RECOMMENDATIONS FOR
E-DISCOVERY LEGISLATION IN HONG KONG

BY

Wang Xin,
09050272
Accounting Concentration

Yang Mengjie
09050299
Accounting Concentration

An Honours Degree Project Submitted to the
School of Business in Partial Fulfilment
of the Graduation Requirement for the Degree of
Bachelor of Business Administration (Honours)

Hong Kong Baptist University
Hong Kong

April 2013
# TABLE OF CONTENT

**ABSTRACT** ........................................................................................................................................... 2  

**INTRODUCTION** ..................................................................................................................................... 2  
A. THE E-DISCOVERY PROCESS .................................................................................................................... 3  
   i. Identification ....................................................................................................................................... 3  
   ii. Preservation and collection ................................................................................................................ 4  
   iii. Processing, review and analysis ....................................................................................................... 5  
   iii. Production ....................................................................................................................................... 5  
B. DEVELOPMENT OF E-DISCOVERY LEGISLATION ............................................................................. 6  

**PART I. HONG KONG CURRENT LEGISLATION** .............................................................................. 8  
A. RELATED LEGISLATION .......................................................................................................................... 8  
B. RELATED CASES ................................................................................................................................... 9  

**PART II. GLOBAL LANDSCAPE OF E-DISCOVERY LEGISLATION** .................................................. 10  
A. THE UK ................................................................................................................................................ 10  
   i. Pre-PD 31B ....................................................................................................................................... 10  
   ii. PD 31B ........................................................................................................................................... 13  
   iii. New CPR 31.5 ............................................................................................................................... 17  
B. THE US ................................................................................................................................................ 18  
   i. The Zubulake Case ............................................................................................................................ 19  
   ii. Federal Rules of Civil Procedure .................................................................................................... 21  
   iii. Other Cases ................................................................................................................................... 22  
C. AUSTRALIA ......................................................................................................................................... 25  
D. SINGAPORE ......................................................................................................................................... 28  

**PART III. RECOMMENDATIONS FOR HONG KONG** ........................................................................... 30  
A. COST AND COST SHIFTING .................................................................................................................... 30  
B. DISCOVERY PLAN .................................................................................................................................. 32  
C. COMPUTER-ASSISTED REVIEW ........................................................................................................... 33  
D. PRE-TRIAL CHECKLIST/QUESTIONNAIRE ........................................................................................... 33  
E. PRESERVATION OBLIGATION ................................................................................................................ 34  

**CONCLUSION** ...................................................................................................................................... 35  

**APPENDIX I** .......................................................................................................................................... 37  

**APPENDIX II** ......................................................................................................................................... 38  

**APPENDIX III** ....................................................................................................................................... 41  

**REFERENCES** ...................................................................................................................................... 42
Abstract

The rapid increasing prevalence of Electronic Stored Information (ESI) has made electronic documents a very important source for litigation evidence.\(^1\) Unavoidably, the discovery process needs to deal with ESI.\(^2\) The discovery of electronic documents is called e-discovery.\(^3\) Due to the unique characteristics of ESI, the logistics of e-discovery is very different from traditional discovery process, and requires careful management.\(^4\) Unfortunately, Hong Kong’s legislation provides very limited guidance on e-discovery, which is very similar to the situation in the UK before the case *Goodale v The Ministry of Justice*. After the *Goodale* case, the UK has made tremendous improvement in legislation to cope with e-discovery. At the same time, many other countries are developing guidelines and raising new thoughts on e-discovery, for the more effective use of technology in the litigation process and international e-discovery. Without catching up on this, Hong Kong may lose international competitiveness if businesses conclude that other jurisdictions are more effective.

Starting with a look at the current legal context of e-discovery and the related cases in Hong Kong, this study reviews existing law related to e-discovery in different countries including the UK, the US, Australia and Singapore. Recommendations are made on how the court in Hong Kong can refer to the existing thoughts of other courts to tackle the major difficulties in managing e-discovery.

Introduction

In litigation, parties in a dispute are required to provide relevant records and information along with other evidence related to the case. The initial phase of the process obtaining the documents and information produced as evidence in litigation is named “discovery”.\(^5\) Electronic information has become the primary medium of communication and business

---

\(^3\) See ibid.
transactions in our modern life. In the US, “More than 90% of all corporate information is electronic; North American businesses exchange over 2.5 trillion e-mails per year; today, less than 1% of all communication will ever appear in paper form”. The rapidly increasing use of electronically stored information (“ESI”) has added a completely new dimension in many litigation processes, including discovery.

A. The E-Discovery Process

The discovery of ESI is called “e-discovery” (short for Electronic Discovery, also called e-disclosure in the UK). E-discovery starts when one party in the lawsuit requests the other party to produce ESI that is relevant to its claim or defence. ESI includes all kinds of electronic data created by or stored on personal computers, mobile phones, e-mail files, social networking sites, portable data storage media, back-up tapes, etc. This list is far from inclusive. Thus, the trick of conducting e-discovery lies in the effectiveness of the process—in other words, how to properly plan the process, and to get hold of the relevant ESI on a cost-efficient and effective basis. It is important to manage ESI properly throughout its lifecycle in order to be more effective in e-discovery. With respect to this problem, lawyers, vendors, and end users worked together to create the Electronic Discovery Reference Model (“EDRM”) Project, which is a framework of the process to be used by practitioners and involves the four steps of (1) identification; (2) preservation and collection; (3) processing, review and analysis; (4) production.

i. Identification

To be more cost-effective, it is important for the parties in litigation to collaborate at this very early stage to locate potential sources of relevant ESI, and determine the reasonable scope, breadth and depth of e-discovery. In recent years, the courts in the US, the UK, Australia and Singapore all added more regulations encouraged the parties to agree upon a

---

6 See Yip (n 2 above).
7 Harvey L. Kaplan, Electronic Discovery in the 21st Century: Is Help on the Way? 733PLI/Lit 65, 67
8 See Shedden (n 1 above), p 1
11 Ibid.
13 Ibid.
discovery plan in this stage. The UK has its *Electronic Document Questionnaire* ("EDQ") for the parties to refer to, and Singapore is the first to contribute a comprehensive sample of discovery plan, which is highly regarded by specialists.

ii. Preservation and collection

Parties have the duty to preserve ESI that “[they know], or reasonably should know, will likely be requested in reasonable foreseeable litigation”. Every company has its own data retention policy. The court may not see the loss of potential relevant information as liable, if it is a result of routine data retention activities. But as long as a litigation is “reasonably anticipated”, the parties involved in the dispute have the obligation to sent out a comprehensive litigation hold notice to their employees to advise them not to delete potential relevant ESI and to suspend the routine data retention activities.

In the collection of ESI, in order to avoid damaging the ESI’s integrity, and the embedded information about the ESI itself (i.e. “metadata”), e-discovery companies can be hired to carry out this service. Sometimes, companies also need to hire computer forensic specialists to conduct deeper search in its computer system to recover damaged ESI. This can be a very expensive and time-consuming process if the data is hard to access. Thus, the courts usually give clear definition of ESI that is deemed to be “not reasonably accessible”, and if there is no good cause, the party shouldn’t request the retrieving and producing of such ESI. For example, in Singapore, the documents stored on backup tapes or were originally deleted but can be recovered by using computer forensic tools are considered “not reasonably accessible”.

---

15 CPR Practice Direction 31B (PD 31B), para 10
19 See Brigham Young University v. Pfizer, 282 F.R.D. 566 (D. Utah 2012).
22 See Electronic disclosure (n 10 above).
23 Ibid.
iii. Processing, review and analysis

Due to the potential for huge volumes of ESI involved in disputes, it is necessary to reduce the volume for review. Privileged information and duplicated data should be filtered. Key word, data range or more sophisticated methods are adopted. Generally, the producing party should also review its search result for relevance before delivering it to others. This process can be extraordinarily costly. For example, in Rowe Entertainment v The Williams Morris Agency (2002), one single request for e-mails on back-up tapes cost the producing party $9.75 million. However, Singapore’s court has made it clear that the producing only needs to carry out the search “to the extent stated in the request” and has no duty to review the search results for relevance.

The costs for processing and reviewing of ESI are generally born by the producing party of the ESI. In some occasions, for instance, when the data is deemed to be “not reasonably accessible”, the court can order a cost-shifting to have the requesting party bear part or all of the costs incurred in the discovery or inspection of ESI.

To save costs, the use of computer software to assist the review process is more and more encouraged by courts. But still, judges, especially in the US, are still debating about the suitability of computer-assisted review in different situations, and many are arguing that it cannot be a substitute for manual review.

iii. Production

Parties may be required to agree on the form of production in pre-trial case management meetings, just like the case in the US. In some other countries, such as Australia, the

---

26 See Electronic disclosure (n 10 above).
27 Ibid.
31 See Sup Ct PD 3/2009, para 43L.
formats of production generally should be the format “in which the documents are ordinarily maintained” or a reasonably usable and searchable format.36

Every stage in the logistic of e-discovery, if not managed carefully, will easily put the parties in dilemmas.37 The courts have realized it is necessary for the judges to proactively manage the whole e-discovery process and to resolve disputes when parties cannot reach an agreement on issues related to e-discovery.38 Thus, a comprehensive set of guidelines on e-discovery is very important to tackle the problems in each step of e-discovery and to streamline the whole litigation process.

B. Development of E-Discovery Legislation

The landscape of the global e-discovery legislation evolves rapidly.

Since the famous Zubulake case, which was heard between 2003 and 2005, e-discovery became a huge issue in the US.39 In 2006, the US had its 2006 amendment of the Federal Rule of Civil Procedure (“FRCP”), in which many rules were established to specially provide guidelines for e-discovery.

However, other countries have been catching up and contributed many other thoughts in regulating e-discovery.

The UK has its Practice Direction 31B for Civil Procedure Rules specifically dealing with the discovery of electronic documents (or e-disclosure). It defines 9 terms such as “Data Sampling”, “Metadata” and “Optical Character Recognition (OCR)”, and identifies several general principles in dealing with electronic documents, which emphasize the effectiveness and efficiency, as well as the cost-saving aspect.40 It also contributed the Electronic Document Questionnaire (EDQ),41 which was later used by the courts in Australia and Singapore as model and developed their own versions of it.

36 See Practice Note CM 6, Art 5.1.
37 See Slusarz (n 12 above).
40 PD 31B, para 5.
41 PD 31B, para 10.
The Federal Court of Australia has its Practice Note CM6 to cope with the use of electronic documents in discovery. The Australian Law Reform Commission (“ALRC”) published a 384-page report titled *Managing Discovery: Discovery of Documents in Federal Courts* in 2011, which is considered “currently the best statement worldwide of what courts should be aiming for” by experts.42

Singapore established its Practice Direction No. 3 of 2009 to provide “guidance on the discovery and inspection” of ESI and “the supply of copies of discoverable electronic documents within the boundaries of established principles on discovery”.43 Substantial amendments to it were made in 2012, including the introducing of three tests to consider the appropriateness for e-discovery,44 the definition of “not reasonable accessible documents”,45 a comprehensive sample discovery plan46 and some progressive methodologies in reviewing and production of ESI.47

One of the main drivers behind the establishment of this Practice Direction was the “increasing amount of e-discovery requests from US companies in Singapore”.48 Hong Kong, as a popular destination for international business and an important common law jurisdiction like Singapore, faces the same surge.49 However, Hong Kong’s court has done little in dealing with e-discovery in its civil procedure rules.50

In Hong Kong’s Practice Direction 5.2, the court allows parties to exchange “copy documents without the need to prepare lists of documents” for discovery.51 There are only few cases relevant to e-discovery. Lawyers have been referring to e-discovery protocols or questionnaires in other jurisdictions, especially Australia and the UK.52

---

44 See Sup Ct PD 3/2009, para 43A.
45 Ibid.
47 See Sup Ct PD 3/2009, para 43J.
49 See ibid.
It is necessary for Hong Kong to catch up in the area of e-discovery if it wants to stay competitive as a jurisdiction that is effective in dispute resolution.53 This study will first look into the current legislation of Hong Kong, and then several other major common law jurisdictions in coping with problems or dilemmas arisen from e-discovery. Among all the countries with a comprehensive set of rules on e-discovery, the UK, the US, Australia and Singapore are selected for the purpose of this study. With a better understanding of the need for a comprehensive e-discovery legislation in Hong Kong, the purpose of this study is to provide thoughts on what issues should be tackled in such legislation and how.

Part I. Hong Kong Current Legislation

A. Related Legislation

The legislation related to e-discovery is currently limited in Hong Kong, where there is no specific Practice Direction.54 The Rule of the High Court (RHC) gives the Court a broad discretion based on the general discovery approach under Chapter 4A Order 24 “Discovery and Inspection of Documents”.55 A party has obligation to discover “…the documents which are or have been in their possession, custody or power relating to matters in question in the action”.56 The courts may refuse to make an order “…if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs”.57 Meanwhile, under the new Order 24 Rule 15A, “For the purpose of managing the case in question and furthering any of the objectives…” the Court may make any orders to limit the scope of discovery.58

Specifically for e-discovery, at present, apart from the related principles above, according to the case CSAV Group (Hong Kong) Ltd v Jamshed Safdar, the Court of Final Appeal has confirmed that the rules that govern discovery process in Order 24 could be equally applied to the documents in electronic form as to the hard copies.59 Nevertheless, in

53 See Dale, A call to arms for ediscovery in Hong Kong (n 48 above).
54 See Crompton & Bleasdale, (n 50 above).
55 Ibid.
56 CAP 4A Order 24 r 1(1).
57 CAP 4A Order 24 r 8(1)
58 CAP 4A Order 24 r 15A
59 See Crompton & Bleasdale (n 50 above).
Hong Kong, there has been very limited guidance on how to approach e-discovery while minimising the associated costs.\textsuperscript{60}

\textbf{B. Related Cases}

There have been few cases associated with e-discovery or its companied issues in Hong Kong. Those related cases mainly include \textit{Deacons v Kevin Richard Bowers},\textsuperscript{61} \textit{Liquidators of Moulin Global Eyecare v Ernst & Young},\textsuperscript{62} and \textit{Moulin Global Eyecare Holdings Ltd v KPMG}.\textsuperscript{63}

In the \textit{Deacons} case, the Au DJ claimed that in a District Court action a party should “take all the reasonable steps and best endeavours to discover all relevant documents”,\textsuperscript{64} which may include the e-discovery approach, retrieving the deleted emails when it is possible through proper techniques and the computer forensics technicians might be involved if necessary.\textsuperscript{65} Since it is difficult to be proportionate in each case, this case law is too general to be applied widely.\textsuperscript{66}

More specifically, in \textit{Moulin v KPMG}, apart from the general principles that guide the discovery of both hard copy documents and the ESI, in the judgment on 8 June 2010, Barma J emphasised that the relevance is important to determine whether the ESI discovery would be ordered or not.\textsuperscript{67} The issue related to the further discovery of particular categories of documents was raised up in this case.\textsuperscript{68} To avoid “tantamount to requiring the defendants to turn over the contents of their filing cabinets (in this context, electronic ones) for the plaintiffs to rummage through”, Barma J refused to order a specific folder in electronic form gained by the defendant.\textsuperscript{69}

The concern of proportionate application and cost issue related to e-discovery was also pointed out in the case of \textit{Liquidators of Moulin Global Eyecare v Ernst & Young}. The problem associated with e-discovery was heightened that the defendant had used inappropriate term to search, which lead to the capture of too many irrelevant documents and

\begin{enumerate}
\item \textit{Ibid}
\item \textit{Deacons v Kevin Richard Bowers} [2008] HKCU 600
\item \textit{Liquidators of Moulin Global Eyecare v Ernst & Young} [2008] HKCU 981
\item \textit{Moulin Global Eyecare Holdings Ltd v KPMG} [2010] HKCU 1251
\item \textit{Deacons} (n 61 above), para 20.
\item \textit{See Crompton & Bleasdale} (n 50 above).
\item \textit{Ibid}.
\item \textit{Moulin v KPMG} (n 63 above), para 14, 32.
\item \textit{See Crompton & Bleasdale} (n 50 above).
\item \textit{Moulin v KPMG} (n 63 above), para 32.
\end{enumerate}
a large amount of extra expenses.\textsuperscript{70} Besides, Kwan J ordered that the defendant should pay the wasting costs that incurred by the plaintiff because the defendant had used incorrect extraction software to prevent the plaintiff from getting access to the documents, which resulted in the plaintiff’s failure of proper management of disclosed documents.\textsuperscript{71}

Despite the cases mentioned, there has been limited guidance from the case law to work out the best e-discovery approach and the associated costs minimising and practice issues.\textsuperscript{72}

\textbf{Part II. Global Landscape of E-Discovery Legislation}

(A brief summary of this section is provided in Appendix II.)

\textit{A. The UK}

The common law system was introduced into Hong Kong by the British after they established their rules in 1842.\textsuperscript{73} In accordance with the Sino-British Joint Declaration signed between the Chinese and British governments on 19 December 1984 and Article 8 of the Basic Law, the present legal system of Hong Kong modelled on the English common law system is to be maintained for 50 more years from the transfer of sovereignty on 1 July 1997; hence as one of the common law jurisdictions, the legislation of Hong Kong has been following that of the UK since 1842.\textsuperscript{74} As the common law includes legal sources (legislation, case law and customary law) and decisional sources (law reports and ordinances), doubled with the fact that the legislation of Hong Kong emulates the British legislation, our discussion will start from a detailed look into the legislation and cases of the UK in relation to the e-discovery (or e-disclosure) and its coordinated issues.\textsuperscript{75}

\textit{i. Pre-PD 31B}

With respect to the court rules introduced in 1999 mainly devised by the leading English judges at the time, “disclosure” replaced the old term “discovery” with substantially reduced scope (we shall still use “discovery” as the international used term referring to this legal procedure in the whole article).\textsuperscript{76} The major reduction was the volumes of neutral

\textsuperscript{70} \textit{Liquidators v Ernst & Young} (n 62 above), para 7(2).
\textsuperscript{71} \textit{Liquidators v Ernst & Young} (n 62 above), para 7(1).
\textsuperscript{72} See Crompton & Bleasdale, (n 50 above).
\textsuperscript{73} Srivastava D.K. \textit{Business Law in Hong Kong} (Hong Kong: Sweet & Mawell Asia 2007 2nd edition) p 19 Chapter 2 2.000)
\textsuperscript{74} See \textit{ibid}.
\textsuperscript{75} \textit{ibid}.
background documents that did not affect the case (but which could result in a “train of enquiry” of potentially relevant documents). Instead, the present disclosing party is required only to undertake the “standard disclosure” contained in the relevant practice direction.

In the current Civil Procedure Rules (CPR) of the UK, Part 31 contains the standard principles of discovery and inspections of documents. The definition of discovery documents in Rule 31.4 is extended to “electronic documents, including e-mail and other electronic communications, word processed documents and databases…the definition covers those documents that are stored on servers and back-up systems and electronic documents that have been ‘deleted’…also extends to…metadata”. The substantive aspects, such as the extent of the documentation which should be searched and disclosed, were considered in 2004 by a Working Party chaired by Mr Justice Cresswell, the recommendation of which was implemented initially in the Commercial Court.

The cases in which the Court considered the preservation and disclosing obligation of the parties in regard to ESI under PD 2A include significant ones as Digicel v Cabel & Wirless (2008), Earles v Barclays Bank (2009), and Goodale v The Ministry of Justice (2009).

In the Digicel v Cable & Wireless case, the legal representative of the parties decided the scope of reasonableness to the search of their defendant client’s e-documents in a huge complex commercial claim with a great expense carried out. Cabel & Wirless used ten keywords in its original search to look for the relevant ESI among 625,000 e-documents. However, the judge in this case ordered another different eight keywords to be searched again. The Court held that the parties should have collaborated over what was reasonable

---

77 Ibid.
78 Ibid.
79 CPR Part 31
80 PD 31A, para 2A.1.
82 Digicel (St Lucia) Ltd v Cable and Wireless plc [2008] EWHC 2522 (ChD).
87 See Majumdar (n 85 above).
and, if they couldn’t agree, the court would decide.\footnote{Ibid.} As a result, the defendants were ordered to re-do their e-discovery exercise carried out in situ searches in several countries at an approximate cost of £2 million in fees together with disbursements of £175,000, and some 6,700 man hours of lawyers’ time.\footnote{Ibid.} This case highlights that the clear guidance, especially for defining the scope of “reasonableness” and who to decide it, is in an emergent need.\footnote{Twentyman, J. (2008). E-disclosure tools take risk out of collaboration. Computer Weekly, , S6-S7.}

In Earles v Barclays Bank (2009), the Judge criticised the lack of cooperation between the parties in regard that issues related to e-discovery was not discussed before or at the Case Management Conference (CMC) despite the fact that the some of the disclosed documents such as the e-mail and telephony records of defendant were highly relevant.\footnote{Ward, A. (2010). E-disclosure & The New Practice Direction 31B. Crippslink, Retrieved March 20, 2013, from http://www.crippslink.com/} The defendant’s solicitors, Simmons & Simmons, had determined it was not proportionate to retrieve and disclose the documents.\footnote{Dale, C. (2008, Oct 26). Case Law at last on Scope of Reasonable Search. Message posted to http://chrisdale.wordpress.com/2008/10/26/case-law-at-last-on-scope-of-reasonable-search/} The Court, however, disagreed with this decision and, although the bank ultimately won the case, decided to recover only 50% of the costs to the successful defendant because the Court held that the discovery could have been adequately carried out if the related principles had been followed properly.\footnote{Weatherall, I., & Standing, G. Banking Update: Report and Review on Recent Cases and Issues. Legal Week Law, Retrieved March 20, 2013, from http://www.wragge.com/analysis_5270.asp#:UXwdZaLviSo} As a result, the Court imposed costs sanctions on the defendant for failure to conduct disclosure satisfactorily by claiming, “…It might be contended that CPR 31PD 2A and electronic disclosure are little known or practised outside the Admiralty and Commercial Court. If so, such myth needs to be swiftly dispelled when over 90% of business documentation is electronic in form. The Practice Direction is in the Civil Procedure Rules and those practising in civil courts are expected to know the rules and practise them; it is gross incompetence not to.”\footnote{See Earles (n 83 above), para 71.} In aspect of preservation of documents, the Judge stated that “before proceedings are commenced there is a duty not to destroy documents deliberately, but no duty to preserve documents, whereas after the proceedings have been commenced documents must be preserved. If they are not
preserved, adverse inferences may be drawn. Failure to preserve documents before commencement of proceedings may result in costs sanctions”.95

ii. PD 31B

In Goodale v The Ministry of Justice in November 2009, the issue of having a comprehensive set of rules on e-discovery was first brought up. As the parties refused to disclose any electronic documents on the grounds of proportionality, Master Whitaker, who was heavily involved in the drafting of the PD 31B at the time, held that the documents were likely to contain highly relevant materials but the parties needed help in how to tackle the associated difficulties.96 It was raised up for the first time that “… a serious practical problem for the case management of disclosure … is now occurring on a regular basis”, “how the parties, and (if disputed) the court determines what the scope of the search for ESI should be, how it is going to be made proportionate and how it is going to be carried out correctly the first time, without the court having to order it to be done again”.97 He provided several suggestions for tackling such problems, including using the prioritisation software as well as active case management.98 A staged approach was also commended, which included limiting the targets to the most obvious custodians (i.e. individuals whose e-mail and data are subject to review) of documents, or key periods and attaching the then draft electronic documents questionnaire to assist the parties.99

In consideration of the above issues, a working party chaired by Senior Master Whitaker prepared a draft Practice Direction on e-discovery (PD 31B) to the Civil Procedure Rule Committee, which came into force on 1 October 2010.100 A more concrete guidance is provided by PD 31B “Disclosure of Electronic Documents”, which supplements the CPR

---

97See Crompton & Bleasdale (n 50 above).
98See Ward (n 91 above).
99Ibid.
Part 31 and is marked in PD 31A 2A.2. The introduction of PD 31B and associated EDQ have taken the legislation of e-discovery to the next stage in the UK.

With most of the retained wording of the PD 31A, under 31B it points out “the purpose of this Practice Direction is to encourage and assist the parties to reach agreement in relation to the disclosure of Electronic Documents in a proportionate and cost-effective manner” at the first place, which strikes out the proportionality and cost-efficiency.

The primary significance done is that PD 31B extends the glossary of e-discovery with more prescriptive phraseology. Specifically, in Paragraph 5, nine technical terms such as “Data Sampling”, “Electronic Document”, “Electronic Documents Questionnaire”, “Metadata”, “Native Electronic Document”, “Optical Character Recognition (OCR)” are clearly defined.

Then PD 31B sets out the five general principles that the parties dealing with the ESI must bear in mind:

1. Aim for efficient management of the electronic documents to minimise the costs;
2. Use technology to ensure the document management is conducted efficiently and effectively;
3. The overriding objective (equality, economy and proportionality);
4. Documents for inspection should be in a form that allows the inspecting party the same access, search, review and display opportunities as the disclosing party had;
5. Do not disclose irrelevant documents.

Central to PD 31B is the need for parties and their legal advisers to be co-operative with each other and well-prepared about e-discovery at an early stage. It requires solicitors to

101 CPR Part 31; PD 31A.
104 See ibid.
105 PD 31B.
notify their clients of the need to preserve potentially disclosable documents as soon as litigation is contemplated. The parties and their legal representatives must discuss the use of technology in the management of electronic documents and the discovery (or disclosure) process prior to the first Case Management Conference. In the end of discussions, the parties must submit to the court a list of the disclosure issues on which they agree or disagree in relation to electronic disclosure (e-discovery). If the parties cannot agree on an approach to disclosure prior to the first CMC or the court considers that the parties’ agreement in relation to disclosure of electronic documents is deficient, the court will either give written directions or order a separate hearing to deal with the unsolved issues. If a party gives electronic disclosure without first discussing the approach to be adopted with its opponent, the court can order such a party to repeat its search or take additional steps – this is likely to be at its own expense. Any of these steps would represent a significant loss of control for the parties to the litigation, which makes it a clearer guidance for the parties.

Another emphasis of the PD 31B is introduction of the concept of an “Electronic Documents Questionnaire”, with a blank questionnaire appended to the Practice Direction, which is designed to elicit from the parties a comprehensive statement as to the extension and location of relevant ESI and proposals for its discovery. Although the Questionnaire is not compulsory, the argument have been readily made that it is the most appropriate and helpful template for the provision of the information that required by Practice Direction. Moreover, the Court has a wide discretion under PD 31B to order use of all or part of the Questionnaire as a part of the disclosure process in the absence of agreement between the parties as to the way they will provide disclosure of ESI. Significantly, the Court also has the power to set aside, of its own volition, what it regards as an inadequate agreement between the parties in relation to the disclosure of ESI, and to require some or the entire Questionnaire to be

108 PD 31B, para 7.
110 See Ward (n 91 above).
111 See Bell (n 107 above).
112 Ibid.
113 Ibid.
115 See Sautter (n 114 above).
116 Ibid.
completed. The Questionnaire itself, which includes a statement of truth, seeks information concerning sources of potentially relevant ESI in terms of custodians, types of data and the locations where it is stored. Specific references to communications such as instant messaging and text messaging indicate that parties are expected to take into account ongoing developments in electronic communications in determining types and sources of potentially disclosable ESI. The Questionnaire also expects parties to consider, and to discuss, the methods of search that will best identify the relevance of ESI. If keyword searches are to be used, the search terms should be identified, and parties are encouraged to consider whether more sophisticated methods of search, such as concept searching or clustering, will in some cases be more effective.

With regard to “a reasonable search” issue raised up in *Digicel v Cabel&Wirless* (2008), PD 31B clarifies in that the “reasonableness” will depend on “the number of documents involved” “the nature and complexity of the proceedings” “ease and expense of retrieval of any particular document” “the availability of documents or contents of documents from other sources” and “the significance of any document which is likely to be located during the search”. Besides the detailed guidance contained on the factors that may be relevant in determining the extent and reasonableness of a search for electronic documents, it requires that there should be a consistent approach to listing documents in a party’s disclosure statement; and there should be co-operation at the outset as to the native format in which documents are to be made available to each other on inspection.

Furthermore, PD 31B also emphasizes the proportionality and cost effectiveness. The disclosure of large amounts of irrelevant ESI is unacceptable. Typically, preparing and reviewing one’s own discovery and challenging the opponent’s discovery are often the most cost and time consuming parts of the litigation process. With the guidance of PD 31B, parties, at an early stage, will not only ensure compliance with duties of e-discovery but also

---

118 PD 31B, Schedule.
119 *See Sautter* (n 114 above).
120 PD 31B, Schedule.
121 *See Ward* (n 91 above).
123 PD 31B, para 22.
124 PD 31B, para 6(3).
125 *See Slusarz* (n 12 above).
hold a real chance of reducing the practice burden and associated costs. PD 31B recommends the use of technology as means of managing documents efficiently and effectively, apart from providing the signposts as to what the court will consider a reasonable search required by CPR 31.7. Software aided keyword searching and other forms of automated searching are referred to with guidance on appropriate use. Techniques that ensure e-discovery is carried out proportionately are suggested, including adopting a staged approach by focusing first on key individuals, date ranges and document sources, and relying on data sampling to check the likelihood of locating relevant evidence in sources.

iii. New CPR 31.5

Apparently the problem of proportionality has been existed before PD 31B, which remains to be a practical obstacle for the parties to keep on the right track. In M3 Property Ltd v Zedhomes Ltd (2012), the Judge refused to give a permission to an independent expert to test the computer devices in order to figure out whether an e-mail purporting to prove settlement of a dispute had existed or it had been fabricated, on the ground that it would be disproportionate. Due to the same reason, in Phaestos Ltd v Ho, King J declined to order early disclosure on the grounds that it would not be proportionate, and rejected the argument that the image of a hard disk drive should be regarded as a disclosable document.

As a result, the new CPR 31.5 “Disclosure Limited to Standard Disclosure” under the recommendations of Lord Justice Jackson are planned to come into force on 1 April 2013. CPR 31.5 is designed to modify the discovery process, which ushers a new era of proportional discovery in the UK. PD 31B will be applicable to this new CPR 31.5. Hence, some of the changes made in CPR 31.5 will be significant to e-discovery.

---

126 See Ward (n 91 above).
127 Ibid.
128 PD 31B, para 5(6).
129 PD 31B.
131 See Electronic Disclosure (n 95 above).
133 It will not apply to cases in which the first Case Management Conference takes place or is due to take place before 16 April 2013.
135 Ibid.
Under the revised version of CPR 31.5, the courts will have several options for addressing discovery of cases involving complex-significant documents. For instance, courts may provide direction in regard to the searches for ESI, the phasing of the different discovery stages, and the formats for disclosing ESI. This new “menu of possible disclosure orders” will allow courts to tailor a discovery strategy or plan to satisfy the specific needs of a particular case.

The new CPR 31.5 will further lead to emphasizing the efficiency of discovery and the importance of its early stage. Specific deadlines are set for procedures such as filing a pre-CMC report, proposal for discovery and budgets. The pre-CMC report should state “what documents exist or may exist or may be relevant to the case (verified by a statement of truth)”, and point out the location of documents as well as the estimated search costs.

Just like PD 31B, CPR 31.5 also addresses the role of technology in reaching the overriding objective in discovery. It is the driving force to the development and adoption of new break-through technologies. Therefore, the deploying effective technologies will be just critical as to ensuring compliance with the new e-discovery provisions.

It seems that the new CPR 31.5 still has some potential loopholes. For instance, although an estimation of discovery costs is required by the new CPR 31.5, in practice, parties often find it very hard to make the estimation in advance. From the recent case *Sylvia Henry v News Group Newspapers Ltd* (2013), it is unlikely that the unapproved exceeded budgeted costs will be recovered, which indicates an important message that the reliable method and process of monitoring adherence of budgets should be conducted.

**B. The US**

Discovery in the US litigation is a right. Relevance of data is defined very broadly, doubled with the fact that there is relatively very limited legal protection for employees’

---


137 See Morrey (n 134 above).

138 See Favro (n 136 above).

139 Ibid.

140 See Morrey (n 134 above).

141 Ibid.


personal information in companies’ information system, e-discovery in the US is often conducted in a very broad scale. The costs of e-discovery in the US are usually extraordinarily high and become a huge burden for the producing party. In Race Tires America, Inc. v Hoosier Racing Tire Corp. (2010), the step of preservation, production and review cost over $100,000. The high e-discovery cost has always been the major issue concerning e-discovery in the US. It was the trigger of the very first steps in e-discovery legislation.

i. The Zubulake Case

Zubulake v UBS Warburg LLC (the Zubulake case) is a landmark case in the area of e-discovery. It was heard between 2003 and 2005. The plaintiff Laura Zubulake sued her former employer UBS for gender discrimination, retaliation and failure to promote, and moved to obtain “all documents concerning any communication by or between UBS employees concerning the plaintiff” from the defendant UBS. The documents included the e-mails automatically backed up on tapes and optical disks, which would cost a lot and take a long time to restore. UBS, the defendant, thus claimed that some of the production cost should be shifted to the requesting party. The decisions the court made in this case are known as Zubulake I, Zubulake II, Zubulake III, Zubulake IV and Zubulake V.

In Zubulake I, a two-step test was created to determine in what situation cost-shifting would be appropriate. With the general presumption that the producing party must pay for the e-discovery costs, the first step is to analyze the accessibility of the data. If accessing the data will create an undue burden or expense for the producing party, the data is considered inaccessible. In Zubulake, the court listed five categories of data storage formats, among which three were identified as “accessible” while the other two were considered “inaccessible”. The court would order the production of accessible data without

144 See ibid.
147 See ibid.
148 See ibid.
149 Ibid.
150 Ibid.
cost-shifting. As for inaccessible data, the second step of the Zubulake test, which is a seven-factor test, would be applied. The seven factors are:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

This seven-factor test was later applied in Zubulake III, in which the court ordered the defendant to pay for 75% of the cost for restoring the documents while shifting 25% of the cost to the plaintiff. Since then, cost-shifting in the search and production of ESI has been generally considered by courts following the Zubulake test.

Later in Zubulake case, the plaintiff found out that some of the backup tapes were missing and moved for sanctions against the defendants for failure in preservation of those tapes. In Zubulake IV, the court decided that there is no duty to preserve backup tapes for disaster recovery, unless information of the key players can be clearly identified as stored on the tapes. However, in Zubulake V, the court issued sanction against the defendant for failing to preserve the backup tapes, inferring bad faith on the part of UBS for this failure, but with no specific discussion on what made it fall within the seemingly narrow exception in Zubulake IV.

The Zubulake framework caused anxiety among corporations about their e-discovery obligations, for it gave the court authority to order the production of old disaster recovery

---

153 Ibid.
155 See Yip (n 2 above).
tapes even if nobody knows what is exactly on them, and at the same time, the company may face severe sanctions for negligent destruction.  

ii. Federal Rules of Civil Procedure

The 2006 Amendments to the FRCP adds the definition of ESI to its own, substituting the words “documents” and “data compilations”, which may cause ambiguity. Amendments were added to Rules 16, 26, 33, 34 and 37, directly aiming at ESI, so as to clarify and better regulate issues related to cost-shifting, the handling of privileged information, pre-trial conference and discovery plan, the use of ESI in interrogatories and subpoena, the production of ESI and sanctions against failure to preserve ESI or to develop and submit a discovery plan.

In Rule 26(b)(2), a two-tier approach is created to deal with the production for inaccessible data. Parties are expected to bear their own cost of searching and producing ESI for reasonably accessible data. If the data is deemed to be “not reasonably accessible” because of undue burden or cost, the requesting party can still make a showing of good cause for the production of such data, and the court, after considering various factors, such as whether “the burden or expense of the proposed discovery outweighs its likely benefit”, could still order the production of such data with conditions specified for the discovery, for example, shifting some of the costs to the requesting party. Thus, in contrast to the Zubulake framework, which treats all non-privileged and relevant data as discoverable, Rule 26(b)(2) removes ESI from the scope of discoverability if the production of the data is deemed to be overly burdensome and there is no good cause for overriding.

To promote structure, uniformity and more predictable practices in e-discovery, Rule 26(2)(f) requires all parties to discuss the e-discovery issues in a pre-trial conference, and to

---

162 Ibid.
167 Ibid.
168 See Fed. R. Civ. P. 37(e) & 37(f).
170 Ibid.
171 See Kim (n 79 above).
develop a discovery plan. A party will face sanctions if it is unwilling to participate in this pre-trial conference planning process for e-discovery. In the discovery plan, the parties are required to state their views or proposals about issues concerning the discovery of ESI, including the form of production.

Rule 34(b) was amended to make it clearer how ESI should be produced. It states that it is the requesting party who specifies the “form or forms in which electronically stored information is to be produced”. Or else, the producing party may provide data in “a form or forms which it is ordinarily maintained or in a reasonably usable form or forms”.

Another highlight in the 2006 F.R.C.P. is the “safe harbour” provided to the producing party in Rule 37(e), when it fails to provide ESI “as a result of the routine, good-faith operation of an electronic information system”. It helps calm the fear of sanctions for inadvertently having a backup tape been overwritten automatically. But it may be rather hard to prove if there is no third party validation.

There are a lot of cases in the US concerning e-discovery. Recently, there has been a lot of discussion on the use of predictive coding, which is a kind of computer-assisted review, in the reviewing process.

The recent case Da Silva Moore v Publicis Groupe & MSL Group (2012) (the Da Silva Moore case) is a flag case addressing the use of “computer-assisted review” in e-discovery. Judge Peck opined that the defendants could use predictive coding, which means depending on a computer program that uses algorithms to tag documents automatically instead of reviewing them manually, for the review of 3 million electronic documents.

---

177 See Fed. R. Civ. P. 37(e).
178 See Kim (n 79 above).
Another case concerning computer-assisted review is *Global Aerospace Inc. v Landow Aviation, L.P.* (2012) (the *Global Aerospace* case), in which Judge Chamblin approved the use of predictive coding over the plaintiff’s objection to the order of computer-assisted review. It is generally accepted that, “no computer program is an adequate substitute for having human beings review and sort the documents.” But in the *Da Silva* case, Judge Peck gave five reasons for the use of computer-assisted review:

1. The parties had agreed to use computer-assisted review;
2. The large volume of ESI that was involved in this case;
3. The “superiority of computer-assisted review to the available alternatives,” such as manual review and keyword searches;
4. The need for cost effectiveness and proportionality under the FRCP; and
5. The transparency of the proposed computer-assisted review process.

However, in the *Global Aerospace* case, Judge Chamblin left the door open for future objection, and did not address the issue of a protocol for implementing computer-assisted review, which was the main issue in the *Da Silva* case.

Given the increasing use of predictive coding by law firms and companies, people are still timid about the idea of having a machine decide which documents to ignore. But the implication of these two cases is that the question lies in when to use predictive coding and how. It is reasonable to believe that as technology and case law develop, lawyers will be able to use predictive coding, as well as other computer-assisted methodologies with more regularity.

---

184 Palazzolo (n 28 above).
185 *Global Aerospace Inc. v. Landow Aviation, L.P.*, No. CL 61040 (Va. Cir. Ct. Apr. 23, 2012). Judge Chamblin noted that, “[t]his is without prejudice to a receiving party raising with the court an issue as to completeness or the contents of the production or the ongoing use of predictive coding.”
186 See Palazzolo (n 28 above).
The issue of preservation obligation has also been frequently raised up in recent cases. A piece of good news for corporations comes from *Brigham Young University v Pfizer (2012)*. In this case, the defendant failed to provide some key documents in e-discovery, as a result of its information retention policies. The court denied the plaintiff university’s motion for discovery sanctions against the defendant. It has been made clearer in this case that companies have no duty to preserve data until litigation is “reasonably anticipated”.

The timing of a comprehensive litigation hold is the crucial point. In *Apple, Inc. v Samsung Electronics Co., Ltd (2012)*, Samsung faced sanctions for its failure to circulate a comprehensive litigation hold instruction when it first anticipated the litigation, resulting in the loss of some key e-mails. Later, Apple was sanctioned for the late issuing of a proper hold notice, which was months after litigation became reasonably foreseeable.

In *Pippins v KPMG LLP (2012)*, the accounting firm (KPMG) objected to the court’s order to preserve thousands of employee’s hard drives, arguing that the high cost of that action was disproportionate to the value of ESI stored on those drives. The court rejected this argument at the end, stating that without KPMG providing any information about the documents in those drives, there is no way to decide how the potential benefit of the discovery weighs against the burden it creates. This decision suggests that when seeking protection under the proportionality principles, the parties shall engage in a co-operative and reasonable conduct.

In conclusion, the US has one of the most comprehensive e-discovery legislation and case law in the world. New issues, such as the use of predictive coding, are being addressed in the courts there. It is a pioneer in the use of e-discovery. But the system is sometimes overly complex and burdensome, resulting in a very high cost and threats to privacy.

190 Ibid.
194 Ibid.
Although Hong Kong’s legal system is not as similar to that in the US than to the UK system, the trends and problems of e-discovery in the US can be a very good reference for courts not only in Hong Kong, but also in any other countries, when making decisions or creating new legislations in this area.

C. Australia

Australia is catching up in the law-making of e-discovery. It had the Practice Note CM 6 (“CM 6”), which is titled *Electronic Technology in Litigation*, coming into effect in 2011. It is very similar to the UK’s PD 31B. But the main focus and principle of CM 6 is on the effective use of technology to “facilitate just resolution of disputes according to law as quickly, inexpensively and efficiently as possible”198. It is specified that consideration of the use of technology be expected for:

1. Creating lists of discoverable documents;
2. Giving discovery by exchanging electronically stored information;
3. Inspecting discovered documents and other material;
4. Lodging documents with the Court;
5. Delivering Court documents to, and otherwise communicating with, each party; and
6. Presenting documents and other material to the Court curing a trial.199

Another emphasis in the CM 6 for the purpose of achieving efficiency and effectiveness is document management.200

In order to have a better document management process and limit the cost and scope of discovery, similar to the UK and the US, CM 6 calls for early cooperation between parties on planning so as to manage documents and conduct e-discovery more efficiently.201 Parties are expected to “meet and confer” to discuss and agree on a discovery plan and protocols for document management.202 More guidelines are given out in the Pre-Discovery Conference Checklist that is released together with the CM 6, which suggests parties to agree upon issues including the scope of discovery, reasonable research strategies, preservation strategies, and

---

197 See Slusarz (n 12 above).
198 See Practice Note CM 6, Art 3.1.
199 See Practice Note CM 6, Art 4.1.
200 See Practice Note CM 6, Art 3.2.
202 See Practice Note CM 6, Art 6.
estimates for discovery costs, etc. But unlike what the UK court has done, CM 6 doesn’t give additional guidelines for determining the accessibility or the ease of retrieving any particular document.

In addition, CM 6 establishes a Document Management Protocol. A Default Document Management Protocol is used for situations with document loads of 200 to 5,000. If the number of Discoverable Documents exceeds 5,000, an Advanced Document Management Protocol can be used instead. The Document Management Protocol demonstrates the management of discovery, and is a very clear guideline for parties in the production and exchange of ESI. It requires “De-Duplication”, which means discarding of duplicate documents, even for paper files that are made into PDF files. Also, it contains detailed requirements for the List of Documents and Document IDs, and requires document imaging be made into PDF or TIFF formats.

Having a jurisdiction rooted in the UK, Australia has its CM 6 largely similar to the UK’s PD 31B, but with a more focused purpose on the effective use of technology throughout the litigation process. CM 6 is a good reference for Hong Kong, since in the short run, these two jurisdictions seem have no urgent need to establish a complex regulation system for e-discovery like the one in the US; and e-discovery doesn’t raise a lot of issue and discussion in Australia compared to the amount of discussions in the US. It is reasonable to believe that CM 6 will take credit for having e-discovery in Australia being somehow manageable and under control.

A more recent contribution from Australia is the 384-page report on *Managing Discovery: Discovery of Documents in Federal Courts* (the “Report”), released by the Australia Law Reform Commission (the “ALRC”). In the Report, the ALRC gives 27 recommendations to identify options for reform in order to improve the effectiveness in handling discovery in the court, for “the sheer amount of data today” has often made

---

203 See Practice Note CM 6, Pre-Trial Checklist.
204 See PD 31B, para 21.
205 See Practice Note CM 6, Default Document Management Protocol.
206 See Practice Note CM 6, Art 8.
207 See Practice Note CM 6, Default Document Management Protocol.
208 See Practice Note CM 6, Art 2.
discovery the most costly and time-consuming process in the litigation. The focus of the recommendations is mainly on the Federal Court. Based on a “facilitative model”, the ALRC encourages the judge’s active participation in facilitating the resolution in any areas of disagreement in a discovery. Robust judicial case management is considered crucial in settling disputes.

One of the key issues in the Report is the discovery plan. The Court has authority to order the development of a discovery plan. In Recommendation 6-1, it is suggested that a party may apply for a discovery plan order before the court issues such an order. The Federal Court of Australia is recommended to provide “the factors likely to be relevant in an application for a discovery plan order” in its practice notes. By issuing an order of discovery plan, the Court should require the parties to make the plan in good faith, and in case of any disagreement, the Court shall exercise its authority to resolve the disagreement in a discovery plan.

Another issue is the cost of discovery. According to the recommendations in the Report, the court has the power to make a costs order to shift “some or all of the estimated cost of discovery” to the requesting party, or to require the requesting party to give security for the payment of discovery expenses. Besides, a maximum amount of discovery costs that can be recovered may also be set out in the costs order. The Report considers circumstances under which such costs orders shall be made, especially when the parties fail to take into account the “overarching purpose” in s37M of the Federal Court of Australia Act (Cth).

When addressing whether or not an order should be made, practitioners are expected to consider factors such as “the parties’ financial resources”, “the likely cost of retrieving

---

211 See Executive Summary. Managing Discovery (n 32 above), p 16.
212 Ibid. p 18.
213 See Recommendation 6-1. Managing Discovery (n 129 above), p 7.
214 Ibid.
218 Ibid.
relevant documents” and the proportionality of the cost to the importance of the matters in dispute.220

Finally, a pre-trial oral examination is also proposed in the recommendations. It may be ordered by the court in limited circumstances to identify potentially discoverable documents, to assess a discovery plan or to resolve disputes in discovery.221

In conclusion, the recommendations in the Report focus on the “educative function” of the practice notes. By introducing more active case management from the courts, and encouraging the use of “various ways in which the discovery can be managed effectively and efficiently”,222 it is expected that “placing specific detailed powers in primary legislation could help drive cultural change in civil litigation in federal courts”223.

Just like the U.K and the US, the focus in Australia on e-discovery is also on increasing the judge’s management role. This Report provides very good and leading thinking on this.224 The practitioners are recommended to taking a more active, or even robust role in guiding the parties in discovery to save time and reduce expense. The educational impact of such practice is expected to bring cultural change.225

D. Singapore

In the Supreme Court of Singapore’s Practice Direction No. 3 of 2009 Part IVA (“PD 3/2009”), an opt-in framework is introduced for requesting and conducting e-discovery.226 It intends to mainly deal with inter partes discovery issues the evidence. Issues such as preservation obligation are not dealt with in this Practice Direction.227

In 2012, the Supreme Court of Singapore made significant change to PD 3/2009 by Amendment No.1 of 2012 of the Practice Directions, which took effect on March 1, 2012. The amended PD 3/2009 will be referred to as the “revised PD 3/2009” throughout this study.

The revised PD 3/2009 removes the original opt-in framework, and substitutes it with three tests that the parties should consider when determining the applicability of e-

---

220 See Recommendation 9-3, Managing Discovery (n 129 above), p 11.
222 See Executive Summary. Managing Discovery (n 32 above), p 19.
224 See Dale, Time to take the next steps: A Hong Kong eDiscovery conference (n 42 above).
225 See Executive Summary. Managing Discovery (n 32 above), p 23.
226 See Sup Ct PD 3/2009, para 43A.
discovery. It clarifies that the court has the power to order the application of e-discovery in appropriate scenarios, even if the parties has not consented to the application.

The definition of “not reasonably accessible documents” is added in the revised PD 3/2009, which includes documents such as those stored on backup tapes or those were originally deleted but can be recovered by using computer forensic tools, etc. A request for such document should demonstrate the “relevance and materiality” of the ESI to justify the cost of retrieving and producing it. A checklist is provided in the revised PD 3/2009 to assist good faith collaboration between parties. The model of this checklist is the UK’s EDQ. But it is in a less technical fashion than the UK equivalent. The issues to discuss in this checklist include the scope of reasonable search, the use of software tools to facilitate searches, privilege review, preliminary searches, inspection and provision of copies, etc.

Moreover, “e-discovery protocols” is substituted by “e-discovery plans”. The sample e-discovery plan is more comprehensive, compared to the old sample of e-discovery protocol. In this amended sample plan, it clarifies that the “not reasonably accessible documents” are not within the scope of general discovery, and that the party carrying out a reasonable search “shall not be required to review the search results for relevance”, which was a decision made in *Sanae Achar v Sc-Gen Ltd (2011)*.

Another completely new provision was Paragraph 43J, which gives the court power to order that “discovery be given by the supply of electronic copies of discoverable electronically stored documents in lieu of inspection”. This will enable progressive litigators, without being involved in disputes on an e-discovery plan or the scope of discovery, to adopt cost saving electronic evidence management methodologies or protocols. In Paragraph 43J(2), several examples of these methodologies or protocols are set out. For example, a meaningful description of one category of ESI can be provided in

---

228 See Sup Ct PD 3/2009, para 43A.
229 Ibid.
233 Ibid.
237 See Lim (n 11 above).
place of a detailed list of all the documents, and parties can exchange the printed or paper copy of documents in the form of digitized documents.

Singapore is more aggressive and focused than Hong Kong on improving the effectiveness of dispute resolution. The modifications in the revised PD 3/2009 are very thoughtful, and some recent court decisions have also been taken into account. The less technical checklist is very welcomed. And the possibility of being able to exchange the ESI without the parties having to undertake a full discovery exercise is very innovative and received positively by e-discovery experts.

Part III. Recommendations for Hong Kong

Considering Hong Kong’s common law legal system, the UK’s PD 31B is a more adoptable model. Meanwhile, the new issues occurred and being discussed in the US often set the global trend of e-discovery regulation, hence, they are good references for Hong Kong as well. In addition, many innovative thoughts and progressive case management methodologies are contributed by Australia and Singapore, which can be quite inspiring. All these existing practices are of great value for Hong Kong to tackle the following key obstacles in e-discovery management. (A brief comparison among these practices is provided in Appendix III.)

A. Cost and cost shifting

The cost of e-discovery – often the single largest cost in litigation today – poses an economic threat to any company facing litigation, which is also one of the main concerns towards the legislation in every country.

The reduction of costs differs from stage to stage in the whole e-discovery procedure. The first two stages of “identification” and “preservation and collection” are where the current legislations focus on in regard to reducing the costs such as requiring parties to

240 See Lim (n 11 above).
241 Ibid.
242 See Srivastava (n 74 above), p 19.
243 See Executive Summary. Managing Discovery (n 32 above), p 14.
submit a list of issues to be concerned, providing sample EDQ and emphasizing early cooperation, to reduce the chance of disputes in later stages.

However, the third phase, “processing, review and analysis”, which is the most expensive stage,\(^{245}\) still needs to be directly regulated, since it is very hard to have everything planned in advance. For instance, courts in Australia emphasize active, even sometimes robust, participation of judges in monitoring this process.\(^{246}\) This can be a good example for Hong Kong.

At the same time, the costs occurred in this step depend a lot on the scope of discovery allowed by the court and the treatment of “not reasonably accessible” documents.

For example, on the scope of discovery, in the UK, whether the carried-out discovery is a reasonable search or not can be totally decided by the court, either before the search, or with hindsight.\(^{247}\) This kind of active case management from litigators is exactly what has been recommended in Australia’s Report.\(^{248}\)

On the treatment of accessibility of ESI, despite the fact that there is clear definition of ESI that are deemed to be “not reasonably accessible” in the US FRCP,\(^{249}\) the responding party is required to disclose the existence of information located on the sources that is “not reasonably accessible”, which cannot be done without conducting some of the expensive procedures to restore or search the sources.\(^{250}\) Singapore treats this issue with simplicity. There is no need to give any description for data that is deemed to be “not reasonably accessible”. A party requesting “not reasonably accessible” documents should not only demonstrate the “relevance and materiality” of the ESI to justify the costs, but also limit the scope of the proposed search.\(^{251}\)

The overall trend is to encourage more proactive participation from the courts in limiting the scope of e-discoveries.\(^{252}\) The party who requests the discovery will naturally want to have everything searched, and be reluctant to miss out any information. It may not be a good

---

\(^{245}\) See Slusarz (n 12 above); Paskach (n 244 above), p 5.

\(^{246}\) See Executive Summary. Managing Discovery (n 32 above), p 18.

\(^{247}\) See Digicel (St. Lucia) Ltd v Cable & Wireless Plc [2008] EWHC 2522.

\(^{248}\) See Executive Summary. Managing Discovery (n 32 above), p 18.


\(^{251}\) See Sup Ct PD 3/2009, para 43D(5).

\(^{252}\) See Bell (n 107 above).
idea to give too much room for parties to negotiate and justify the disclosure of not reasonably accessible information. The courts in the UK, Australia, and Singapore are practicing more rigidly in this respect. As a result, e-discovery in these countries usually costs much less, comparing to the US.253

If Hong Kong is to establish a set of regulation to tackle the problems in e-discovery, the costs issue is likely going to be the trickiest one. What Hong Kong should learn from the existing practices, is that simplicity, and even sometimes rigidness, can be very crucial in tackling the complex issue of e-discovery costs.

B. Discovery Plan

Collaboration between parties in advance is essential for a good e-discovery practice.254 Clear and binding guidelines provided by legislation are recommended.255 In recent years, the courts started to address the issue of making a discovery plan prior to the start of e-discovery.

In Australia, although the Practice Note CM 6 doesn’t give very detailed guidelines about discovery plan, in the Report of the ALRC, the matters to settle in a discovery plan have been listed out.256 Singapore has made this even clearer and easier to follow by establishing a comprehensive sample discovery plan.257 It further clarifies the scope of a reasonable search and the obligation of each party. The parties who choose to move away from the established outlines in the sample discovery plan have the obligation to justify such action.258

The comprehensive sample discovery plan is potentially a very good practice to be referred to by other legislations, including Hong Kong. It provides more clarity, leaving less ambiguities and room for disagreements in the early stage, which is good for the collaboration between parties.

254 See Bell (n 107 above).
255 Ibid.
C. Computer-Assisted Review

Because of the huge burden of costs and time that comes from the process of relevance review, which is usually performed by the party who conduct the e-discovery, computer-assisted review has become a newly brought up issue, especially in the US.

The concern about having computers to do the relevance review is always the missing out for some potentially relevant information. There is not yet a clear protocol in the US that outlines the circumstances that are suitable for a computer-assisted review.

In Singapore’s pre-discovery checklist, the use of software tools “to facilitate searches and to save costs” is highly recommended. No specifications are made to limit the applicability of this kind of computer-assisted review. And it clarifies that the party conducting the search has no obligation to spend additional efforts to further review the search results for relevance.

Under Paragraph 43J of Singapore’s Practice Direction 03/2009, the court can allow the parties to discharge their e-discovery responsibility by merely supplying the electronic copies of discoverable ESI to the court, so that the court will be able to conduct even more advanced and innovative cost saving methodologies or protocols.

As technology advances and the need of e-discovery increases, using computer programs to assist in the e-discovery process is an irresistible trend. On one hand, when and how to apply computer-assisted review is largely arguable. On the other hand, this doesn’t mean that Hong Kong has to copy Singapore’s approach, which may leave too little room for the requesting party to justify using manual review. But courts should always promote the use of advanced methodologies to help improve the efficiency of the litigation process. It will be very helpful to have more guidelines, such as a sample protocol, to promote the use of computer-assisted review.

D. Pre-trial Checklist/Questionnaire

The unpredictable costs of e-discovery ask regulator to pay more attention to guidance on e-discovery to a cost-effective way in legislation. As “Scope Creep” is commonplace

---

259 See Paskach (n 244 above), p 5.
261 Ibid.
263 See Palazzolo (n 28 above).
264 See Vorro (n 100 above).
resulting in e-discovery budget overruns, the forehead plan and restriction to keep on the track of schedule is essential for the e-discovery.\textsuperscript{265} Although currently the British courts don’t require any detailed discovery plan or a specified budget before the action,\textsuperscript{266} they do strongly suggest that it should be included in the list of discovery issues to be considered, which must be submitted before the first CMC.\textsuperscript{267} The EDQ set by the UK provides a standard example for the parties to specify their own e-discovery scope of reasonableness as well as their proposals for the discovery of the opponent parties by clarifying, for instance, the search range of date, key custodians, method to adopt, etc. Even though the questionnaire is not compulsory, the required list submitted before the first CMC assures the avoidance unnecessary expenses and a certain degree of consideration given by the parties before carrying out the e-discovery procedure.\textsuperscript{268}

Having the UK’s EDQ as model, Australia and Singapore established their own version of EDQ. Australia has its Pre-Discovery Conference Checklist;\textsuperscript{269} Singapore has Check List of Issues for Good Faith Collaboration.\textsuperscript{270} The Singapore’s version is largely welcomed by experts in this field, because it is not as technical as the UK one, and thus, considered to be more user-friendly.\textsuperscript{271}

In this perspective, Hong Kong legislation is highly recommended to follow or model these helpful legal tools created by the UK, Australia and Singapore. This can add clarity and promote good faith cooperation in e-discovery, to make the whole process smoother with less costs and waste.

\textbf{E. Preservation Obligation}

Preservation obligation is another hot topic in e-discovery. According to the case \textit{Earles v Barclays Bank} (2009), “before proceedings are commenced there is a duty not to destroy documents deliberately, but no duty to preserve documents, whereas after the proceedings have been commenced documents must be preserved”.\textsuperscript{272} “…Failure to preserve documents

\textsuperscript{266} See New CPR 31.5.
\textsuperscript{267} See Morrey (n 134 above).
\textsuperscript{268} See Ward (n 91 above).
\textsuperscript{269} See Practice Note CM 6, Pre-Discovery Conference Checklist.
\textsuperscript{271} See Lim (n 11 above).
\textsuperscript{272} \textit{Earles v Barclays Bank} (n 83 above), paras 27-30.
before commencement of proceedings may result in costs sanctions”. It’s generally considered that companies are not liable for the loss of documents due to the routine document retention activities.

However, the obligation of preservation still raised a lot of discussions, especially in the US, mainly on the timing of the litigation hold. According to the US regulation, the company should impose a litigation hold for documents as long as the litigation is reasonably anticipated.

It doesn’t have to be that complicated. In Australia, the preservation issue is simply listed out as a matter to be addressed during pre-discovery conferences. The take-away for Hong Kong is that clear regulation in legislation would reduce unnecessary arguments on the timing and scope of the duty to preserve ESI.

Conclusion

The use of electronically stored information nowadays is everywhere. We leave electronic fingerprints almost for everything we do. It is unavoidable that the use of ESI in litigation process is increasing rapidly, too. E-discovery has been around for roughly ten years and has brought to the practitioner and the parties in civil litigation some major problems, such as huge costs, ambiguity on scope of discovery, pre-trial cooperation, etc.

Hong Kong has done very little in this respect, while other common law legislations, such as the UK, the US, Australia and Singapore, are competing with each other in establishing and amending e-discovery regulations to streamline the litigation process. The US used to be the leader in this field. However, the UK, Australia and most recently, Singapore are catching up and have provided many innovative thoughts. Although sometimes the effort made by the courts may, in fact, muddy the water even more. The current trend is clear that guidelines should be made in a more clear, uniform and binding manner.

Without clear guidelines to tackle e-discovery, the discovery process can potentially go out of control. Hong Kong is already late in this respect. But with these other legislations as references, following up on e-discovery is not likely going to be an extremely challenging and risky task for Hong Kong. The UK’s Practice Direction 31B seems to be a good starting point.
point for Hong Kong. It can also refer to cases and different thoughts from other courts on
dealing with the major issues in e-discovery, and thus, directly follow up by establishing a
comprehensive set of regulation. The issues arisen from e-discovery are still evolving. It is
necessary to have guidelines to cope with the ever-changing phenomenon of the litigation
process caused by the changes happened in our world. It is not too late for Hong Kong to
catch up.
Appendix I

Electronic Discovery Reference Model

## Appendix II

### E-Discovery Legislation in the UK, the US, Australia and Singapore

<table>
<thead>
<tr>
<th>Country</th>
<th>Legislation/Legal Resources</th>
<th>Cases</th>
<th>Case Law</th>
<th>Issues</th>
<th>Implications to Hong Kong</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Hong Kong</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
|  | ● Chapter 4A Order 24 “Discovery and Inspection of Documents”: general discovery approach  
● Order 24 rule 1(1): discovery obligation  
● Order 24 rule 8(1): the Court may refuse to make an order due to cost saving  
● Order 24 rule 15A: the Court may make any orders to limit the scope of discovery | 1. **CSAV Group v Jamshed Safdar**  
2. **Deacons v Kevin Richard Bowers**  
3. **Moulin Global Eyecare v KPMG**  
4. **Liquidators of Moulin Global Eyecare v Ernst & Young** | 1. Order 24 could be equally applied to the e-documents.  
2. Reasonable steps should be taken to discover all relevant documents.  
3. Relevance is important to determine discoverability.  
4. Extra wasted expense should be paid by the party who caused it. | ● Scope of discovery  
● Relevance  
● Costs of irrelevant e-discovery  
● Cost-shifting | ● Limited legislation and no Practice Direction specifically to e-discovery |
| **The UK** |  |  |  |  |  |
|  | ● Civil Procedure Rules Part 31 “Disclosure and Inspection of Documents”  
● Paragraph 2A.1 of Practice Direction (PD) 31A extends “Documents” in CPR Part 31 to e-documents  
● Practice Direction 31B “Disclosure of Electronic Documents”: detailed guidance specifically to e-discovery; attached Electronic Documents Questionnaire  
● Civil Procedure Rules Part 31.5 “Disclosure Limited to Standard Disclosure” (new version will come into force on 1 April 2013): increase the management role of the court | 1. **Digicel v Cabel & Wireless**  
2. **Earles v Barclays Bank**  
3. **Goodale v The Ministry of Justice**  
4. **M3 Property Ltd v Zedhomes Ltd**  
5. **Phaestos Ltd v Ho**  
6. **Sylvia Henry v News Group Newspapers Ltd** | 1. The Court may require to re-do the e-discovery if wrong search term had been used regardless of costs incurred.  
2. Costs sanctions was imposed on the winning party for its failure to conduct disclosure satisfactorily  
3. The court determines the scope, the way, and proportionate of the search  
4. Disproportionate expertise computer test was not permitted by the court  
5. The court declined to order the disproportionate disclosure  
6. The unapproved exceeded budgeted costs will not be recovered from the other side | ● Reasonableness  
● Those practising in civil courts are expected to have knowledge competency of e-discovery rules  
● Proactive cooperation in early stage  
● Scope and proportionate of search  
● Proportionality  
● Cost-shifting | ● Current position of HK is like before **Goodale v The Ministry of Justice**  
● HK may refer to PD 31B  
● EDQ is a good example |
<table>
<thead>
<tr>
<th>The US</th>
<th>Australia</th>
</tr>
</thead>
</table>
| • Federal Rules of Civil Procedure Rule 26(b)(2): two-tier approach for inaccessible data  
• Rule 26(2)(f): discussion is required in a pre-trial conference  
• Rule 37(f): sanctions to the party unwilling to participate in the pre-trial conference  
• Rule 34(b): form of ESI to be produced and maintained  
• Rule 37(e): allowed failing to provide ESI | • Practice Note CM 6  
“Electronic Technology in Litigation”: emphasis use of technology; Document Management Protocol; Pre-trial Checklist  
• “ALRC” report on “Managing Discovery: Discovery of Documents in Federal Courts”: 27 recommendations to the court  
• s37M of the Federal Court of Australia Act (Cth): “overarching purpose” |
| 1. **Zubulake v UBS Warburg**  
2. Da Silva Moore v Publicis Groupe & MSL Group  
3. Global Aerospace Inc. v Landow Aviation, L.P.  
4. Brigham Young University v Pfizer  
5. Apple, Inc. v Samsung Electronics Co., Ltd  
6. Pippins v KPMG LLP | • Cost-shifting  
• Accessibility of data  
• Computer-assisted review  
• Duty of preservation  
• Failure to disclosing documents in time  
• Benefits vs. costs |
| 1. **Zubulake I**: two-step test determining the application of cost-shifting; **Zubulake III, IV, V**: sanction was issued against failing to preserve the backup tapes  
2. Computer-assisted review is allowed  
3. Computer-assisted review is allowed  
4. Parties have no duty to preserve data until litigation is “reasonably anticipated”  
5. Sanctions are given for failing to circulate a litigation instruction and late issuing of held notice  
6. Without any transparency about the information, there is no way to decide how the potential benefit of e-discovery weighs against the costs | • Document management  
• Early cooperation between parties  
• Discovery plan  
• Pre-trial oral examination |
| HK may pay attention to the complex e-discovery issues such as cost-shifting, computer assisted review, etc. that have been widely discussed | • Active participation of court in document management is important for efficiency and effectiveness  
• Appropriate use of technology can be helpful |
| Singapore | • Supreme Court of Singapore’s Practice Direction No. 3 of 2009 Part IVA (“PD 3/2009”): opt-in framework  
• “Revised PD 3/2009” under “Amendment No. 1 of 2012 of the Practice Directions”: three tests; Paragraph 43J | 1. *Sanae Achar v Sc-Gen Ltd* | 1. “not reasonably accessible documents” are not within the scope of general discovery; and the party is not required to review the search results for relevance | • Discovery plan  
• Reasonable accessibility  
• Review of relevance | • Strict provision and powerful court management may help to achieve effectiveness  
• Simplicity works better sometimes |
### Appendix III

How the Five Key Issues in E-Discovery Are Addressed in the Other Countries

<table>
<thead>
<tr>
<th>Cost</th>
<th>Discovery Plan</th>
<th>Computer-Assisted Review</th>
<th>Pre-trial Checklist/Questionnaire</th>
<th>Preservation Obligation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scope of Discovery</td>
<td>Treatment of Inaccessible Data</td>
<td></td>
<td></td>
<td>Timing</td>
</tr>
<tr>
<td>UK</td>
<td>Reasonable</td>
<td>Reasonably flexible</td>
<td>Suggested to have</td>
<td>--</td>
</tr>
<tr>
<td>US</td>
<td>Broad</td>
<td>Largely flexible</td>
<td>Suggested to have</td>
<td>Largely debatable</td>
</tr>
<tr>
<td>Australia</td>
<td>Reasonable</td>
<td>Reasonably flexible</td>
<td>Suggested to have</td>
<td>--</td>
</tr>
<tr>
<td>Singapore</td>
<td>Reasonable</td>
<td>Generally not flexible</td>
<td>Strongly encouraged, with detailed requirements</td>
<td>Encouraged by court</td>
</tr>
</tbody>
</table>
References


Ward, A. (2010). E-disclosure & the new Practice Direction 31B. *Crippslink,*


