Discovering a New Reality: Electronic Documents in Dispute Resolution

電子蒐證新時代：爭議中電子文件的使用

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So-called "Big Data" is here to stay. Business is customarily carried out in emails, text messages, instant chat software and other internet-based software (such as WhatsApp, Skype and Viber). Given this reality, when disputes arise, the core documentary evidence will almost always be in an electronic format. A pilot has been launched in Hong Kong which introduces a radical change in the way parties must deal with electronic documents in litigation on the Commercial List. It is crucial that businesses manage their electronic documents so that they are ready to deploy them as evidence when needed.

On 16 June, the Hong Kong Judiciary issued Practice Direction SL1.2 – "Pilot Scheme for Discovery and Provision of Electronically Stored Documents in Cases in the Commercial List" (the "Practice Direction"). The Practice Direction sets in motion changes to the way in which parties involved in litigation in Hong Kong must handle and disclose electronic documents. It is inevitable that the pilot – while limited to the Commercial List initially – will be applied to litigation across the board in due course.

The Practice Direction is modelled on equivalent rules in other common law jurisdictions such as England and Wales, Australia and Singapore, where e-discovery has been practised for many years. As in these other jurisdictions, the focus is on ensuring that e-discovery is carried out in a cost effective way that is proportionate to the amounts and issues in dispute in the proceedings.

In this note, we set out some basic information about what will be required under the Practice Direction.

Does the Practice Direction Apply to all Litigation?

No. During the pilot period, the Practice Direction will generally only apply to cases commenced or transferred to the Commercial List with a value in dispute of over HK$8 million and where there are at least 10,000 documents to be searched. The Judiciary is understood to be testing the water in these relatively high-value complex disputes before the Practice Direction is rolled out more widely.

Under paragraph 1(2) of the Practice Direction, parties may apply to the Court for the Practice Direction to apply to cases not on the Commercial List. We expect that this will rarely happen, but it is a strategic tool that should be considered in cases where electronic evidence is likely to have particular significance.

Where Do We Start with an E-Discovery Exercise?

The legal team needs to consider how to handle electronic documents at the very outset. As soon as litigation is in contemplation, the parties' legal representatives must notify their clients to preserve documents that may be discoverable. Document destruction policies should be suspended and data preserved (para 7 of the Practice Direction).

The immediate engagement required is underlined by the fact that a draft Electronic Documents Discovery Questionnaire ("EDDQ") must be served by parties at the same time as the Statement of Claim (for the Plaintiff) and the Defence (for the Defendant). The EDDQ requires information about the nature and type of electronic data held by a party and its proposals for the search and review of the same. A final copy

of the EDDQ must be attested by a Statement of Truth and filed before the first Case Management Conference.

In order to achieve this, the legal teams must set aside their adversarial inclinations and cooperate with each other to try to agree the approach that will be taken towards the discovery of electronic documents. Paragraph 12 of the Practice Direction makes clear that lawyers who fail to cooperate properly will be exposed to a possible wasted costs order if problems later emerge with the exercise that is carried out.

How Do We Identify Relevant Documents?

The Practice Direction recognises that the forensic collection of electronic data is important in maintaining the integrity of documents, and adopting a collaborative approach with a forensic technology expert will be key.

The Practice Direction also recognises that a range of automated and manual tools should be used in order to filter electronic documents for relevance. Parties are expected to be familiar with and use electronic tools such as keyword searches, de-duplication software, concept searching and other forms of technology assisted review. Paragraph 23 of the Practice Direction makes clear that it is insufficient to use only keyword searching and instead "*parties should consider supplementing Keyword Searches and other automated searches with advanced techniques, such as Concept Searching and Data Sampling and other advanced technologies, including technology assisted reviews*" (para 24).

This robust stance is intended to reduce the man-hours (and therefore costs) of the manual review. Having a legal team that understands the available options and can advise on them will be crucial in properly managing the process and controlling costs.

What Electronic Documents Will Need to be Disclosed

The standard rule for discovery under Order 24 Rule 1 of the Rules of the High Court provides that all documents must be disclosed which relate "*to matters in question in the action*". This test is wide and often means that parties have to search for and disclose "*documents that may enable a party to advance his own case or damage that of its adversary*" (*Compagnie Financière du Pacifique v Peruvian Guano Co.* (1882) 11 QBD 55).

This wide test for disclosure presents significant challenges for e-discovery, since it could vastly expand the scope of the exercise required. The Judiciary has recognised this challenge and paragraph 5(1) of the Practice Direction limits the scope of e-discovery to a test comparable with that of standard disclosure in England and Wales:

> the scope of discovery of Electronic Documents in cases governed by this Practice Direction shall be limited to Electronic Documents directly relevant to an issue arising in the proceedings, being Electronic Documents which are likely to be relied on by any party to the proceedings or Electronic Documents which support or adversely affect any party's case. (emphasis added)

The Practice Direction makes clear that background documents or electronic documents that may lead to a "train of enquiry" need not be discovered. While this reduced scope is to be welcomed, it applies only to electronic documents, meaning that hardcopy documents in existence must still be disclosed on *Peruvian Guano* principles.

What Does This Mean for Businesses?

The Practice Direction may have limited impact during the pilot. However, we suggest that businesses should take the opportunity now to get to grips with and understand their electronic data:

- It is important that all businesses understand what electronic documents are being created and where they are stored. Often records are created automatically without anyone realising.
- Robust document retention policies should be put in place to ensure that the right data is being retained but huge volumes of data are not being warehoused.
- There is a tendency to be far less formal in electronic communications. Try to avoid embarrassing disclosures by reminding employees that such communications are likely to be discoverable in litigation.
- Effective project management of e-discovery will be crucial and the party that gets it right will have a huge strategic advantage. ■

所謂的「大數據」是現時的大勢所趨。現時的商業往來都慣於通過電郵、短訊、即時聊天軟件以及其他網上軟件（例如WhatsApp、Skype和Viber）進行。基於這種現實情況，當發生爭議時，主要的文件證據都幾乎是電子格式的。就此香港最近推行了一項試驗計劃，這將會顯著改變商業案件審訊表中，各方處理電子文件的規定方式。企業必須管理其電子文件，以便在需要時調配有關文件作為證據，這是非常重要的。

在6月16日，香港司法機構發出實務指引SL1.2 —「商業案件審訊表中案件電子儲存文件的透露及提供之試驗計劃」(以下簡稱為「實務指引」)。實務指引將促使本港訴訟中各方改變其處理和透露電子文件的方式。是次的試驗計劃初期只涉及商業案件審訊表中案件，但毫無疑問，計劃在適當時間將進一步推廣到所有訴訟案件。

實務指引以英格蘭和威爾士、澳洲和新加坡等普通法司法管轄區的相關規例作為藍本。在這些地方，電子蒐證已推行多年。在此等司法管轄區，重點在於要確保相對於研訊程序中爭議的金額和問題，電子蒐證能以符合成本效益的方式進行。

本文將簡介有關實務指引當中的要求之一些基本資訊。

實務指引是否適用於所有訴訟？

否。在試驗計劃期間，實務指引一般只適用於商業案件審訊表中所開展或轉移至有關審訊表的案件，而有關案件中爭議的金額須超過800萬港元，而需要翻查的文件至少有10,000份。司法機構旨在於這些較高金額的繁複爭議中試驗這份實務指引，日後才較廣泛推行。

根據實務指引的第1(2)段，非商業案件審訊表中的案件的當事人可向法院申請實施有關指引。我們預期出現這些情況的機會不太，但對於電子證據可能會起着獨特作用的案件，這份指引可以被考慮作為一項策略工具。

我們應從哪裡開始電子蒐證？

法律團隊在一開始時就需要考慮如何處理電子文件。當預計將會進行訴訟時，各方的法律代表就必須通知其客戶保存可能會被蒐集得到的文件。文件銷毀政策應該暫停，而資料應予以保留(實務指引第7段)。

此外，即時協定是必須的，原因是申索陳述書(予原告人)及抗辯書(予被告)提出時電子文件透露問卷(Electronic Documents Discovery Questionnaire, EDDQ)的初稿需要同時送達。EDDQ要求相關方填寫所持有電子資料的性質及種類，以及其打算如何搜尋和審核有關的資料。EDDQ的最終版本須經屬實申述簽署見證，並於首次案件管理會議之前進行存檔。

為了達致此一目標，法律團隊必須拋開成見、互相配合，嘗試配合電子文件蒐集的方向。實務指引的第12段明確指出，指引推出後倘若律師未能有效合作而其後出現問題，法院可能會發出虛耗訟費命令。

我們如何辨別相關文件？

實務指引確認在維持文件的完整性方面，電子資料的取證收集是非常重要的，而與法證技術專家合作至於關鍵。

此外，實務指引也指出應該使用一系列的自動和手動工具，根據相關性篩選電子文件。各方應熟悉並加以運用各種電子工具，例如關鍵詞搜尋、重複資料刪除軟件、概念搜尋以及其他形式的科技輔助審核。實務指引第23段明確指出，只是使用關鍵詞搜尋並不足夠，反之「各方應考慮在關鍵詞搜尋和其他自動搜尋外輔以先進的技術，例如概念搜尋和數據採集等其他先進科技，包括科技輔助審核」(第24段)。

此一堅定立場旨在減少人手審核所耗用的時間(以至成本)。倘若法律團隊能了解各個可用選項，並就此提供建議，對於妥善管理流程以及控制成本至為關鍵。

需要披露哪些電子文件？

《高等法院規則》命令24規則1指出關於「該宗訴訟中他們之間的任何有關事宜」的所有文件都必須透露。這個測試是相當廣泛的，並往往意味着各方需要搜尋及透露「*可能使案件中一方有利或另一方不利的文件*」(*Compagnie Financière du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55)。

這種對披露的廣泛測試對電子透露可謂重大的挑戰，原因是所涉及的範圍將可能大大擴闊。司法機構意識到此一挑戰，而實務指引的第5(1)段將規限電子透露範圍的測試與英格蘭和威爾士的相若：

> 本實務指引所規限的電子透露範圍應限於直接關於研訊程序中所出現的問題，而此等電子文件可能於研訊程序中由任何一方作為依據，或對任何一方的案件呈述提供支持或造成負面影響。(重點為我們所加。)

實務指引明確指出，可能會導致「一連串調查」的背景文件或電子文件則無須透露。 雖然將範圍縮小的做法是值得歡迎的，但僅適用於電子文件，這意味着所存在的印刷文件根據 Peruvian Guano 原則仍然必須予以披露。

這對企業有甚麼啟示？

在試驗計劃期間，實務指引的影響可能相當有限。儘管如此，我們建議企業現時應趁此機會掌握和了解其電子資料：

所有企業都需要理解創建了甚麼電子文件以及這些文件儲存在哪裡，這是非常重要的。許多時候，有關紀錄會自動建立，但卻未為人所知。

需要有嚴謹的文件保留政策，以確保適當的資料能得以保留，而不是儲存大量不必要的資料。

至於電子通訊方面，人們往往沒有甚麼正規的做法。提醒員工這些通訊可能會在訴訟中被蒐集，從而盡量避免尷尬的情況。

有效的電子透露項目管理是相當關鍵的，而能行之有效實行的一方將會擁有顯著的策略優勢。 ■