DISCLOSURE: TECHNOLOGY ASSISTED REVIEW AND THE COURTS – WHERE ARE WE NOW?

The *Pyrrho* and *Brown* decisions in 2016 represented a watershed moment in litigation as the High Court approved, for the first time, the use of technology assisted review, or TAR, as part of the disclosure process. Judicial attitudes towards TAR have moved forward rapidly since then as the Courts seek to find ways to streamline disclosure and encourage accurate, cost effective and timely document review. The Courts have now said that parties no longer need the approval of the court to deploy TAR.

WHAT IS TAR?

TAR (also referred to as "computer-assisted review" or "predictive coding") is an electronic tool which combines lawyers' subject matter expertise with a form of artificial intelligence to predict the likely relevance of documents to a particular case or matter. As lawyers investigate and review a sample of the documents, the computer learns which documents are relevant and which are not, and is then able to predict relevance across the entire document population. This has the potential to reduce dramatically the time and cost associated with document review.

PYRRHO AND *BROWN* START THE CONVERSATION

After the decision in *Pyrrho Investments Ltd v MWB Property Ltd* [2016] EWHC 256 (Ch), there was much fanfare amongst litigators and litigation technology providers in England & Wales as the Courts had firmly pinned their colours to the TAR mast. Not only had the Courts approved the use of TAR, they had gone on to extol its benefits, partly based on evidence from the USA and Ireland where the courts have been dealing with cases involving TAR since as early as 2012.

Judicial acceptance and encouragement of TAR went one step further in *Brown v BCA Trading* [2016] EWHC 1464 (Ch). Whilst in *Pyrrho*, the parties had agreed to the use of TAR, in *Brown*, the Court was faced with a disputed application. Nonetheless, an order approving TAR was made because the Court considered its use to be proportionate, as well as consistent with the overriding objective.

These decisions embodied the spirit of Practice Direction 31B of the Civil Procedure Rules, which encourages "the use of agreed software tools" and "automated methods of searching".

WHAT IS THE COURTS' ATTITUDE TO TAR TODAY?

Ascertaining the current judicial thinking on TAR (as with many case management questions) is not always straightforward. Discussion on these

Key points

- Recent judicial comments have confirmed the Court's support for TAR and have removed the need for the Court's prior approval

- The use of TAR complements other initiatives aimed at streamlining the disclosure process

- Clifford Chance litigators are at the forefront of this technology, having access to a dedicated team of eDiscovery professionals in our offices to deliver innovative and efficient solutions to clients facing large and complex review exercises

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types of issue is typically confined to Case Management Conferences, most of which are not reported. In fact, even before *Pyrrho* and *Brown* there was anecdotal evidence that TAR had been used for some time by parties and had been approved by judges in the Commercial Court and the TCC. The decisions had simply not made it to the Law Reports.

Similarly, in the two years since *Pyrrho* and *Brown*, the jurisprudence on TAR has not stood still, even though reported cases remain few and far between.

In an unreported CMC held on 5 October 2017 in *Tchenguiz v Grant Thornton UK LLP*, Knowles J was asked to decide a contested application to deploy TAR as part of the disclosure process. This application to the Commercial Court was thought necessary as the judge in *Pyrrho* had said that it was appropriate for the Court to approve the use of TAR because of its novelty in this jurisdiction.

However, court users have been so swift in adopting TAR as part of their disclosure process that the judge recognised that TAR was no longer novel. As such, he held that the Court did not need to approve the use of TAR in advance. Knowles J went on to say that any party seeking to use TAR must be well aware of its disclosure obligations, and ultimately it is up to that party to decide how best to meet that obligation.

What Knowles J stressed, and what the decision of Coulson J in *Triumph Controls UK Limited v Primus International Holding Co.* [2018] EWHC 176 (TCC) has reinforced, is that it is essential for the parties to engage meaningfully on a proposal to use TAR at an early stage in the disclosure process. In *Triumph*, an order was made requiring a switch back to manual document review when the party using TAR had failed to engage appropriately with the other party and had provided so little detail on the nature of its TAR process that the process "cannot be described as transparent, and cannot be said to be independently verifiable".

Lightening the burden of disclosure, particularly in major commercial disputes, is at the forefront of the judiciary's, and indeed the GC100's, minds. The judiciary has proposed a pilot scheme recommended by the Disclosure Working Group (of which Knowles J is a member) which aims to streamline disclosure exercises and remedy a perceived over-reliance on standard disclosure. It also aims to encourage the use of TAR in appropriate cases. If adopted, this pilot may start later in 2018.

CLIFFORD CHANCE AND TAR

The Case Management Group at Clifford Chance is an experienced and professional eDiscovery team with expertise in implementing and managing complex, large-scale review exercises involving TAR. Working seamlessly as part of our Litigation & Dispute Resolution practice across the litigation, arbitration and regulatory investigation spheres, the Case Management Group can:

- manage complex disclosure and data review processes

- advise on new technology solutions and best practices

- assist in early case assessment through the use of advanced analytical tools

- advise on the accessibility of data

With the Case Management Group managing the mechanics of the eDiscovery process, our lawyers can focus their time and energy on the complex legal issues of a matter.

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A CLIFFORD CHANCE TAR CASE STUDY

A major international investment bank recently instructed us in a high-profile matter in the Commercial Court to use our TAR capabilities to manage, review and disclose relevant documents from a population of nearly 7 million in total. We were able to quickly and cost efficiently locate and review potentially relevant documents within the population. This required just 160,000 documents (or 2.32%) of the entire population of documents to be manually reviewed, producing significant reductions in time and cost.

Following the judicial guidance since *Pyrrho* and *Brown*, we sought the agreement of the other side on the use of TAR ahead of the first CMC, focusing on running a reasonable and proportionate review with a well-documented and robust TAR process. In light of all parties' agreement, the Court was satisfied with the use of TAR.

We employed a Continuous Active Learning (CAL) protocol for our TAR process.

CAL is a cutting-edge technique often referred to as "predictive coding 2.0". CAL learns from lawyers' day-to-day document review and investigation which allows it to refine its understanding of relevance as a case develops throughout the review. CAL ranks all documents individually based on their likelihood of containing relevant information, and as new information comes to light or new data enters the case, documents are re-ranked accordingly.

The TAR process
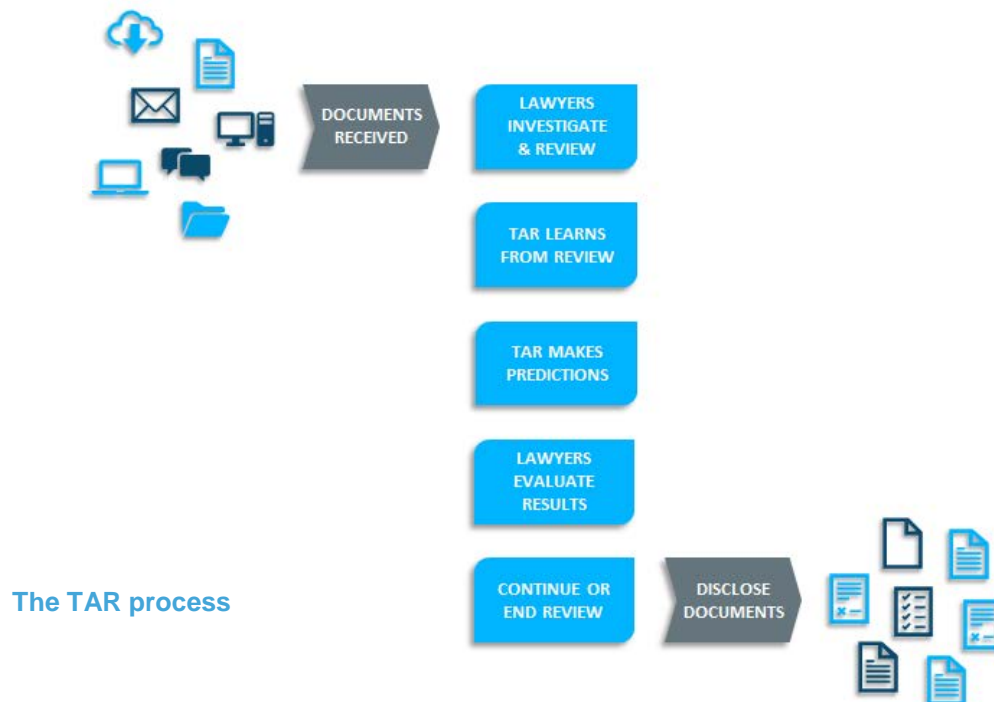
THE FUTURE?

Sir Geoffrey Vos, Chancellor of the High Court, speaking at the end of 2017 and again at the start of 2018, stressed that the Judiciary of England & Wales is not standing still. Indeed, it cannot afford to. The Chancellor recognised that, if the Business and Property Courts of England & Wales are to remain at the forefront of international commercial dispute resolution, the Judiciary must embrace and adapt to the advent of legal technology.

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The Court's enthusiastic adoption of TAR and the rapid progression in judicial attitudes since the decisions in *Pyrrho* and *Brown*, demonstrates that the Courts are readily keeping up with the pace of change.

With the benefit of our dedicated Case Management Group and our experience in executing large-scale TAR exercises, Clifford Chance's Litigation and Dispute Resolution practice is excellently placed to guide clients through the new world of TAR.

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