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The Hong Kong Judiciary's Pilot Scheme for Electronic Discovery

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The Hong Kong Judiciary introduced a pilot scheme¹ on electronic documentary discovery in the Commercial List of the Court of First Instance, which came into force on September 1, 2014, with a review planned within a year of operation (the "Pilot Scheme").

The purpose of the Pilot Scheme is to provide a framework for reasonable, proportionate and economical discovery of electronic documents, and to encourage and assist the parties to reach agreement on how discovery can be done.

Discovery in Hong Kong

Under the existing discovery rules, which make no distinction between discovery of paper, on the one hand, and discovery of electronically stored information ("ESI"), on the other, the parties mutually exchange documents which are relevant or potentially relevant to the matters in dispute. The process typically involves the parties in a mutual exchange of lists of documents, followed by inspection and the provision of copies. The exercise is designed to enable the parties to obtain information about their opponent's case prior to trial, such that both parties know the issues to be addressed, and what documentary evidence is available, in advance, thereby avoiding trial by ambush.

The ordinary rule is that the parties have to disclose all

documents that are within their possession, custody or power. The obligation is to disclose not only documents which are directly relevant to the issues, but also documents containing information which may enable a party either to advance his own case or to damage that of his opponent, or which may fairly lead him to a train of inquiry which may have either of those two consequences². This onerous obligation is recognized as a major contributing factor to the rising costs of litigation³.

E-Discovery Pilot Scheme

Motivations for the Pilot Scheme include the "Underlying Objectives"⁴ introduced by Hong Kong's 2009 civil justice reforms. Those objectives include cost-effectiveness, speed, proportionality, procedural economy and fairness in respect of the Court's civil procedure.

The Underlying Objectives mandate the Court actively to manage cases by various methods, such as "making use of technology" and "giving directions to ensure that the trial of a case proceeds quickly and efficiently"⁵.

A feature of the Pilot Scheme is that it is non-prescriptive in nature, and encourages, indeed requires, the parties to cooperate at an early stage of the litigation to facilitate the disclosure of ESI.

Application

The Pilot Scheme is intended to apply to all civil actions in the Commercial List from September 1, 2014, provided the claim or counterclaim exceeds HK\$8 million (roughly U.S.\$1 million) and there are at least 10,000 documents to be searched for the purposes of discovery. In some circumstances, it may also be applied to cases outside the Commercial List.

Scope

Under the Scheme, discovery is limited to documents which are “directly relevant” to an issue arising in the proceedings. Hence, unlike in ordinary discovery, the scope is more restrictive. Given the amount of ESI that is generated in modern day commerce, this more limited form of discovery is intended to ensure that discovery is conducted in a proportionate and cost-effective manner. Any request for additional discovery will need to be justified on an application for specific discovery supported by evidence demonstrating that such evidence is necessary.

Electronic Documents Discovery Questionnaire

The Pilot Scheme introduces a requirement for each party to complete an Electronic Documents Discovery Questionnaire (“EDDQ”), which is intended to facilitate early communications between the parties on their e-discovery obligations. It is designed to facilitate mutual exchanges of basic information, such as the date ranges of the disclosure, the custodians of documents, the forms of electronic communications and documents, the information on any database system used by the party, the preservation of ESI, and also any anticipated problems.

The EDDQ gives rise to significant “front-loading”. The parties’ EDDQs in draft form are required to be served together with their respective Statements of Claim and Defence. Each party is then required to file its finalized EDDQs with the Court no later than seven days before the first Case Management Conference, which generally takes place within three months after close of pleadings in a case on the Commercial List.

The Reasonable Search

Given the volume of ESI in most commercial cases, it is not feasible for the parties to conduct a full review of all available materials to ascertain their relevance for the purpose of discovery. Thus, the Scheme provides that the parties are required to conduct a reasonable search of ESI in ways which are proportionate.

The reasonableness of the search depends on the following factors:

- the number, availability and significance of the electronic documents;
- the nature and complexity of the proceedings; and

- the ease and expense of retrieving any particular electronic document, taking into account factors such as the accessibility, location and materiality of the document.

Depending on the circumstances, it may be considered reasonable for a party to conduct a keyword search using appropriate parameters, supplemented if necessary by the use of automated searches with advanced techniques such as concept searching.

In an appropriate case, a “staged approach” may also be adopted, with discovery initially being given in respect of limited categories of documents, which can subsequently be expanded where necessary.

Lists and Production of Electronic Documents

Where discovery of ESI is involved, the requirement to serve Lists of Documents in the traditional way is dispensed with. Instead, the list may be in the form of a computer generated file, as long as it is in a sensible and logical format.

In respect of document production, with a view to preserving metadata, the Pilot Scheme stipulates that the ESI is to be produced in native format (*e.g.*, Word or Excel), unless otherwise agreed by the parties or ordered by the Court. If produced in different formats, the documents need to be word-searchable unless good reason is shown.

The Litigants’ Obligations

The following are the key takeaway points for parties engaging in e-discovery under the Pilot Scheme:

1. The Court expects the parties to consider discovery issues as soon as litigation is contemplated.
2. The Court requires the parties to take steps to preserve documents, including any ESI. This applies in particular to documents which might otherwise be deleted in accordance with a document retention policy or in the ordinary course of business. ESI should be preserved in its native format.
3. With the help of the EDDQ, the Court expects the parties and their legal representatives to discuss the use of technology in the management of ESI for the purposes of discovery.
4. The Court also expects the parties to be technically competent to engage in meaningful discussions in facilitating the discovery of ESI. Technical expertise in respect of e-discovery should be obtained if necessary in order to address the following matters prior to the first Case Management Conference:
 - a. the categories of ESI that are within the parties’ control, or are contained in their computer systems and devices;
 - b. the scope of a reasonable search of ESI;
 - c. the deployment of techniques to reduce the burden and costs of discovery of ESI, such as keyword or auto-

matic searching, the elimination of duplicative documents, and the identification and dealing of privileged materials;

d. the preservation of ESI;

e. the formats in which lists of documents and the ESI are to be produced; and

f. the digitization of paper documents.

5. The Court encourages the parties to agree among themselves the conduct of discovery by way of a discovery protocol, a sample of which is provided in the Pilot Scheme. Any disputes about this shall be resolved at the Case Management Conference.

6. Further, the parties are encouraged to agree among themselves the basis of charging for or sharing the costs of the discovery of ESI.

Comment

While the concepts introduced by the Pilot Scheme are not new⁶, they do, however, represent a cultural shift from the practice of adversarial discovery.

Hopefully, when the Court eventually introduces a “per-

manent” practice direction on e-discovery, the practice of gamesmanship and unnecessary interlocutory applications on discovery will be reduced, with resulting significant cost savings.

NOTES

¹ Practice Direction SL1.2 — “Pilot Scheme for Discovery and Provision of Electronically Stored Documents in Cases in the Commercial List”.

² *Compagnie Financiere du Pacifique v. Peruvian Guano Co.* (1882) 11 QBD 55 (CA).

³ “Reform of the Civil Process in Hong Kong”, Butterworths Asia, 2000, p. 155, at 162-166.

⁴ Order 1A, Rule 1 of the Rules of High Court.

⁵ Order 1A, Rule 4 of the Rules of High Court.

⁶ The Hong Kong e-discovery Pilot Scheme is closely modeled on “Practice Direction 31B — Disclosure of Electronic Documents” under Part 31 CPR of the English High Court.

The text of Practice Direction SL1.2 — “Pilot Scheme for Discovery and Provision of Electronically Stored Documents in Cases in the Commercial List” is available at <http://legalref.judiciary.gov.hk/doc/npd/eng/PDSL1.2.htm>.

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