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Hong Kong Court of First Instance case casts spotlight on new Practice Direction on "e-discovery" between parties

Introduction

Discovery of electronically created or electronically stored information in civil litigation (**e-discovery**) is a complex and often costly process. A new Hong Kong Practice Direction SL1.2 (**Practice Direction**) seeks to balance the playing field between parties in relation to the discovery of electronically stored information (**ESI**).

The Practice Direction, operative on 1 September 2014, provides new rules for the handling and disclosure of ESI between parties involved in civil litigation. Existing rules on discovery will continue to apply. Specific rules for e-discovery already exist in other common law jurisdictions, such as England and Wales[1], Australia[2] and Singapore[3]. The Hong Kong Practice Direction is largely drafted along similar lines to its UK equivalent[4].

A recent Hong Kong Court of First Instance decision in *Chinacast Education Corp v Chan Tze Ngon*,[5] (**Chinacast Education**) focuses attention on the requirements placed upon parties and their lawyers in complying with the practical guidelines in the Practice Direction. This briefing highlights key features of the Practice Direction as well as observations made by the Court in *Chinacast Education*.

Application

The Practice Direction will apply to all civil actions in the Commercial List after 1 September 2014 where the claim or counterclaim exceeds HK $8 million and there are at least 10,000 electronic documents to be searched for the purposes of discovery. The Practice Direction will also apply to other cases if the parties agree or where the court may direct.

Scope

The scope of e-discovery in cases governed by the Practice Direction is limited to those electronic documents that are "directly relevant" to an issue arising in the proceedings[6], being documents likely to be relied on by any party to the proceedings or electronic documents which support or adversely affect any party's case. A detailed definition of "electronic document" is given in the Practice Direction. The Practice Direction makes it clear that in the absence of exceptional circumstances necessitating disclosure at an early stage of the proceedings, "background electronic documents" or electronic documents that may lead to a "train of enquiry" may be subject to specific discovery, upon a party's application to the court supported by affidavit evidence, only after ordinary discovery, the supply of electronic copies and the service of factual and expert evidence has been completed.[7] This is so as to discourage costly 'fishing exercises', precisely the type of discovery sought but disallowed in the *Chinacast Education* case.

As soon as litigation is contemplated, parties will be required to preserve discoverable electronic documents as part of the discovery process.

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[1] Practice Direction 31B, Civil Procedure Rules (UK).
[2] Practice Note CM 6 (Electronic technology in litigation), 1 August 2011 (Australia).
[3] Practice Direction 3 of 2009 (Singapore).
[4] http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part31/pd_part31b
[5] [2014] HKEC 1381, Court of First Instance, 15 August 2014.
[6] Practice Direction SL 1.2., paragraph 5(1).
[7] Practice Direction SL 1.2.paragraphs 5(2) and (3).

Key points for parties undertaking e-discovery

Under the Practice Direction, parties will be encouraged to reach agreement for the mutual discovery of "directly relevant" ESI. Before the first case management conference, parties will be required to discuss how they should use technology to manage the discoverable ESI and, in particular, for the purposes of:

- creating lists of electronic documents which are to be disclosed;
- providing documents and information regarding documents in electronic format;
- identifying privileged and other non-discoverable documents;
- identifying the format of how electronic documents will be presented at trial.

An "Electronics Documents Discovery Questionnaire" (**EDDQ**) will have to be filed by parties.

In addition to the requirements mentioned above, parties and their lawyers will need turn their minds to practical matters such as:

- the preservation of electronic documents, with a view to preventing loss of documents before trial;
- the categories of ESI within the parties control, the computer systems, electronic devices and media on which e-documents may be held, storage systems and document retention policies;
- which electronic documents are subject to discovery within the parameters of "reasonable search": relevant factors include (but are not limited to) the number of electronic documents involved, the nature and complexity of the proceedings, the ease and expense of retrieving any particular e-document including issues of accessibility, location, recovery costs;
- the tools and software techniques to be used to reduce the burden and cost of e-discovery;
- the use of agreed keyword searches, data sampling and other technologies;
- whether paper documents should be digitized for discovery and, if so, the format in which such documents should be exchanged (ie. in 'pdf' or some other format);
- whether metadata (data about data) should be disclosed;
- the basis of charging for or sharing the cost of the provision of ESI; in the event that agreement cannot be reached, directions can be sought from the court;
- whether to engage an e-discovery or data management expert to assist early on in the process of preservation, retention and retrieval of electronic documents.

Existing rules of discovery still apply

The existing rules related to the discovery and inspection of documents between parties under Order 24 of the Rules of the High Court (**RHC**) will still apply. No distinction is made in Order 24 RHC with regard to paper-based documents or electronically-sourced documents. However, e-discovery applications can be oppressive because of the nature of ESI in complex and commercial cases, and, in most cases, the sheer volume involved, giving rise to accessibility issues. Costs can spiral disproportionately if e-discovery requests are unformulated and wide-ranging. As mentioned, parties will be expected to seek directions from the court at the earliest practical date if they are unable to reach agreement on any matter related to the discovery of electronic documents.

Requests for e-discovery must be proportionate, economical and relevant

Although the Practice Direction was not in force when *Chinacast Education* was decided, the Court held that the "general principles" of the Practice Direction applied. In *Chinacast Education,* a dispute about education service contracts between

the plaintiff companies and its former directors and officers, the plaintiffs sought discovery of ESI from the defendants' personal accounts, including "electronic copies of all emails", without having disclosed the number of documents involved.

It was apparent in *Chinacast Education* that e-discovery of the defendants' emails was to further the plaintiffs' case of conspiracy to commit breaches of contract or fiduciary duty. However, the plaintiffs could not demonstrate that the defendants' personal accounts contained the information necessary to establish a conspiracy and an intention to injure, much less put forward any proposal as to how to define and determine the e-documents and to point to where, and during what period of time, the relevant information could be found.

The plaintiffs had not considered practical issues such as, how to keep the cost of e-discovery proportionate to the amounts claimed, how to efficiently manage the e-documents and what sort of technological tools should have been used to minimize costs. The Court noted that the discovery of irrelevant e-documents places an excessive burden in time and cost on the party to whom discovery is given. The plaintiffs had already obtained 120,000 electronic documents from the defendants' Group computer, including emails, but could not demonstrate how any of the emails related to their alleged conspiracy case. According to the Court, the request for electronic copies of all of the defendants' emails amounted to a "fishing exercise". The plaintiffs' e-discovery applications were denied.

Relevant principles to be considered in e-discovery applications

In *Chinacast Education*, the Court noted that, in addition to the discovery rules under Order 24 RHC[8], which apply equally in e-discovery applications, certain principles will be borne in mind by courts when parties make e-discovery applications:-

- e-discovery requests must not be oppressive and must be necessary for a fair trial or saving costs;
- the scope of e-discovery depends on issues at trial; discovery should be limited to what is relevant and necessary; courts should discourage "satellite" litigation and propose a proportionality test as to costs and the importance of documents;
- a party who fails to cooperate with the other side and to comply with court orders for discovery has to pay extra costs that the other party has incurred in order to gain access to the electronic documents;
- following civil justice reform (CJR), the courts have, increasingly, limited discovery in the context of actively managing cases;
- costs should be limited as far as possible; a "staged" approach can be adopted for appropriate cases so that a search for electronically stored information could start with, for example, "the most important people at the top of the pyramid" because "often the opposite party will find everything they want without going down the pyramid"[9];
- in the case of a dispute over privileged documents, a special committee can be set up by the court to handle issues of sorting out privileged material from a storage of e-information;
- duplication of documents must be avoided; a party who fails to carry out de-duplication may be ordered to pay costs.

Going Forward

From 1 September 2014 in Hong Kong, as part of CJR and active case management, parties pursuing e-discovery of directly relevant electronic documents will need to abide by the new Practice Direction (unless a consent order is made). The Practice Direction imposes obligations on parties and lawyers, at the outset of litigation, to agree the scope of, and limits to,

[8] Including the authorities referred to in *The Incorporated Owners of Kodak House II and No. 321 Java Rd v Kai Shing Management Services Ltd*, (unreported), HCA 711/2011.
[9] *Chinacast Education Corp v Chan Tze Ngon,* supra, para. 28.

e-discovery and sets out procedural requirements to be followed when seeking discovery and inspection of electronically stored documents and information.

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