless there is good reason to do so, the court will not accede to applications for photocopies

or paper copies of electronic documents⁶¹ and provisions defining what constitutes 'reasonable search.'⁶²

There are provisions specific to the extent of what constitutes a reasonable search. The Practice Direction lists relevant factors such as the circumstances of the case, the numbers of electronic documents involved, the nature and complexity of the proceedings, the ease and expense of retrieving documents,⁶³ the availability and significance of electronic documents that are likely discovered during the search.⁶⁴

Finally, recognizing that it may require further amendment, PD SL1.2 specifies that it will be reviewed on or before 1 September 2015.⁶⁵

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55 *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.

56 The Final Report on Civil Justice Reform, 3 March 2004 http://www.civiljustice.gov.hk/eng/archives_fr.html.

57 Para 5(1) PD SL1.2.

58 Para 5(2) PD SL1.2.

59 Para 2 PD SL1.2.

60 Paras 4(1)-(3) PD SL1.2.

61 Pursuant to Order 24, rules 9, 11 and 11A of the RHC. Footnote 1 PD SL1.2.

62 Paras 17-21, see in particular paras 17-19 PD SL1.2.

63 This in turn may depend on how easy documents can be viewed, their location, the devices involved, their likelihood of location, the cost of recovery if they are not easily available as well as other associated costs, their likelihood of being materially altered in the course of recovery, discovery or supply. Para 18(3) PD SL1.2.

64 Paras 17, 18 PD SL1.2.

65 Para 35 PD SL1.2.