The Sedona Conference Draft Primer on eDiscovery in the Asia Pacific (APAC) Region

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Introduction

EDiscovery practice and procedure in Asia vary greatly according to the origins of each jurisdiction's legal system. Those countries with common law systems, such as Australia, New Zealand, Hong Kong and Singapore, have well established and embedded eDiscovery practice and procedures in their respective Court rules. In other jurisdictions based on civil law or hybrid legal systems, eDiscovery is less common, although still carried out for international arbitrations and pursuant to foreign regulatory investigations, where document production is required.

The growth in eDiscovery business in Asia is reflective of the wide application of eDiscovery processes beyond formal court proceedings to international arbitrations, regulatory investigations and internal investigations, enabling the identification, collection and analysis of electronically stored information (ESI). Multinational companies with operations in China were one of the first groups to adopt eDiscovery approaches to support investigation workflows, particularly during the early 2000's with the rapid rise in enforcement by the United States for Foreign Corrupt Practices Act cases, which often required the production of large amounts of documents to the U.S. Department of Justice or Securities and Exchange Commission.

While the traditional uses for eDiscovery are typically for formal litigation proceedings and regulatory investigations, the use cases for eDiscovery have expanded to other areas of legal and compliance work. This includes large-scale contract analysis, information governance initiatives, and, more recently, data breach response efforts. The growth in data breaches and privacy regulations within the Asian region have led to eDiscovery as a workflow increasingly being used to identify personal data that has been breached to enable notifications to be made to regulators and affected individuals as required by relevant privacy and data protection regulations. This growth will continue as privacy regulation continues to develop rapidly in Asia. For example, Japan is the first country to receive an adequacy ruling by the European Commission post GDPR enforcement and there are ongoing adequacy talks between the European Commission and South Korea. India's first privacy regulation, Personal Data Protection Bill, 2018, is expected to become law this year and further tightening of privacy laws in New Zealand and Australia is expected.

Set out below is a summary of eDiscovery in each of the countries covered by this Paper, in alphabetical order, which is expanded upon in greater detail in the main body of this paper.

Australia and New Zealand

Australia and New Zealand are common law systems with well-established rules and court issued practice notes that govern the collection, exchange and use of ESI in proceedings.

Discovery of documents is highly regulated in Australia, with Federal and state court practice notes outlining the rules and principles that parties must adhere to throughout litigation. There have been several significant decisions in Australia relating to eDiscovery that encourage the use of technologically assisted review (TAR) to minimize the time and expense associated with modern litigation involving ESI. The Federal Court of Australia is currently reviewing its default and advanced document management protocols that serve as an agreement between parties in relation to the scope, means and format of documents to be are exchanged. It is anticipated that this Practice Note will be updated in the next year. The State court issued practice notes are regularly reviewed and updated to keep up with the trends in eDiscovery. In 2018, both the Queensland and Victorian Practice Notes were updated, with Victoria mandating use of Technology Assisted Review (TAR) in appropriate matters and Queensland focusing on parties agreeing to Document Management Plan.

New Zealand's High Court Rules include a Discovery Checklist and Listing and Exchange protocol that set the foundation for an expectation that parties utilise tools and processes to streamline the discovery process, unless otherwise ordered by the court.

The New Zealand government introduced to Parliament on 20 March 2018, a Privacy Bill amending the current *Privacy Act*. Australia's Notifiable Data Breach Scheme has now been in force since February 2018, and the Australian government announced in March that it would strengthen both the funding and powers of the Australian Information Commissioner by amending the *Privacy Act 1988* (C'th) in late 2019. While New Zealand received an adequacy ruling from the European Commission in 2012, Australia needs to strengthen its *Privacy Act* in order to satisfy the requirements of the GDPR and be considered a safe third country for data protection purposes.

China – Mainland

Ediscovery, as a workflow, is mature and well developed in Mainland China. It has been widely used and adopted for more than a decade, and specialized local service providers include consultants, technicians, and law firms. However, despite its name, eDiscovery in China is rarely used for "discovery" as that term is traditionally applied for evidence disclosure during litigation. The civil procedure rules in Mainland China do not allow one party to compel evidence disclosure from another party during civil litigation and, although a court may independently exercise its fact-finding authority to collect files, in practice this is often limited and typically targets a narrow scope of evidence. Nevertheless, eDiscovery in China is still used for litigation matters involving other jurisdictions, especially for several recent cases involving Chinese companies facing lawsuits in the U.S., but it is more often used for other types of large-scale ESI analysis, with compliance and ethics investigations as the largest usage but recently also expanding to include contract analysis, information governance initiatives, and data breach response efforts.

A key anticipated development for this field is the finalization of Mainland China's cross-border transfer rules. The Chinese government drafted and released for comment a set of rules, the Measures on Personal Information and Important Data Cross-Border Transfer Security Assessment (Draft), that would significantly limit the cross-border transfer of personal information and important data, each of which is broadly defined. Because the majority of the uses of eDiscovery in Mainland China are international matters related to cross-border transfers, the final version of the rules will have a significant effect, either to reassure companies that transfer is allowed under certain situations or to drastically change eDiscovery practices by forcing localization and intensifying conflicts of law issues that already arise when foreign jurisdictions require the transfer of data that is prohibited from transfer under the Mainland China rules.

Hong Kong

As a Special Administrative Region of China, Hong Kong maintains a common law jurisdiction under the "One Country, Two System" principle, which is enshrined in the Basic Law, Hong Kong's mini-constitution. Hong Kong, being a former British colony, generally adopts principles and practices of court procedure similar to those of England and Wales. The scope of evidence-taking and the relevant legal tests are therefore also comparable. Substantial legal implications on evidence-taking arise from the jurisdictional differences between mainland China and Hong Kong, such as certain restrictions on cross-border data transfer and when legal professional privilege ("LPP") can be invoked. LPP is a fundamental right under Hong Kong's Basic Law, but does not expressly exist in mainland China.

In 2014, the High Court of Hong introduced the Practice Direction SL 1.2, "Pilot Scheme for Discovery and Provision of Electronically Stored Documents in Cases in the Commercial List," which governs the collection, exchange and use of ESI in court proceedings. Much of the language of the Practice Direction comes from the English Practice Direction 31B. However, it goes further to spell out "technology assisted reviews" ("TAR") in its provisions on "other automated searches." While there are very few cases on eDiscovery in Hong Kong, it is expected that English and Australian jurisprudence, including judgments on ESI handling and TAR, would be highly persuasive. The Practice Direction is limited to commercial cases. Its pilot scheme has been extended indefinitely, pending further judgments on eDiscovery in Hong Kong courts. In reality, eDiscovery and digital forensic analysis have been widely adopted for many years in large-scale commercial litigation and arbitration, regulatory enforcements and internal investigations in Hong Kong.

The Personal Data (Privacy) Ordinance (Amendment) 2012 added more specific provisions and restrictions on the use of personal data in direct marketing. Financial and insurance regulations also impose data protection requirements on regulated entities and individuals, including data control requirements and notification of data subjects. The PDPO generally requires consent from individuals before using their personal data for a new purpose, however there is an exception for the use of personal data for discovery purposes in connection with legal proceedings in Hong Kong. In parts of the PDPO that have not yet been brought into force, the transfer of personal data out of Hong Kong is prohibited unless written consent of the data subject has been obtained or the data is being transferred to jurisdictions the Hong Kong Privacy Commissioner has designated as having similar data protection laws. The legislature has delayed implementing the cross-border transfer prohibition pending review of its impact on several industries, and no list of acceptable jurisdictions has been approved at this time.

India

India is the largest democracy in the world with a hybrid legal system combining civil, common law and religious law within a legal framework inherited from the days of the Raj. The Indian Evidence Act of 1872 provided the core principles that may be admissible in legal proceedings. As more documents came to be digital, traditional approaches to authenticate evidence (such as certifying copies, production of mechanical copies) were found to be lacking and unable to handle the complexity of ESI. There are 3 likely scenarios for information discovery: matters that are sub-judice; matters that are under arbitration; and for international matters.

The IT Act (2000) of India defines certain rules to carry out any electronic evidence collection or proceedings, which are typically less common than in other parts of Asia such as Hong Kong and China. These rules include:

- Authentication of electronic records (through affixing a digital signature and use of crypto / hash techniques);
- Legal recognition of electronic records;
- Retention of electronic records;
- Penalties for damages to computers / computer systems;
- Tampering with computer source data; and
- Confiscation of any electronic evidence that may have been used in breaking the law.

Discovery of documents, data and information in India for dispute resolution and legal proceedings is slowly gaining ground, considering the presence of branch/ offshore offices for a variety of international companies. The current absence of well-defined data protection laws makes it easier for companies to get access to the data stored within the country. However, with the proposed Personal Data Protection Regulation, the rules of are likely to be revised.

Japan

Generally speaking, Japan has a civil law system, and English and American-style discovery procedures are not permitted. Parties are not obligated to disclose their evidence, and physical and electronic document discovery is fairly limited. A litigant, however, can petition the court to order a party or third party to produce specific documents. The court would ordinarily encourage parties to voluntarily exchange documents before issuing an order as a last resort. In Japan, “eDiscovery” as a technology solution and technique is applied extensively in support of proceedings involving the U.S., including cross-border litigation, arbitration and regulatory enforcements. Domestically, it is also strongly adopted in large-scale internal investigations, contract analysis, data breach response, and information governance contexts.

Attorney-client privilege neither exists in the same sense nor to the same extent as in English and American jurisdictions. An attorney, in private practice or in-house, has the right and duty to protect the confidentiality of his / her communications with a client in civil and criminal proceedings, and the breach of such duty is subject to civil and criminal sanctions. Work product created by attorneys that are disclosed in Japanese

proceedings can then be compelled to be produced in the U.S. as legal professional privilege could be considered lost or waived upon disclosure in Japan.

Under the Japanese data privacy law, data users cannot transfer personal data overseas to a third party, unless informed consent is obtained. The data subject should be informed about the receiving country, unless the foreign country is white-listed by the Personal Information Protection Commission of Japan ("PPC"). In January 2019, Japan and the European Commission entered an adequacy arrangement, resulting in the PPC white-listing the 28 E.U. Member States as well as Norway, Liechtenstein and Iceland.

Korea

As US-style discovery is not part of domestic Korean civil procedure, discovery is still in discussion stages in domestic Korean law. Much like other civil law jurisdictions, there is a process for requesting documents from counterparties but the authority sits primarily with the judge as primary fact finder. Thus, US-style discovery remains in the realm of cross-border litigation and disputes. Additionally, corporations and their counsel who are familiar with discovery workflows often implement these tools when conducting internal investigations.

Korean data privacy is primarily governed by the Personal Information Protection Act (PIPA), which was originally passed in 2011, and underwent a number of revisions including most recently in 2017. Practitioners in Korea who work with data, or who need to handle data for cross border litigation, corporate investigations, or arbitration matters, will need to be mindful of Korea's expansive and strict data protection laws.

Malaysia

Malaysia follows a common law system that has been largely influenced by English laws, a testament to its English legacy. The Rules of Court 2012 (ROC) deal with all procedural requirements in relation to all civil actions commenced in court. Although there are no specific provisions for eDiscovery, the term 'documents' has been defined sufficiently widely to include 'electronic' documents. The provisions of O.24 ROC2012 govern all types of documents and can technically be applied to the conduct of eDiscovery as well. In Malaysia, discovery is not as of right but is subject to an order of court comprising three stages, namely (i) disclosure, (ii) inspection and (iii) production. EDiscovery as such has yet to be established in Malaysia. Any discovery of 'computer generated documents' is generally given as printouts and not viewed in its original electronic format. There is a lack of awareness of eDiscovery as a procedure and consequently any possibility of introducing it remains remote.

Malaysia's Personal Data Protection Act 2010 (PDPA) governs the disclosure of personally identifiable information but only in relation to commercial transactions. Its purview is restricted to only private enterprises and organisations and specifically excludes the government and its agencies. Cross-border transfers of personal data may take place where exemption criteria under the PDPA are met, including where the data subject has consented and where the data user has taken all reasonable precautions and exercised 'due diligence' to ensure that the personal data will not be processed in the recipient country in a way that would contravene the PDPA.

Singapore

Singapore is a common law jurisdiction with an English legal legacy. General provisions for discovery and inspection of documents in civil proceedings are contained in the Singapore Rules of Court, Order 24 and rules thereunder. Discovery is not an automatic right but must be granted by an order of Court. EDiscovery is facilitated by Practice Directions (PD) which set the criteria for eDiscovery as being:

- where the claim or the counterclaim exceeds $1 million; or
- where documents discoverable by a party exceed 2,000 pages in aggregate; or
- where documents discoverable in the case or matter are comprised substantially of electronic mail and/or electronic documents.

To ensure a smooth e-discovery process, parties must agree to an "E-Discovery Plan" based on good faith collaboration.

Personal data in Singapore is protected under the Personal Data Protection Act 2012 (PDPA). The PDPA sets out to balance the right of individuals to protect their personal data, including rights of access and correction, against the needs of organisations to collect, use or disclose personal data for legitimate and reasonable purposes. The PDPA allows for cross-border data transfers subject to the transferor ensuring that the recipient has legally enforceable obligations to protect such data comparable to the PDPA.

In summary

The development and growth of eDiscovery is Asia provides both challenges and opportunities. As the volume of ESI continues to grow exponentially the use cases for eDiscovery are expanding. For global organisations and those transferring data across borders, compliance with the developing and new regulations will be a priority. We hope this guide will assist readers with understanding the legal systems and the development of eDiscovery rules and procedures, as well as outlining developing privacy regulations in the APAC region.

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Australia

I. JURISDICTION IN AUSTRALIA

Australia is a common law country with a federated court system which includes federal, state and territory courts, and specialist tribunals. The High Court is the highest court and can hear appeals from all other Australian courts and has original jurisdiction in all matters concerning the Australian Constitution.

A. Federal Jurisdiction

The Federal Court hears criminal and civil cases concerned with Commonwealth law. It also hears appeals from decisions of the Federal Circuit Court, save for family law decisions. From 1 January 2019, the Family Court of Australia and the Federal Circuit Court of Australia will be combined into a single structure, called the Federal Circuit and Family Court of Australia (FCFC).[1] This structure will comprise two divisions: the FCFC (Division 1) and FCFC (Division 2).[2] The former will be a continuation of the Family Court and will only hear matters relating to family law, whereas the latter will be a continuation of the Federal Circuit Court and manage cases relating to both family law and general federal law matters.[3]

Additionally, the Federal Court is undergoing significant restructure through the adoption of a National Court Framework (NCF). This framework means the Court's work is organised and managed nationally by reference to subject matter areas called National Practice Areas ('NPA'), outlined in the Federal Court's Central Practice Note:[4]

- Administrative and Constitutional Law and Human Rights;
- Admiralty and Maritime;
- Commercial and Corporations;
- Federal Crime and Related Proceedings;
- Employment and Industrial Relations;
- Intellectual Property;
- Native Title;
- Taxation; and
- Other Federal Jurisdictions.

[1] Australian Government, Attorney-General's Department, Structural Reform of the Federal Courts <https://www.ag.gov.au/LegalSystem/Courts/Pages/Structural-reform-of-the-federal-courts.aspx>.
[2] Ibid.
[3] Ibid.
[4] Federal Court of Australia, Practice Note CPN-1 – Central Practice Note: National Court Framework and Case Management, 25 October 2016, para 3.1.

This will allow the Court to drive efficiencies through specialisation and individual docket management. Each of the NPA areas will have its own practice note that should be consulted when filing a matter in that area.

B. State and Territory Jurisdictions

The Supreme Court is the highest court in each state and territory, and is made up of a trial division and a Court of Appeal. Trial divisions hear the most serious criminal offences and deal with complex civil disputes. The Court of Appeal hears appeals from lower courts. Each state court has criminal and civil procedure rules, as well as specific guidelines in the form of court practice notes that outline the requirements and processes to be undertaken in civil litigation and discovery.

II. DISCOVERY IN AUSTRALIA

The rules and principles underlying discovery in Australia are derived from the English procedure of the Court of Chancery prior to the enactment of the *Chancery Practice Amendment Act 1852* (UK).[5] The Court of Chancery required parties to "disclose on oath".[6] Akin to other common law countries, Australia historically followed the judgment of Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* and the principle that a party should disclose documents relating to any matter in question.[7] The test provides a very wide scope of discovery as "parties are required to discover documents which may lead to a train of inquiry that may damage the case of the party giving the discovery or advance the opponent's case".[8] The *Peruvian Guano* test has garnered judicial criticism with Logan J in *Sunland Waterfront (BVI) LTD v Prudentia Investments Pty Ltd (No 4)* stating that such a concept belongs to an era "limited to pen and ink and later a manual type writer".[9] It has little, if any, relevance in the rapid advance of technology. Further, such practices have previously enabled well-resourced individuals to abuse the process.[10] Justice Logan further stated that one must not forget that discovery "was meant to be a handmaiden of justice, not its master".[11] The *Peruvian Guano* test was progressively narrowed until it was ultimately "consigned to the dustbin".[12] This means that "the days of the search for the smoking gun are gone" and the focus now turns on proportionality, not the "fight".[13]

At the Federal level, the *Peruvian Guano* approach "is no longer applied"[14] and it "would be a highly unusual order for [the] Court to make".[15] The court's practice note reaffirms that parties do not have an automatic "right to discovery",[16] and demonstrates a "commitment to limiting discovery to the circumstances of the

[5] *Harwood v Trustee of the Property of John Mervyn Harwood* [2015] FCCA 1058 (28 April 2015)162 [11] citing Chancery Practice Amendment Act 1852 (UK) 15, 16 Vict cc 80, 86, 87.
[6] *Harwood v Trustee of the Property of John Mervyn Harwood* [2015] FCCA 1058 (28 April 2015) 162 [13].
[7] *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 63.
[8] *Redline Contracting Pty Ltd v MCC Mining (Western Australia) Pty Ltd* [2012] FCA 1157 (15 October 2012) [13].
[9] *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (*No 4) [2010] FCA 863 (12 August 2010) [5] (Logan J).
[10] Ibid.
[11] Ibid [6].
[12] *Volunteer Fire Brigades Victoria Inc v Country Fire Authority* [2016] VSC 573 (29 September 2016) [53].
[13] Ibid [33].
[14] *Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (Subject to Deed of Company Arrangement)* (No 3) [2018] FCA 1058 (17 July 2018) [9].
[15] *Redline Contracting Pty Ltd v MCC Mining (Western Australia) Pty Ltd* [2012] FCA 1157 (15 October 2012) [18]. See also Federal Court Rules 2011 (Cth) r 20.15.
[16] Federal Court of Australia, Practice Note CPN-1 – Central Practice Note: National Court Framework and Case Management, 25 October 2016, para 10.2.

case".[17] Thus the rules,[18] "aimed at narrowing the scope of discovery",[19] require documents to be "directly on point", in a sense that "they tend to prove or disprove the allegation in issue".[20] For standard discovery under rule 20.14(1), parties are required to disclose documents that are "directly relevant to the issues raised by the pleadings or in the affidavits".[21] In order to be considered directly relevant,[22] documents must satisfy at least one of the following criteria enumerated in rule 20.14(2):

- Documents on which a party intends to rely;
- Documents that adversely affect the party's own case;
- Documents that support another party's case; or
- Documents that adversely affect another party's case.[23]

The Court in *Adelaide Brighton v Concrete Supply Pty Ltd* provided an indication as to the interpretation of r 20.14(2)(c), stating that the phrase "documents support another party's case", means "the strengthening of a position, contributing to success, preventing failure or corroborating or substantiating a claim".[24] However, it is important to note that the scope of discovery is dependent on what is at issue and what is pleaded in each case.[25]

[17] *Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (Subject to Deed of Company Arrangement)* (No 3) [2018] FCA 1058 (17 July 2018) [10]. See also Australian Law Reform Commission's Report, Managing Discovery: Discovery of Documents in Federal Courts No 115 (2011) [5.73]–[5.114].
[18] *Federal Court Rules 2011* (Cth) rr 20.14(1)(a), 20.14(2).
[19] *Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (Subject to Deed of Company Arrangement)* (No 3) [2018] FCA 1058 (17 July 2018) [8].
[20] *Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (Subject to Deed of Company Arrangement)* (No 3) [2018] FCA 1058 (17 July 2018) [8] citing Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 2) [2011] FCA 1396, [34]–[38].
[21] Federal Court Rules 2011 (Cth) r 20.14(1)(a).
[22] *Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (Subject to Deed of Company Arrangement*) (No 3) [2018] FCA 1058 (17 July 2018) [5]–[6]. Besanko J noted that 'the requirements of r 20.14(2) are satisfied if the Court reaches the conclusion that the documents are directly relevant to one or other of the criterion'.
[23] Federal Court Rules 2011 (Cth) r 20.14(1)(a).
[24] *Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (Subject to Deed of Company Arrangement*) (No 3) [2018] FCA 1058 (17 July 2018) [7], citing Dennis v Chambers Investment Planners Pty Ltd [2012] FCA 63, [34]–[39].
[25] Redline Contracting Pty ltd v MCC Mining (Western Australia) Pty Ltd [2012] FCA 1157 (15 October 2012) [20] (Siopsis J).

At the state and territory level in Victoria,[26] Queensland,[27] Northern Territory,[28] Australian Capital Territory,[29] South Australia,[30] Tasmania[31] and New South Wales,[32] the rules are very similar to the Federal rules. This is to the extent that each state sought either to "exclude" the "train of inquiry"[33] or pass laws that demonstrate a "deliberate narrowing of the obligation".[34] An exception to this is Western Australia, which stands in contrast to its neighbouring states. Order 26 rule 1 of the *Rules of the Supreme Court 1971* (WA) employs the same wide expression used by Brett LJ in the *Peruvian Guano* case, where a party is required to discover all documents "relating to any matter in question".[35] The Supreme Court of Western Australia in *Schlam v WA Trustee Executor & Agency Co Ltd* stated that "there is no material difference" between the phrases and neither did it mean that "the issues must actually have been joined in the pleadings".[36] In determining which documents relate to the matter in question, reference should first be made to the pleadings[37] and further consideration may also be given to the "conduct and admissions of the parties and the nature of the action".[38] Although the *Peruvian Guano* approach is still embedded in Western Australia's discovery rules, the Supreme Court in *Corporate Systems Publishing Pty Ltd v Lingard (No 3)*[39] stated that "there is no strict entitlement to an order for discovery" and that such an order must be considered against the backdrop of the costs and time involved with the exercise.[40] Moreover, the court clarified that documents that solely lend themselves to the "credit of a party do not relate to a matter in issue".[41] The Court in *Lackovic v Insurance Commission of Western Australia* also noted that failure to "give proper discovery" may result in a "retrial" where "justice requires it".[42]

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[26] See *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 29.08 where a party is required to disclose documents 'relating to any question in the proceeding'.
[27] See *Uniform Civil Procedure Rules 1999* (Qld) r 211(1)(b) where a party must disclose documents that are 'directly relevant to an allegation in issue in the pleadings'.
[28] See *Supreme Court Rules 2018* (NT) o 29.02(3) which states that unless a pleading contains allegations referred to in r 13.10(3) and save for when the Court orders otherwise, there is no requirement on a party to 'discover a document that is relevant only because it may lead to a train of enquiry'.
[29] Note that in the Australian Capital Territory, the term 'disclosure' is used instead of 'discovery'. The rules surrounding the disclosure of documents is encapsulated in the *Court Procedure Rules 2006* (ACT) div 2.8.2.
[30] See *Supreme Court Civil Rules 2006* (SA) r 136(1) which requires a party to disclose documents that 'are directly relevant to any issue raised in the pleadings or affidavits filed in lieu of pleadings'.
[31] *Supreme Court Rules 2000* (Tas) r 382(1) requires a party to discover documents that 'are directly relevant to the issues raised by the pleadings'.
[32] *Uniform Civil Procedure Rules 2005* (NSW) r 21.2(4) which states courts may not give a discovery order "unless the document is relevant to a fact in issue".
[33] *Australia Bank Ltd & Ors v Idoport Pty Ltd & Anor* [2000] NSWCA 8 (15 February 2000).
[34] Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd [2001] 1 Qd R 276 [7].
[35] Rules of the Supreme Court 1971 (WA) o 26 r 1.
[36] *Schlam v WA Trustee Executor & Agency Co Ltd* [1964] WAR 178.
[37] Corporate Systems Publishing Pty Ltd v Lingard (No 3) [2008] WASC 1 (18 January 2008) [7] (Beech J).
[38] *Schlam v WA Trustee Executor & Agency Co Ltd* [1964] WAR 178, 186; Thomson Reuters Westlaw, *The Laws of Australia* (at 1 August 2017) 5 Civil Procedure, '5.3 Discovery and Interrogatories' [5.3.1450].
[39] [2008] WASC 1 (18 January 2008).
[40] *Corporate Systems Publishing Pty Ltd v Lingard (No 3)* [2008] WASC 1 (18 January 2008) [7]
[41] *Corporate Systems Publishing Pty Ltd v Lingard (No 3*) [2008] WASC 1 (18 January 2008) [7] citing *Beecham Group Pty Ltd v Bristol Myers Co* [1979] VR 273, 278 *and CSBP Ltd v Gerling Australia Insurance Co Pty Ltd* [2007] WASC 9 (8 February 2007) [46].
[42] *Lackovic v Insurance Commission of Western Australia* (2006) 31 WAR 460 [128].

III. DISCOVERY REQUIREMENTS AND GUIDING PRINCIPLES

The principles of cooperation, proportionality and efficiency are embedded throughout Australian discovery rules, practice,[43] and legislation.[44]

The High Court of Australia recognises that the essential role of the judiciary in actively managing discovery[45] now forms an "accepted aspect of the system of civil justice administered by the courts in Australia".[46] As part of its case management system, the Federal Court encourages parties to meet and discuss the use of technology. This may include eLodgment of documents, eTrials, eCourtroom and video or audio link hearings.[47] Further, parties should also consider the Case Management Imperatives which include identifying and narrowing the issues in the proceeding, taking to trial only the critical points, considering any available alternative dispute resolution methods and other ways to maximise productivity.[48] It is essential for parties to keep in mind that the Court will not approve "expansive and unjustified [r]equests"[49] and such requests must facilitate the "just resolution of the proceedings" in line with the foundational objective of the discovery principles. For example, practitioners should initially consider available active data prior to requesting an order for the expensive and time-consuming recovery of data from backup tapes, as such an order may be contingent upon the requesting party paying costs associated with the production of the archival data.[50]

The Supreme Court of Victoria in *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No 1)* appointed a Special Referee after the identification of a large volume of potentially relevant documents. [51] This is in order to manage the workload in a way that is in line with the principles of proportionality. At the federal level and in some states and territories, courts and parties have a duty to act in accordance with the "overarching purpose" of civil practice and procedures. [52] This includes giving "consideration [to] proportionality",[53] facilitating the "just resolution of disputes according to law" and dispensing with the matter "as quickly, inexpensively and efficiently as possible".[54] In achieving this, courts expect parties and their lawyers[55] to eliminate any unnecessary process driven costs,[56] to use technology to facilitate this process, and for the parties to consult and identify the real issues in dispute early and to deal with those issues efficiently.

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[43] See Federal Court of Australia, *Practice Note CPN-1 – Central Practice Note: National Court Framework and Case Management*, 25 October 2016, pars 10.2–10.4. This section of the practice note encourages parties to also 'consider the possible benefits of utilising innovative discovery techniques, including the Redfern Discovery Procedure' if appropriate.
[44] An example of this is the overarching purpose present in the *Federal Court of Australia Act 1976* (Cth) s 37M and *Civil Procedure Act 2010* (Vic) s 7.
[45] Ronald Sackville, 'Mega-Lit: Tangible Consequences Flow from Complex Case Management' (2010) 48(5) *Law Society Journal* 47.
[46] *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.
[47] Federal Court of Australia, Practice Note CPN-1 – Central Practice Note: National Court Framework and Case Management, 25 October 2016, para 8.2.
[48] Ibid para 8.5.
[49] Ibid para 10.6.
[50] Roger Forbes and Chris Rogers, 'Discovery of Documents' Law Council of Australia / Federal Court of Australia, *Case Management Handbook* (2014).
[51] [2016] VSC 734 (2 December 2016).
[52] Federal Court of Australia Act 1976 (Cth) s 37M.
[53] *Matthews v SPI Electricity Pty Ltd & Ors* [2011] VSC 401 (30 August 2011) [25].
[54] Federal Court of Australia Act 1976 (Cth) s 37M(1)(a)–(b).
[55] *Federal Court of Australia Act 1976* (Cth) s 37N(2) states that 'a party's lawyer must, in the conduct of a civil proceeding before the Court (including negotiations for settlement) on the party's behalf: (a) take account of the duty imposes on the party by subsection (1) and (b) assist the party to comply with the duty'.
[56] Federal Court of Australia, *Practice Note CPN-1 – Central Practice Note: National Court Framework and Case Management*, 25 October 2016, para 7.3. See also *Federal Court of Australia 1976* (Cth) s 37N that states that 'the parties to a civil proceeding before the Court must conduct the proceeding….in a way that is consistent with the overarching purpose'.

It is evident throughout the court rules and practice notes that Australian courts are consistent with Sedona Principle 6, that "responding parties are best situated to evaluate the procedures, methodologies and technologies appropriate for preserving and producing their own electronically stored information".[57] The "unfathomable volume of information"[58] that can arise in the digital age,[59] has informed the modern approach to discovery in Australia, to the extent that "dealings in hard copy are to be the exception rather than the rule"[60] and "converting electronic files to hard copy requires exceptional justification."[61] The Federal Court Rules "do not impose an obligation of absolute disclosure" and proportionality is relevant throughout the entirety of the discovery process, often assisted by techniques such as Technology Assisted Review.[62] Considerable leeway is given to parties to determine their discovery requirements, although appropriate consideration must be given to balancing the identification of relevant documents and ensuring costs are proportionate to the value of documents for litigation.[63] However, court ordered search terms for discovery provide a mechanism for courts to dictate the appropriate balance of proportionality of disclosure against other considerations such as delay where it is deemed necessary.[64]

IV. COURT PRACTICE NOTES – DOCUMENT EXCHANGE PROTOCOLS

Australian courts have a long tradition of developing practice notes which set out document exchange protocols to be used in collecting, de-duplicating, e-processing, naming and describing discovery documents. They also provide guidelines to parties on the use of technology to enhance the efficiency of trial.

The first Practice Notes were prepared in 1996-97 at the state level in both New South Wales and Victoria and the first federal Practice Note followed in 1999. Although there have been changes to the Practice Notes through the years, the data exchange tables, data fields and numbering system have generally remained the same, providing the security of consistency in preparing and exchanging data. The Federal Court and most states and territories have developed and released document exchange protocol guidelines.[65]

Despite the minor differences between the discovery requirements and exchange protocols of each state and territory, the Federal Court's protocol is accepted as the default commercial standard for civil disputes. Parties may agree to tailor this protocol to reflect the specific requirements of their case, particularly in matters where a large volume of discoverable documents is anticipated.

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[57] The Sedona Conference, The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production (3rd ed, 2018).
[58] Peter Vickery, 'Managing the paper: Taming the Leviathan' (2012) 22 *Journal of Judicial Administration* 51, 53.
[59] See *Seven Network v News Limited* (2009) 182 FCR 160.
[60] Supreme Court of Victoria, *Practice Note SC Gen 5 Technology in Civil Litigation*, 29 June 2018, para 4.3
[61] Supreme Court of Victoria, *Practice Note SC Gen 5 Technology in Civil Litigation*, 29 June 2018, para 8.2
[62] Forbes and Rogers, 'Discovery of Documents' Law Council of Australia / Federal Court of Australia, *Case Management Handbook* (2014).
[63] Forbes and Rogers, 'Discovery of Documents' Law Council of Australia / Federal Court of Australia, *Case Management Handbook* (2014).
[64] Forbes and Rogers, 'Discovery of Documents' Law Council of Australia / Federal Court of Australia, *Case Management Handbook* (2014).
[65] Federal Court of Australia, Practice Note CPN-1 – Central Practice Note: National Court Framework and Case Management, 25 October 2016; Supreme Court of Victoria, Practice Note SC Gen 5: Technology in Civil Litigation, 29 June 2018; Supreme Court of New South Wales, Practice Note No. SC Gen 7: Supreme Court – Use of Technology, 9 July 2008; Supreme Court of Queensland, Practice Direction Number 10 of 2011: Use of Technology for the Efficient Management of Documents in Litigation, 22 November 2011; Supreme Court of the Northern Territory of Australia, Practice Direction 2 of 2002: Guidelines for the Use of Information Technology in Any Civil Matter, 13 February 2002; Supreme Court of South Australia, Supreme Court Practice Directions to Operate in Conjunction with the Supreme Court Civil Rules 2006: Part I – Practice Directions, 13 March 2014; The Supreme Court of Western Australia, Consolidated Practice Directions, 27 October 2014.

Document identification numbers remain consistent throughout the entirety of a document's life cycle, including hyperlinks to pleadings, expert reports, court books, and at trial. This approach to document numbering and identification minimises unnecessary duplication and renumbering of documents, as the same version of the document will be referenced throughout a case life cycle, reducing duplication and the volume of documents included in court book, as well as the costs involved with document management. The Court also provides a Pre-Discovery Conference Checklist of issues to be considered before the first pre-discovery case management conference.

Document Identification	Export Tables	File Formats	Host & Attachments
Document IDs are assigned to each unique document in the format of SSS.BBB.FFF.NNNN unless otherwise agreed between the parties. Once assigned, a document's ID does not change throughout discovery, and is used in pleadings, expert reports witness statements and in the court book.	Document exchange protocols usually specify the fields and export tables required for discovery such as an Export Table, Parties Table, Pages Table, and an Export_Extras table, with fields: Document_ID Document_Type Document_Date Correspondence_Type Organisation Person_To Person_From Host_Reference	Although documents can be reviewed in PDF or their native file format, generally documents are exchanged as a multipage searchable PDF with individual page Document ID. This facilitates page referencing in pleadings and witness statements.	Host documents must be immediately followed by each of their attachments, as this interdependent relationship can contribute to establishing the facts in a dispute, and will impact upon any claims to privilege or confidentiality.

Table 1: Overview of the Federal Court of Australia's Document Exchange Protocol

V. ADDITIONAL DISCOVERY CONSIDERATIONS

A. Technology Assisted Review

The Supreme Court of Victoria was the first Australian court to approve the use of Technology-Assisted Review (TAR) techniques in civil litigation.[66] In *McConnell Dowell*,[67] the Supreme Court of Victoria made an order for the appointment of a Special Referee to examine what appropriate measures and considerations should be taken in managing a case involving a large number of documents. The claim generated around 4 million potentially relevant documents, subsequently reduced to 1.4 million by McConnell Dowell.[68] The Court recognised that the "enormous number of documents"[69] called for "special management",[70] with Vickery J stating that "the prospect of McConnell Dowell's solicitors conducting the manual review of 4 million documents for relevance in a cost effective manner is unrealistic".[71] The court formed the view that the use of TAR is "far more sophisticated" in comparison to a "word search facility", referring to Master Mathews description in *Pyrrho*[72] to explain the process.

[66] Supreme Court of Victoria, *Technology Assisted Review Plays Key Role in Litigation* <https://www.supremecourt.vic.gov.au/contact-us/news/technology-assisted-review-plays-key-role-in-litigation>.
[67] [2016] VSC 734.
[68] *McConnell Dowell Constructors (Aust) Pty Ltd v Santam* Ltd (No 1) [2016] VSC 734 (2 December 2016) [2]–[3].
[69] Ibid [4]
[70] Ibid [5].
[71] Ibid [5].
[72] *Pyrro Investments Ltd v MWB Business Exchange and Ors* [2016] EWHC 256 (Ch) [19]–[24].

The endorsement of the agreement of the parties to use TAR in *McConnell Dowell* resulted in the world's first Practice Note on the topic. The Supreme Court of Victoria's Technology in Civil Litigation Practice Note provision the ability for the court to order discovery by TAR, "whether or not it is consented to by the parties".[73] The rationale being that "the inability or reluctance of a lawyer to use common technologies should not occasion additional costs for other parties… and [is] a basic component of legal practice."[74] Australian practitioners and government authorities, including the Australian Government Solicitor,[75] the Australian Competition and Consumer Commission,[76] and the Australian Securities and Investments Commission,[77] have since embraced TAR as an accepted response to achieving proportionate and cost effective review and discovery in light of large sets of documents. In *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd,* the court placed considerable emphasis upon the transparency of TAR processes, algorithms, relevance thresholds and validation testing, adding to the list of requirements that parties must consider when determining appropriate document exchange protocols. [78]

B. Legal Hold – Document Retention

Australia follows the practice of issuing document preservation notices (a legal hold) once litigation is commenced or anticipated. These notices explain that all potentially relevant information should be identified and preserved. Many Australian states and territories have passed criminal laws that prevent the unlawful destruction of evidence by corporations and individuals. In Victoria, section 254 of the *Crimes Act 1958* (Vic) states that any person who "destroys", "conceals" or "expressly, tacitly or impliedly" permits the destruction of evidence is "guilty of an indictable offence".[79] Section 255 also imputes liability to a corporation where a corporate culture existed which encouraged, tolerated or led to the formation of an employee's intention to unlawfully destroy documents, subject to a due diligence defence contained in section 255(5). These laws do not prevent the adoption of a document retention and defensible disposition policy that is systematically enforced and openly shared through employee training programs.[80]

C. Privilege and Clawback Clauses

The common law concept of legal professional privilege[81] has been cited as "the oldest of the privileges for confidential communications".[82] The Uniform Evidence Acts recognise two types of privilege, relating to advice and litigation. Sections 118 and 119 cover confidential communication made between a client and his or her lawyer "for the dominant purpose" of providing legal advice or legal services *or* for an "anticipated *or*

[73] Supreme Court of Victoria, *Practice Note SC Gen 5 Technology in Civil Litigation*, 29 June 2018, para 8.7.
[74] Ibid para 4.3.
[75] See generally Claudia Oakeshott, Christopher Henies and Lara Strelnikow, 'Technology Assisted Review' [2017] 3 *Australian Government Solicitor*, 33–37.
[76] Ibid.
[77] Australian Security and Investments Commission, 'ASIC Enforcement Outcomes: July to December 2016' (Report 513, March 2017) 29.
[78] [2016] FCAFC 148 (26 October 2016).
[79] Crimes (Document Destruction) Act 2006 (Vic) s 254(1).
[80] The Sedona Conference, *The Sedona Conference Principles and Commentary on Defensible Disposition, Public Comment Version* (August 2018) < https://thesedonaconference.org/publication/Commentary_on_Defensible_Disposition>.
[81] The Uniform Evidence Acts refer to the privilege as 'client legal privilege' rather than the common law term 'legal professional privilege'. See *Evidence Act 1995* (Cth) pt 3.10, *Evidence Act 2008* (Vic) pt 3.10, *Evidence Act 2001* (Tas) pt 10, *Evidence Act 2011* (ACT) pt 3.10; *Evidence (National Uniform Legislation) Act 2011* (NT) pt 3.10.
[82] John Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law (3rd ed, 1940) [2290]. Also see Baker v Campbell (1983) 49 ALR 385, 408 (Murphy J).

pending" litigation.[83] However, it is worth noting that despite recognition of the two categories at common law and legislation, courts in Australia "have not kept the two branches of privilege so distinct".[84] In determining the "purpose" of a document, a court will have regard to "the evidence and the parties' submissions".[85] It is "a question of fact to be determined objectively".[86] In deciphering the term "dominant", regard must be given to its ordinary meaning, which in this case would be the "ruling, prevailing, or most influential purpose".[87] In instances where the two purposes are of equal value, "the dominant purpose must predominate over other purposes: the test is one of clear paramountcy".[88]

A common element incorporated into document exchange protocols are clawback clauses.[89] These clauses allow for the recovery of inadvertently disclosed information by a producing party where it becomes apparent to the discovery recipient that privileged information has been disclosed. Clawback clauses help to avoid situations where equitable intervention must be relied upon to recover privileged information.[90]

VI. IMPACT OF PRIVACY LAWS

The Australian Government introduced a Notifiable Data Breaches scheme in February 2018 requiring Australian Government agencies and organisations with obligations to secure personal information under the *Privacy Act 1988* (Cth) to notify individuals affected by data breaches that are likely to result in serious harm. The Office of the Australian Information Commissioner (OAIC) is the entity responsible for enforcing this regime and many businesses have already taken steps to strengthen their data governance practices, including revising privacy policies, introducing data breach response plans and minimising risk through the development of Information Governance frameworks including defensible disposal of data. The Australian government announced in March 2019 additional funding to OAIC along with increased penalties for all entities covered by the *Privacy Act 1988,* and new for infringement notice powers for OAIC.

Given the volume of data to be analysed in a data breach, eDiscovery software and workflows are used during the data-breach investigation in determining the scope of a data breach and identifying the individuals affected.

VII. SUMMARY

Australia has an extensive history developing eDiscovery processes and conducting eTrials. Australia was the birthplace of many global eDiscovery and eTrial software platforms, such as Ringtail, EDT, Nuix and Delium, and eDiscovery processes are second nature to those in the Australian commercial dispute community. Australian courts have proactively created and updated practice notes to assist parties in managing discovery in line with continuing advancements in technology. This trend seems likely to continue in order to meet the changing demands of modern legal practice. When undertaking litigation in Australia, it is important to keep

[83] *Evidence Act 1995* (Cth) ss 118, 119. These sections are substantially equivalent to the Evidence Acts in New South Wales, Victoria, Tasmania, Australian Capital Territory and Northern Territory. See Australian Government, *Uniform Evidence Acts Comparative Tables* (10 July 2015) < https://www.ag.gov.au/LegalSystem/Pages/Uniform-Evidence-Acts-comparative-tables.aspx>.
[84] Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (No 2) (2009) 180 FCR 1 [8].
[85] *Hall & Hall and Anor* [2016] FamCA 745 (6 September 2016) [25].
[86] Ibid.
[87] *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332 [10]; *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, 416.
[88] *Hall & Hall and Anor* [2016] FamCA 745 (6 September 2016) [24], citing *Sydney Airports Corporation Ltd v Singapore Airlines Ltd* [2005] NSWCA 47 (9 March 2005) [7].
[89] M Legg and L Dopson, 'Discovery in the Information Age – The Interaction of ESI, Cloud Computing and Social Media with Discovery, Depositions and Privilege' [2012] *University of New South Wales Law Research Series* 11.
[90] See *Expense Reduction Analysis Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303.

this in mind and ensure that only the most up-to-date practice notes are relied upon to ensure the timely resolution of the dispute.

One key way to reduce, eDiscovery costs and data breach costs it to reduce the volume of data through good information governance and defensible disposition of data. The mindset of "keeping everything" needs to be changed, as amassing vast volumes of old, unknown data poses great risk both in actual costs and potential reputational damage.

CHINA - Mainland

I. INTRODUCTION

The legal system in Mainland China (the legal jurisdiction not including Hong Kong, Macao, or Taiwan) is based on principles that are similar to civil law jurisdictions. The judicial system has four levels, with the local People's Courts at the lowest level and the Supreme People's Court at the highest level. Most cases are settled by local People's Courts, but higher courts hear cases of first instance that involve high potential damages, considerable influence on society, unusually complex situations, or cases involving significant foreign elements. Higher courts may also hear appeals of judgements from lower courts, and Mainland China allows for a two-hearing system with the verdict at the appellate level being the final decision.

II. LOCAL CIVIL LITIGATION DISCOVERY

The concept of discovery as the compelled disclosure of evidence from the opposing party is not a part of the Chinese legal system's civil litigation approach. Typically, parties have the burden of producing their own evidence in a case and cannot force the opposing party to submit documents or any other type of evidence. As a result, eDiscovery, as it is traditionally applied in other jurisdictions, is not commonplace for local civil litigation in Mainland China.

Similar to civil law jurisdictions, China places the judge in the role of fact finder, and the court will conduct its own investigations and review of the evidence. Article 64 of the Civil Procedure Law states that "A party shall be responsible for providing evidence in support of his or her allegations. Where a party and his or her agent ad litem are unable to collect evidence on their own for reasons beyond their control, or where the people's court deems that the evidence is necessary for the trial of the case, the people's court shall investigate and collect the evidence." The courts have broad power to investigate and collect evidence under these rules, but traditionally exercise this power in a limited way and, in practice, it is not common for a party to convince the court to collect evidence from the opposing party.

The requirements related to evidence disclosure are spread through several rules. The 2001 Several Provisions of the Supreme People's Court on Evidence in Civil Procedures has some of the most detailed rules about evidence exchange, time requirements, and the general procedure, although even these materials are still relatively general. The 2015 Judicial Interpretation of China's Civil Procedure Law and the 2017 Civil Procedure Law further clarify aspects of the evidence disclosure procedure but have no coverage of rules where one party may compel the disclosure of evidence from another party.

ESI is a specifically recognized type of evidence under the 2012 Criminal Procedure Law, 2014 Administrative Litigation Law, and 2017 Civil Procedure Law, and generally courts are quick to adopt new types of evidence and adapt to China's rapidly changing environment.

III. CROSS-BORDER CIVIL LITIGATION DISCOVERY

Traditional uses of eDiscovery exist in China and have been increasing in recent years but occur for international matters involving discovery productions from China to other jurisdictions. Over the last several decades, one of the cornerstone trends of Chinese companies has been the active pursuit of opportunities outside of China. As part of this push, large companies, especially government-invested companies, were encouraged to expand into other countries, sell more goods abroad, and diversify operations to become more international. A natural side-effect of these efforts has been that these companies increasingly face legal challenges in the foreign jurisdictions, particularly the United States and the E.U., and cross-border civil litigation discovery quickly became a critical issue as these companies, for the first time, had to deal with the concept that they may be required to collect a large amount of documents from China and send them to a foreign court or enforcement agency.

These types of cases, which occur with increasing frequency, demonstrate the most traditional application of eDiscovery processes in Mainland China. These cases also highlight the challenging set of cross-border transfer rules and significant protections that Chinese companies will assert in order to avoid production. The most well-known example comes from Wultz v. Bank of China Limited[91], in which a complex set of circumstances led to an American family suing Bank of China in New York for liability arising out of the death of a family member during a suicide bombing in Israel. As part of claims that Bank of China's failure of finance controls allowed for the funding of the terrorist group directly responsible for the death, the Wultz family attempted to compel the disclosure of a variety of documents from China related to the bank's systems, knowledge of the accounts, and internal investigations. The case highlights how a U.S. court handled a series of strategies by Bank of China that were used, mostly unsuccessfully, in an attempt to avoid the disclosure of documents, including through assertions of Chinese rules related to bank secrecy, anti-money laundering, counter-terrorist financing, attorney-client privilege, work-product doctrine, and state secrets. Similar notable cases, also involving Chinese companies attempting to avoid production of documents from China to a U.S. court, include Gucci America, Inc. v. Weixing Li[92] and Tiffany (NJ) LLC v. Andrew[93].

IV. OTHER USES OF EDISCOVERY IN MAINLAND CHINA

Although China's civil litigation system does not have the same approach that led to rapid growth of eDiscovery in other jurisdictions, China has been a key global hotspot for eDiscovery due to a variety of other applications of the eDiscovery workflow. Primarily led by investigations related to regulatory and ethical compliance requirements, the eDiscovery market and services in mainland China has grown rapidly over the last decade.

EDiscovery, as a workflow, is frequently used for investigations. Mainland China, as a key jurisdiction worldwide for anti-bribery, antitrust, and other white-collar crime issues, quickly drove demand for a substantial market of practitioners who collect and analyze large amounts of ESI in order to identify key pieces of evidence. Multinational companies with operations in China were one of the first groups to adopt eDiscovery approaches to support investigation workflows, particularly during the early 2000's with the rapid rise in enforcement by the United States for Foreign Corrupt Practices Act cases, which often required the production of large amounts of documents to the U.S. Department of Justice or Securities and Exchange Commission.

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[91] *Wultz v. Bank of China Ltd.*, 979 F.Supp.2d 479 (2013).
[92] *Gucci America, Inc. v. Weixing* Li, 135 F.Supp.3d 87 (2015).
[93] *Tiffany (NJ) LLC v. Andrew*, 276 F.R.D. 143 (2011).

After the initial uses of eDiscovery for investigations, the use cases have expanded to other areas of legal and compliance work, especially large-scale contract analysis, information governance initiatives, and, more recently, data breach response efforts. Each of these challenges requires a scalable and controlled sorting of information, and eDiscovery services, as a known and tested approach, have quickly filled these needs.

V. PRIVILEGE

China does not have and does not recognize the concept of attorney-client privilege that is available in other jurisdictions. Historically, this type of protection would not be relevant in a jurisdiction like China because there is minimal risk of exposure for attorney-client communications due to the lack of U.S.-style discovery or other document production requirements. Instead, China has a duty of confidentiality for attorneys in its Lawyers Law, which requires attorneys to maintain confidentiality for parties involved in their practice activities. Similar requirements are found in the professional ethics rules, but none of these rules are intended to be used by a client as a shield to withhold evidence during a trial or enforcement action. Nevertheless, there are protections relevant to controlling the exposure of sensitive information. For example, in some circumstances, a party may request that a particular proceeding be held in closed court and that additional protections be implemented in order to control the exposure of the information or evidence.

VI. IMPACT OF PRIVACY LAWS

A. General Data Protection Rules

The Chinese data protection framework is generally centered around three levels for scope of protection: individual, company, and government.

At the individual level, personal information is broadly defined and broadly protected. The definition in Mainland China is similar to other jurisdictions' use of "personally identifiable information" and includes anything that, separately or in combination, could identify an individual natural person. The personal information rules provide many examples and lists of personal information, and further divide these by type and level of required protection. For eDiscovery matters, personal information has become a significant point of concern due to the broad scope and protection of the rules, which are similar to E.U. rules and require limited collection, consent from data subjects, security controls, and other similar types of measures. At the time of this writing, this is still a developing issue, and it is not clear how deeply these new rules will affect each of the different types of eDiscovery cases but there is a potential for a significant effect, especially for cross-border transfers.

At the company level, trade secrets and "important data" are protected. The rules related to trade secrets are generally similar to other jurisdictions and require companies to take active protection measures in order to later bring enforcement through dispute resolution. The rules related to important data are, however, relatively unique. This category of information is defined by industry, and is also a key part of the unfolding discussion about cross-border transfer rules because it currently falls under a draft piece of legislation, the Measures on Personal Information and Important Data Cross-Border Transfer Security Assessment (Draft), that would prohibit this data from being transferred out of China without first passing a security assessment.

At the government level, China has a variety of protected government information that is similar to other jurisdictions, with "state secrets" as the most commonly discussed category. Although China's state secret protection system is similar to other countries', because of the way China's government and economy are integrated and structured, both currently and historically, concerns about unauthorized access or transfer of state secrets are more common. For eDiscovery practitioners, this has long been a key focus, and the screening for state secrets has traditionally been a part of review projects in order to reduce the risk for this type of protected information.

B. Cross-Border Data Transfer Rules

Because of the international nature of most eDiscovery projects in Mainland China, cross-border transfers are typically a key part of the considerations and planning. Originally, these restrictions were found in a patchwork of laws and rules that targeted restrictions for state secrets, healthcare information, specific data in the energy industry, and other types of narrowly focused rules. More recently, the government has taken steps to supplement and eventually replace that patchwork with a more centralized data protection framework.

The core of the new data protection framework is the Cybersecurity Law, which has clear, but limited, restrictions on cross-border transfers. Under article 37 of this law, personal information and important data gathered or produced by critical information infrastructure operators is required to be stored in Mainland China and must pass a security assessment before being transferred. Controversially, a draft piece of legislation, the Measures on Personal Information and Important Data Cross-Border Transfer Security Assessment (Draft), was later released for public comments that extended these requirements beyond critical information infrastructure operators, a very narrow group of companies that are typically large Chinese entities, to network operators, a much larger category of companies that could have profound effects, especially for the operations of multinational corporations. This legislation has not yet been finalized at the time of this writing, but other guidelines and specifications, which have a lower degree of authority, that have already come into effect also contain these types of restrictions.

Following the Cybersecurity Law, China has passed several guidelines and other rules that will also have a significant effect on cross-border transfers. Notably, at the end of 2018, China passed the International Criminal Judicial Assistance Law, which implements a narrow set of restrictions and requirements in situations where evidence related to a foreign criminal proceeding is being transferred out of China. Similar to the restrictions for some types of personal information and important data, the new law implements an initial prohibition on the transfer unless a specified process is successfully completed.

Although the cross-border transfer rules are still developing, each new rule and enforcement action seems to further entrench the restriction for transfer of data from China and exacerbate some of the existing conflicts of law questions that arise when foreign jurisdictions require transfer and production of evidence that is specifically prohibited from leaving China. For eDiscovery practitioners, these new rules are quickly creating one of the most complex set of obligations and riskiest areas for practice.

VII. SUMMARY FOR EDISCOVERY IN MAINLAND CHINA

China rarely has any industry or any practice that is small, and the demand for eDiscovery services that can support cross-border litigation, internal and regulatory investigations, and compliance monitoring is no exception. The use of eDiscovery as a workflow is more diverse in China, with a diminished focus on litigation procedure and a much stronger practice for white-collar crime investigations. Adding to this diversity of types of eDiscovery projects is a rapid proliferation of data and data types, with mobile chats – especially the ubiquitous WeChat – quickly overtaking traditional emails, even for business usage, in a society that demands and is obsessed with rapid change and development. This background creates one of the most complex and dynamic Information Governance and eDiscovery jurisdictions in the world and, when combined with government rules that are heavily focused on control and security of data and often unique within the global system, results in one of the most challenging countries for eDiscovery.

HONG KONG

I. JURISDICTION IN HONG KONG: OVERVIEW[94]

Hong Kong is a Special Administrative Region ("HKSAR") of the People's Republic of China ("PRC"), operating under a legal system separate to the PRC, which allows the HKSAR to retain significant autonomy in most aspects of government[95]. Most national laws in the PRC do not apply to the HKSAR[96]. The Basic Law, which is essentially the HKSAR's mini-constitution, provides that in addition to the social and economic systems previously in place, the common law system in force while Hong Kong was a British colony shall be maintained until 2047[97]. The adoption of the common law system in Hong Kong means that both case law and the rules of civil procedure, such as the Rules of the High Court and Rules of the District Court, play key roles in developing the rules for dispute resolution procedures and evidentiary processes, including those for discovery[98].

Hong Kong is also an international alternative dispute resolution center, and is a signatory of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as, the New York Convention). The Arbitration Ordinance and the Mediation Ordinance provide a legislative framework for arbitration in Hong Kong and adopts nearly identical provisions as the UNCITRAL Model Law on International Commercial Arbitration Law including the 2006 amendments.

II. DISCOVERY IN HONG KONG: OVERVIEW

Order 24 of both the Rules of the High Court and the Rules of the District Court sets out the civil procedure rules on discovery in the HKSAR[99]. The two do not differ in substance, and allow for party discovery, broad disclosure, and document production guidelines, and non-party discovery, among other rules. However, these rules do not differentiate between electronic and paper documents. This creates a degree of uncertainty in applying technologies in discovery, for example, proportionately to recover corrupt or deleted electronically stored information ("ESI"), and in properly using search terms to find responsive ESI.

In part because only a handful of jurisdictions in Asia are common law jurisdictions[100], the region has been slow to develop codified systems and rules to address electronic disclosure or discovery. Hong Kong was the second Asian jurisdiction to introduce formal procedures for the disclosure of electronic documents in 2014 when Practice Direction SL 1.2 – "Pilot Scheme for Discovery and Provision of Electronically Stored Documents in Cases in the Commercial List" (the "Practice Direction") was issued[101]. The Practice Direction

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[94] Thanks to Nyssa Gomes for her research and input on an earlier version of this chapter.
[95] Basic Law of the HKSAR, Preamble, articles 8 & 160, and instrument 16, para. 1.
[96] *See* Basic Law of the HKSAR, article 18, annex III, and instruments 5-7.
[97] Library of Congress, "Introduction to China's Legal System" (March 7, 2014), available at: http://www.loc.gov/law/help/legal-research-guide/china.php
[98] *See* Basic Law of the HKSAR, articles 8 & 84. Generally, the District Court handles claims for an amount over HK$50,000 but not more than HK$1 million. The Court of First Instance of the High Court handles claims that exceed HK$1 million.
[99] *See* Rules of the High Court (Cap. 4A), 71 § 24; Rules of the District Court (Cap. 336H), 67 § 24.
[100] Ng, K., & Jacobson, B. (2017) "How Global is the Common Law? A Comparative Study of Asian Common Law Systems – Hong Kong, Malaysia, and Singapore," *Asian Journal of Comparative Law*, 12(2), 209-232.
[101] At the time of writing, the Pilot Scheme is still in effect after its application period was extended.

is drafted similarly to its English equivalent[102], and was an important step in clarifying the norms, rules, and use of eDiscovery in Hong Kong. The pilot scheme is still in effect.

III. DISCOVERY IN HONG KONG: REQUIREMENTS AND GUIDING PRINCIPLES

Order 24 of the Rules of the High Court subject parties to civil litigation in Hong Kong to broad disclosure obligations designed to allow courts to address cases using all relevant materials. The Order requires parties to disclose a list of all documents relating to any matter at issue in the case in their possession, custody, or power within 14 days after the close of pleadings. Parties are then required to serve a notice to inspect, which states a time and place for the opposite party to inspect the listed documents. Parties may agree to dispense with or limit discovery, and the Order also lays out the courts' responsibilities for case management and powers of enforcement when there is a failure to comply with discovery obligations[103].

The 2014 Practice Direction is tailored to the challenges of eDiscovery and is intended to provide a framework for reasonable, proportionate, and economical eDiscovery, as well as to encourage cooperation between parties. In this sense, the Practice Direction captures the general principles of traditional discovery and applies them in the context of eDiscovery. It is mandatory in cases commenced or transferred to the Commercial List after September 1, 2014 where a claim or counterclaim exceeds HK$8 million and there are at least 10,000 documents to be searched. The Practice Direction may also apply to cases not in the Commercial List upon application of a party or by direction of the Court[104].

The Practice Direction requires a proportionate, economical, and organized approach to discovery, and encourages cooperation by the parties.[105] As the Practice Direction was created specifically to deal with the challenges of eDiscovery, the rules lay out technological concepts and methods, such as preservation, metadata and data fields, and the "reasonable search" criterion for discovery. The Practice Direction also includes mention of the judicious use of automated search tools and software analytics in order to make the process more efficient. The Practice Direction also includes a sample protocol for discovery of ESI[106]. The Practice Direction strongly emphasizes proportionality throughout the discovery process.

Article 84 of the Basic Law provides that Hong Kong courts may refer to case precedents from other common law jurisdictions[107]. Examples of relevant legal precedent include *Liquidators of Moulin Global Eyecare v Ernst & Young*[108], which concerns proportionality and cost, *Moulin Global Eyecare Holdings Ltd v KPMG*[109], which articulates relevancy balancing in the determination of whether eDiscovery will be ordered or not, and *Pyrrho Investments Ltd & Anor v MWB Property Ltd & Ors*[110], which outlines the appropriate use of predictive coding in eDiscovery.

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[102] English Civil Procedure Rules 1998, Practice Direction 31(b) (Disclosure of Electronic Documents).
[103] *See* Rules of the High Court (Cap. 4A), 71 § 24; Rules of the District Court (Cap. 336H), 67 § 24.
[104] *See* "Pilot Scheme for Discovery and Provision of Electronically Stored Documents in Cases in the Commercial List", Practice Direction SL 1.2 ("HKSAR PD SL 1.2").
[105] See Chinacast Education Corporation v Chan Tze Ngon [2014] 5 HKC 277 at [16] & [28].
[106] *See* HKSAR PD SL 1.2.
[107] Basic Law of the HKSAR, article 84.
[108] *Liquidators of Moulin Global Eyecare v Ernst & Young* [2008] HKCU 981.
[109] *Moulin Global Eyecare Holdings Ltd v KPMG* [2010] HKCU 1251.
[110] *Pyrrho Investments Ltd v MWB Property Ltd* [2016] EWHC 256 (Ch). *See* also Sebastian Ko and Michael Yuen, "Pyrrho Investments: English Predictive Coding Case Strikes New Balance in E-Discovery," Hong Kong Lawyer (April 2016), available at: http://www.hk-lawyer.org/content/pyrrho-investments-english-predictive-coding-case-strikes-new-balance-e-discovery

IV. SPECIFIC DISCOVERY GUIDANCE

A. Privilege

The Basic Law establishes the constitutional right to legal privilege, which protects communications between clients and their lawyers from disclosure under legal compulsion[111]. Broadly speaking, Hong Kong courts recognize legal advice privilege and litigation privilege. There are circumstances where parties must disclose the existence of privileged document, but not the content.

Legal advice privilege covers confidential communications between a party and their lawyer, which are intended to solicit or provide legal advice. Legal advice privilege protects any legal advice or request for legal advice regardless of whether or not it is related to the litigation at issue. Hong Kong adopts a more liberal approach than England and Wales, for example, in applying legal privilege in the context of corporate clients by adopting the "dominant purpose test"[112]. According to the precedent set in 2015 in *Citic Pacific Ltd v Secretary for Justice*, internal confidential documents created by employees of a corporation with the dominant purpose that it or its contents will be used in order to obtain or request legal advice is privileged no matter the role of the employees creating the document[113]. This extends the definition of a "client" for the purposes of privilege analysis beyond just the legal department of an organization in Hong Kong cases.

Litigation privilege covers all communications between a client and its lawyer that are related to conducting, aiding the course of, or giving or receiving legal advice in connection to the litigation at issue[114]. Moreover, Hong Kong courts do not require production of documents privileged under U.S. law[115].

In 2012, the Court of Appeal established a partial waiver of privilege under Hong Kong law in *Citic Pacific Ltd v Secretary for Justice*[116]. In this case, Citic had voluntarily provided prima facie privileged documents to the Securities and Futures Commission ("SFC") as part of a regulatory inquiry. A related criminal investigation was undertaken by the police, and the privileged documents were sought by the third party for the purposes of the separate investigation. The Court found that Citic had only partially waived privilege when it produced the documents to the SFC, as they had been provided to the extent necessary for the SFC to conduct its investigation and had not been provided for other purposes and should not be provided to third parties[117]. In its decision the Court encouraged written stipulations as to the scope of any partial waiver of legal privilege.

As Hong Kong guarantees privilege as a constitutional right, Hong Kong courts generally are reluctant to strip parties of legal privilege. There is, however, a limited crime or fraud exception to legal professional privilege if the primary purpose of the communication in question is guiding or facilitating the commission of criminal offenses[118].

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[111] Basic Law of the HKSAR, article 35; *see also* Akai Holdings Ltd (In Compulsory Liquidation) v Ernst & Young [2009] 12 HKCFAR 649 (CFA) (The right to confidential legal advice "is entrenched for all persons in Hong Kong. It is so entrenched by two constitutional provisions").
[112] *Citic Pacific Ltd v Secretary for Justice* [2015] HKEC 1263.
[113] Id.
[114] *Akai Holdings Ltd (In Compulsory Liquidation) v Ernst & Young* [2009] 12 HKCFAR 649 (CFA).
[115] Rules of the High Court, (Cap. 4A), 219 § 70 r.6.
[116] *Citic Pacific Ltd v Secretary for Justice & Anor* [2012] HKCA 153.
[117] Id.
[118] *Super Worth International Ltd v Commissioner of the Independent Commission Against Corruption* [2016] 1 HKLRD 281.

B. Banking Customer Privacy

Additional issues to be aware of include how the Hong Kong common law of bank secrecy may affect discovery. In Hong Kong, a bank owes its customers a common law duty not to disclose to third parties information that it has obtained through virtue of the banking relationship[119]. There are four exceptions to this duty: with express or implied consent of the customer; where disclosure is under compulsion of the law or duty to the public; and where the interests of the bank require disclosure[120].

Hong Kong banks and other deposit-taking institutions are subject to additional regulatory requirements of customer confidentiality, through the Hong Kong Monetary Authority[121]. Usually these will not create a conflict for discovery, as most institutions in Hong Kong include clauses allowing for the disclosure of information to regulators and other legal authorities in their new account terms and conditions. Additionally, these confidentiality obligations are superseded by court imposed legal duties to disclose.

C. Financial Regulatory Cases

Discovery and disclosure proceedings in litigation and regulatory enforcements in the financial services sector feature prominently in shaping Hong Kong eDiscovery practices, given the international financial center status of the HKSAR.[122] This is particularly so in respect of cases under the jurisdiction of the SFC, an independent statutory body set up to regulate Hong Kong's securities and futures markets.

The Court of First Instance confirmed in *Securities and Futures Commission v Wong Yuen Yee & Ors* a heightened standard for discovery disclosures involving disqualification proceedings against directors[123]. The Court ruled that the SFC has a duty to disclose which is comparable to a prosecutor in a criminal proceeding – all relevant material, including those which may undermine its case.

The SFC has wide investigative powers under the Securities and Futures Ordinance, including the ability to compel a person to attend an interview. These interviews do not provide an interviewee with the right to remain silent and non-compliance with SFC disclosure requirements may result in imprisonment or fines[124]. This means that the SFC is likely to have information a respondent may not have access to, especially if, as occurred in the *Wong Yuen Yee* case above, the respondents have resigned before the disqualification process was initiated and lost access to relevant documentation as directors.

The SFC argued that a standard of disclosure analogous to civil proceedings should be used, namely, any documents relevant to the pleaded issues or that could lead to a train of inquiry that could produce relevant information. The Court, however, weighed the severe consequences of a disqualification order to a respondent against the SFC's coercive investigative powers that are meant to protect the public interest. The Court ruled that in order to ensure due process and a fair outcome, the SFC's disclosure requirements should include all relevant documents collected in the investigation unless they were obviously irrelevant, not just those related to pleaded issues.

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[119] *Ssangyong Corp. v Vida Shoes International, Inc, No. 03 Civ.* 5014, 2004 WL 1125659, at * 6 (S.D.N.Y. May 20, 2004).
[120] Id.
[121] Hong Kong Monetary Authority, "Code of Conduct" (CG-3) (2002) at 2.9.2.
[122] Basic Law of the HKSAR, article 109.
[123] Securities and Futures Commission v Wong Yuen Yee & Ors [2017] HKCU 23.
[124] *See* Securities and Futures Ordinance (Cap. 571).

D. Obtaining Evidence for Foreign Proceedings

Hong Kong laws are open to receiving evidence for a foreign proceeding from a willing witness within the territory, whether this is done by way of deposition or other similar procedures. If a witness is unwilling to provide evidence in a foreign matter, the foreign court must issue an application to the Court of First Instance of the HKSAR for an order for evidence to be obtained in Hong Kong[125]. The requesting court must show that the foreign proceedings have been instituted before the requesting court or that institution of the foreign proceedings must be contemplated[126]. Service of process is completed according to the Hague Service Convention, to which the HKSAR is a party[127].

Applicants may only ask for specific documents known or likely to be in the witness' possession, custody, or control[128], and may not conduct "fishing expeditions" or otherwise request lists of unspecified documents or other evidence. Privileged documents are not required to be produced[129]. Should a witness be compelled to be deposed under this Ordinance, the witness is entitled to payment for expenses and time spent[130].

E. Conflict of Laws

As in many jurisdictions, requirements for discovery in Hong Kong may sometimes conflict with prohibitions or limitations on data transfers in another jurisdiction, and vice versa. Thus, in these scenarios, whether a litigant discloses or not, they would be contravening at least one set of laws and exposed to related sanctions, the severity of which differ from jurisdiction to jurisdiction. This creates a "Catch-22" situation for litigants. A recent case in Hong Kong has helped illuminate how Hong Kong courts are likely to handle such questions, though it did not create a definitive precedent.

In *Securities and Futures Commission v Ernst & Young*,[131] Ernst and Young, an accounting firm, was compelled by the Court of First Instance to produce to the Securities and Futures Commission, the primary securities regulator of the HKSAR, certain documents it had withheld in a regulatory request for information. Ernst & Young argued that the documents were not within its possession, but the possession of its PRC affiliate, Ernst & Young Hua Ming, LLP, and that the production of those documents would put it in conflict with the PRC's state secrets law.

Under Hong Kong laws, if a person or firm is served with a notice to disclose documents under section 179 or 183 of the Securities and Futures Ordinance, they must comply unless they have a "reasonable excuse" for non-compliance[132]. The Court, referring to *Bank of Valletta*, laid out a test for "reasonable excuse" based on balancing three principles: 1) the adverse consequences for compliance compared to those of noncompliance; 2) whether the public interest in a case outweighs the public or private interest in not breaking foreign law; and 3) whether there are alternative means of obtaining the requested evidence without adverse consequences to the investigation[133].

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[125] Evidence Ordinance (Cap. 8), 32 § 75.
[126] Evidence Ordinance (Cap. 8), 32 § 75.
[127] Rules of the High Court (Cap. 4A), 219 § 69 r.1.
[128] Evidence Ordinance (Cap. 8), 32 § 76(4)(a)(b).
[129] Rules of the High Court (Cap. 4A), 219 § 70 r.6.
[130] Evidence Ordinance (Cap. 8), 32 § 76 (5).
[131] Securities and Futures Commission v Ernst & Young [2014] HKEC 864.
[132] Securities and Futures Ordinance § 179(13) or 184(1).
[133] *Bank of Valletta v National Crime Authority* (1999) 164 ALR 45 (Hely J) and (1999) 165 ALR 60 (upheld on appeal by the Full Court).

While in this case the question of whether contravention of a foreign law is sufficient to constitute a "reasonable excuse" was left open, as the documents in question could not be proven to contain state secrets, the balancing test used in this case provides a framework for future litigants.

F. Enforcement of Hong Kong Judgments in Mainland China

The HKSAR and the PRC signed the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned ("Commercial Arrangement") in 2006. The Commercial Arrangement only applies to final judgments for liquidated damages in commercial contract disputes where the parties have agreed in writing to either the PRC or Hong Kong as the sole jurisdiction for resolving disputes. In Hong Kong, the Mainland Judgment (Reciprocal Enforcement) Ordinance (Cap. 597) brought the Commercial Arrangement into effect in 2008, and the Supreme People's Court Judicial Interpretation No. 9 (of 2008) brought it into effect in the PRC. On June 20, 2017, a domestic and family case arrangement, the Arrangement on Reciprocal Recognition and Enforcement of Civil Judgment in Matrimonial and Family Cases, was signed. It has yet to be implemented in the respective jurisdictions.

V. IMPACT OF PRIVACY LAWS

Data protection laws regularly become relevant during discovery, especially where a party requires the collection, preservation, processing, transfer and/or production of data. Personal data privacy laws are the primary data protection laws relevant in these situations in Hong Kong. In 1996, Hong Kong passed the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO"). The PDPO defines "personal data" broadly to mean any data relating to a living individual from which his/her identity can be ascertained, and "data" as any representation of information in any document, including an expression of opinion. The PDPO regulates the individual or entity ("data user") controlling the collection, holding, processing, or use of personal data either in or from Hong Kong, and protects the privacy rights of an individual ("data subject") in relation to his/her personal data.

The PDPO is based on six data protection principles, which are meant to act as guiding principles, as opposed to detailed rules to regulate conduct. The PDPO was amended in 2012 with the Personal Data (Privacy) (Amendment) Ordinance, which added more specific provisions and restrictions on the use of personal data in direct marketing. Financial and insurance regulations also impose data protection requirements on regulated entities and individuals, including data control requirements and notification of data subjects. The PDPO generally requires consent from individuals before using their personal data for a new purpose, however there is an exception for the use of personal data for discovery purposes in connection to legal proceedings in Hong Kong[134].

There are codes of practice and guidance setting out specific requirements in respect of certain types of personal data such as identity card numbers, personal identifiers and consumer credit data. A data user must take all practicable steps to safeguard personal data from unauthorized or accidental access, processing, erasure, loss, or use. Data users are responsible for their use of third-party processors and other agents. In contracting third parties, the data users must implement data protection safeguards. In 2012, guidance was issued on contractual safeguards that could be imposed on third party processors and other agents such that they follow the PDPO and protect personal data as the data users would have themselves. In parts of the PDPO that have not yet been brought into force, the transfer of personal data out of Hong Kong is prohibited unless written consent of the data subject has been obtained or the data is being transferred to jurisdictions the Hong

[134] Personal Data (Privacy) Ordinance (Cap. 486), 22, § 33 (i).

Kong Privacy Commissioner has designated as having similar data protection laws.[135] The legislature has delayed implementing the cross-border transfer prohibition pending review of its impact on several industries, and no list of acceptable jurisdictions has been approved at this time.[136]

Moreover, criminal or civil penalties may apply depending on the nature of the breach. For example, the disclosure of personal data to third parties without the data subject's consent for direct marketing and for monetary gain could result in a maximum fine of up to HK$1 million and imprisonment for up to five years. Non-compliance with an enforcement notice issued by the Privacy Commissioner could result in imprisonment for up to two years and a maximum fine of HK$50,000 on first conviction, or HK$100,000 on subsequent conviction. An individual who suffers loss, including injured feelings, resulting from a breach of the PDPO in respect of his/her personal data may seek compensation from the data user responsible for the breach.

VI. SUMMARY

Hong Kong's location, common law traditions, and discovery rules make it an attractive jurisdiction for parties seeking discovery or disclosure in litigation, arbitrations, and investigations in the Greater China region. Adopting a common law legal system, Hong Kong's evidentiary and court procedural rules are comparable to those in England and Singapore, while its data protection regime is relatively liberal particularly in respect to cross border data transfers. Due to its proximity and connection to mainland China, Hong Kong is a popular venue for cross border dispute resolution. This is especially the case where the underlying transaction involves PRC parties, because obtaining evidence in the PRC often proves slow and burdensome in practice. For similar reasons, Hong Kong is also a popular venue for enforcement proceedings involving PRC parties in commercial matters.

VII. LINKS TO RESOURCES

- Basic Law of the HKSAR
  http://www.basiclaw.gov.hk/en/basiclawtext/index.html

- Hong Kong Case Law
  http://legalref.judiciary.hk/lrs/common/ju/judgment.jsp

- Personal Data (Privacy) Ordinance (Cap. 486)
  https://www.elegislation.gov.hk/hk/cap486

- Evidence Ordinance (Cap. 8)
  https://www.elegislation.gov.hk/hk/cap8

- Rules of the High Court (Cap. 4A)
  https://www.elegislation.gov.hk/hk/cap4A

- Rules of the District Court (Cap. 336H)
  https://www.elegislation.gov.hk/hk/cap336H

- Practice Direction SL 1.2
  http://legalref.judiciary.hk/lrs/common/pd/pdcontent.jsp?pdn=PDSL1.2.htm&lang=EN

[135] Personal Data (Privacy) Ordinance (Cap. 486), 22, § 33.
[136] Legislative Council Panel on Constitutional Affairs, LC Paper No. CB(2)1368/16-17(03).

INDIA

I. INTRODUCTION

India, the seventh largest country in the world, became an independent democracy in 1947. The constitution of India came into effect in 1950 and serves as the fountainhead of the Indian Legal system.

India has a hybrid legal system with a combination of civil, common, and customary or religious law, within the legal framework inherited from the colonial era.

The judicial system in India has a three tiers, comprised of:

- Supreme Court: highest appellate authority in the legal system
- High courts: standing at the head of the state judicial system
- District and sessions courts: for the judicial districts or states
- Civil courts (civil judges) & criminal (judicial/metropolitan magistrates) jurisdictions.

Over that time, many Indian laws have been changed, updated and modified, in keeping with the changing times and needs. Additionally, certain new laws have been enacted, for example to address Information Technology (IT Act 2000).

II. DISCOVERY IN INDIA - OVERVIEW

Traditionally, the Indian Evidence Act 1872 provided the principles of evidence that may be admissible in legal proceedings. For documentary evidence, primary evidence (the document itself) or secondary evidence (certified copies of that document, copies made by mechanical processes that ensure accuracy) were considered acceptable. However, as more and more documents came to be digitized and electronically stored, traditional approaches to authenticate secondary evidence were found to be lacking and unable to handle the complexity posed by ESI.

The Information Technology Act, 2000 was brought into force to address technological advancements and the increasing spread of e-commerce. The Act also covers electronic records and activities carried out by electronic means. The Act's purpose was to:

- Provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and information storage
- Facilitate electronic filing of documents with Government agencies
- Amend the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Books Evidence Act, 1891, and the Reserve Bank of India Act, 1934 , for all connected matters

Under the IT Act 2000, the requirements laid down for documentary evidence under various existing laws were deemed satisfied by a digital version of the same, including digital signatures instead of physical signatures.

III. IT ACT 2000 – OVERVIEW

The IT Act 2000 lays down the details of the establishment of the Cyber Regulations Appellate Tribunal and appointment of the Presiding Officer of the same. This Cyber Appellate Tribunal has the same powers as a civil court when trying a suit, in respect of:

a) Summoning and enforcing the attendance of any person and examining them on oath;

b) Requiring the discovery and production of documents or other electronic records;

c) Receiving evidence on affidavits;

d) Issuing commissions for the examination of witnesses or documents;

e) Reviewing its decisions;

f) Dismissing an application for default or deciding it ex parte;

g) Any other matter which may be prescribed

The Cyber Appellate Tribunal is not bound by the procedure laid down by the Code of Civil Procedure but is guided by the principles of natural justice and has powers to regulate its own procedure.

IV. DISCOVERY IN INDIA - LEGAL OBLIGATIONS

While there is no specific clause or provision under the various Indian laws specifically assigning power to an arbitrator or judge to direct discovery, it has been determined in various cases in Indian legal history that the arbitrator or judge has absolute power and flexibility to conduct the proceeding as he or she may consider appropriate and is not bound by the Indian Evidence Act, 1872 or Code of Civil Procedure, 1908.

Additionally, the IT Act, 2000 brings to light the powers of the Cyber Appellate Tribunal with respect to requiring the discovery and production of documents. This opens doors for extensive discovery of evidence in matters relating to disputes, covering both physical and electronic documents.

There are three likely scenarios for information discovery:

A. For matters that are sub-judice:

The courts and tribunals can direct the parties involved to make data available for discovery and review, and failure to do so may result in penalties as below:

- Failure to furnish any document, return or report: penalty up to one lakh and fifty thousand rupees for each such failure
- Failure to file return or furnish information, books or other documents within the time specified in the regulations: penalty up to five thousand rupees for every day during which such failure continues
- Failure to maintain books of account or records: penalty up to ten thousand rupees for every day during which the failure continues

- For any other contraventions of any rules or regulations, for which no penalty has been separately provided: Either compensation of up to twenty-five thousand rupees to the person affected or a penalty of up to twenty-five thousand rupees.

Similarly, penalties are applicable in case of tampering with or causing damage to computer systems, detailed in sections 5.4 and 5.5 below.

B. For matters that are under arbitration:

For most commercial disputes companies are likely to undergo an arbitration process, where they submit documents to support their claim, provide evidence to counter-claim or defend themselves against claims. In these cases, the arbitrator can direct the parties to make available their systems and data for discovery and review. Though the penalties for failure to disclose the documents are not defined, non-disclosure of key information and non-resolution of the matter could lead to a legal case in which the parties could be mandated to share the information by an order of the court.

C. For international matters:

India is a signatory to the Hague Convention of March 18, 1970 on the taking of evidence abroad in Civil or Commercial matters which lays out guidelines to facilitate discovery and improve mutual judicial co-operation with another country. While the Hague Convention does not mandate procedures for obtaining documents and evidence located in another territory, it does provide guidance for requesting such information.

The discovery process followed under Hague Convention cases would require the appointment of commissioners for execution of the requests under the order of the relevant high court.

V. DISCOVERY IN INDIA- GUIDING PRINCIPLES

The IT Act 2000 defines the following rules for carrying out electronic evidence collection or proceedings:

A. Authentication of electronic records

Any subscriber may authenticate an electronic record by affixing his digital signature, and the authentication of the electronic record shall be affected using asymmetric crypto system and hash function which envelop and transform the initial electronic record into another electronic record.

B. Legal recognition of electronic records

Where any law provides that information, or any other matter, shall be in writing or in typewritten or printed form, such requirement shall be deemed satisfied if such information or matter is

a) rendered or made available in an electronic form; and

b) accessible to be usable for a subsequent reference.

C. Retention of electronic records

1. Where any law provides that documents, records or information shall be retained for any specific period, that requirement shall be deemed satisfied if such documents, records or information are retained in the electronic form, if

a) The information contained therein remains accessible to be usable for a subsequent reference;

b) The electronic record is retained in the format in which it was originally generated, sent or received, or in a format that can be demonstrated to represent accurately the information originally generated, sent or received;

c) The details which will facilitate the identification of the origin, destination, date and time of dispatch or receipt of such electronic record are available in the electronic record:

Provided that this clause does not apply to any information that is automatically generated solely for enabling an electronic record to be dispatched or received.

2. This clause does not apply to any law that expressly provides for the retention of documents, records or information in the form of electronic records.

D. Penalty for damage to computer or computer system

If any person without permission of the owner or any other person who oversees a computer, computer system or computer network

a) Accesses or secures access to such computer, computer system or computer network;

b) Downloads, copies or extracts any data, computer data base or information from such computer, computer system or computer network including information or data held or stored in any removable storage medium;

c) Introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network;

d) Damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network;

e) Disrupts or causes disruption of any computer, computer system or computer network;

f) Denies or causes the denial of access to any person authorised to access any computer, computer system or computer network by any means;

g) Provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made thereunder;

h) Charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network,

Such person shall be liable to pay damages by way of compensation not exceeding one crore rupees to the person so affected.

E. Tampering with computer source documents

Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy or alter any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force shall be punishable with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.

F. Confiscation

The IT Act, 2000 also allows confiscation of any computer, computer system, floppies, compact disks, tape, drives or any other related accessories that may have been used in violating the law.

VI. SUMMARY:

Discovery of documents, data and information in India for dispute resolution and legal proceedings is slowly gaining ground, considering the presence of branch/offshore offices for a variety of international companies. The current absence of well-defined data protection laws makes it easier for companies to get access to the data stored within the country. However, with the proposed Personal Data Protection Regulation, the rules and procedures are likely to be revised and should be monitored for change.

VII. SOURCES:

- THE INFORMATION TECHNOLOGY ACT, 2000
- https://cis-india.org/internet-governance/blog/anvar-v-basheer-new-old-law-of-electronic-evidence
- http://www.lawyersclubindia.com/articles/The-Indian-Legal-System-3100.asp
- http://www.mondaq.com/india/x/651400/Arbitration+Dispute+Resolution/Discovery+In+Arbitration
- http://www.inhouselawyer.co.uk/legal-briefing/the-hague-evidence-convention-applicability-in-the-indian-legal-system/
- https://www.hcch.net/en/instruments/conventions/full-text/?cid=82

JAPAN

I. JURISDICTION OVERVIEW[137]

Japan is a civil law jurisdiction with certain common law influences[138]. The Constitution of Japan sets out the separation of powers in Japan and provides the structure of the judiciary[139]. The Supreme Court is the court of last instance, and the High Courts are the primary courts of appeal[140]. District Courts have general jurisdiction for any civil claim with a value of over ¥1,400,000, with claims worth less than that value tried in Summary Courts[141].

Due in part to a cultural aversion to litigation, Japan has far fewer lawyers per capita when compared to most Western countries[142]. Attorney candidates in Japan are required to either graduate from a law school, or pass a preliminary examination in order to sit for the bar[143]. After passing the bar examination, candidates are required to complete a one-year apprenticeship at the Legal Training and Research Institute of the Supreme Court before becoming qualified to practice. Alternatively, in exceptional circumstances, candidates may show previous relevant practical work experience as a substitution for the apprenticeship[144].

The legal profession is supplemented with several different quasi-lawyer professional classifications which typically cannot try cases except in very limited circumstances relating to their qualifications. These include for example *shiho-shoshi*, sometimes called judicial scriveners, who perform work related to real estate transactions, commercial filings, and drafting court documents, and may appear in summary court litigation[145]; and *benrishi*, who perform work similar to a patent attorney, and may under certain circumstances represent clients in intellectual property related disputes[146]. All quasi-lawyer positions in Japan are governed by associations and require candidates to sit an exam to gain their qualifications, but may not necessarily require a bachelor, or bachelor equivalent, degree in law.

The main body of Japanese law is made up of the Six Codes, or Roppō, which include the Constitution, the Civil Code, the Code of Civil Procedure, the Criminal Code, the Code of Criminal Procedure, and the Commercial Code[147]. The Roppō are supplemented by various statutes and regulations, as well as administrative and cabinet orders[148]. The Code of Civil Procedure, most recently updated in 1996, governs the

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[137] Thanks to Nyssa Gomes for her research and input on an earlier version of this chapter.
[138] Veronica Taylor et al., "Business Law in Japan" §1 (vol. 1 2008).
[139] 日本国憲法 [The Constitution of Japan], 1946, art. 41, 65, 76-82.
[140] Id. art. 77-81.
[141] 裁判所法 [The Court Act], 1947, art. 24, 33(1)(i).
[142] United Nations Office on Drugs and Crime, "Global Study on Legal Aid: Country Profiles" (2016), available at: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/GSLA_-_Country_Profiles.pdf
[143] Japan Federation of Bar Associations, "The Japanese Attorney System," available at: https://www.nichibenren.or.jp/en/about/judicial_system/attorney_system.html
[144] Id.
[145] 日本司法書士会連合会 [Japan Federation of Shiho-Shoshi's Associations], 司法書士の業務 [Duties of Shiho-Shoshi], available at: https://www.shiho-shoshi.or.jp/html/global/japanese/index.html

[146] 日本弁理士会 [Japan Patent Attorney Association], 弁理士法で定められた弁理士の業務について [Duties of Patent Attorneys as established by the Patent Attorney Act], available at: https://www.jpaa.or.jp/patent-attorney/business/

[147] Masaji Chiba, Japan, edited by Tan, Poh-Ling, Asian Legal Systems: Law, Society and Pluralism in East Asia (1997).
[148] Taylor et al., supra, at 5.

production of evidence in regards to civil litigation[149]. While the power of judicial review is granted to Japanese courts under the Constitution[150], Japanese judges customarily defer to the legislature on politically sensitive topics. As there are no formalized enforcement mechanism that would enable a court to independently exercise its powers of judicial review, courts appear to be reluctant to do so[151]. Judicial decisions are not considered to be of precedential value, but Japanese judges are expected to study previous decisions as a factor in their decision making[152].

II. DISCOVERY OVERVIEW

Pretrial or party discovery is extremely limited in Japan, and the comparatively drastic difference in procedures available for evidence collection after litigation proceedings commence has led many scholars to conclude that there are no procedures available under Japanese law that could appropriately be termed analogous to common law style discovery[153]. Whether or not it should be properly termed as discovery, Japanese attorneys have limited methods of evidence collection which are primarily driven by courts after litigation proceedings have commenced[154].

Evidence collection and production procedures are largely driven by judges, and are made up of short hearings over an extended period that are meant to clarify claims relating to evidence in the case, as well as to encourage parties to settle[155]. There is no cutoff for the timing of introducing new evidence or amendment of pleadings, as judges are expected to be able to appropriately evaluate evidence and there is no jury trial so there is no jury to surprise or otherwise unduly influence with the introduction of new evidence[156].

There are four commonly used methods of collecting evidence[157], some of which can be used pretrial:

(a) a motion for preservation of evidence[158];

(b) a request made through a lawyers' association[159;]

(c) court ordered production of documents[160]; and

(d) by the inquiry of a party[161] (a request similar to interrogatories, though with significant caveats[162]).

In general, many practitioners have found that Japanese corporations are somewhat resistant to discovery requests, especially U.S. style discovery requests, due to the vast gulf between Western and Japanese cultures

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[149] 民事訴訟法 [Code of Civil Procedure] 1996, art. 179-189.
[150] 日本国憲法 [The Constitution of Japan] 1946, art. 76, para. 2.
[151] Carl F. Goodman, "The Evolving Law of Document Production in Japanese Civil Procedure: Context, Culture, and Community," 33 Brook. J. Int'l. L. (2007), 134.
[152] Id. at 128.
[153] Craig P. Wagnild, "Civil Law Discovery in Japan: A Comparison of Japanese and U.S. Methods of Evidence Collection in Civil Litigation," 3 Asian-Pac. L. & Pol'y J. (2002) 1, 2.
[154] Id.
[155] Masahisa Deguchi, "Reform of Civil Procedure Law in Japan," 17 Ritsumeikan L. Rev. (2000).
[156] Wagnild, supra, at 17.
[157] Id. at 8.
[158] 民事訴訟法 [Code of Civil Procedure] 1996, art. 234-242.
[159] 弁護士法 [Attorney Act] 2005, art. 23-2.
[160] 民事訴訟法 [Code of Civil Procedure] 1996, art. 220-227.
[161] Id. art. 163.
[162] Id.

when it comes to the appropriateness and breadth of evidentiary requests for the purposes of litigation. Japanese culture highly values privacy as well as loyalty and the interests of the group or company over individuals. While the practical effect of these cultural influences can be overstated, they can become a factor in cases where a Japanese corporation is party to litigation.

III. DISCOVERY REQUIREMENTS AND GUIDING PRINCIPLES

A. Motion for the preservation of evidence

Parties may at any point prior to or after filing submit a motion to the court to preserve evidence or testimony related to proposed or ongoing litigation[163]. The motion must be made to the correct jurisdiction, with either the court receiving the case filing, or in the case of a pretrial motion, the District or Summary Court that has jurisdiction over the residence of the party or the person from whom the evidence is requested to be collected[164]. It must contain the name of the opposing party, detail the evidence to be collected, and articulate the reason evidence must be preserved[165]. A court may deny the motion, and while a party may reapply, it is not immediately appealable to a higher court[166].

The differences between the Japanese legal method of preserving documents and the affirmative duty to preserve information relevant to a claim or defense established under U.S. law has implications for any U.S. litigation involving Japanese parties or witnesses. U.S. courts have sanctioned Japanese firms for failures to preserve electronically stored documents. For example, in 2013, Sekisui America Corp. was sanctioned for failing to issue a litigation hold for 15 months. In 2014, a jury awarded US $9 billion in punitive damages against Takeda Pharmaceutical in a products liability case, partially because Takeda destroyed or deleted electronically stored documents relevant to the case, which the judge decided was in bad faith due to an earlier litigation hold. The damages were later reduced to US $36 million. The case, nevertheless, serves as a strong warning in terms of preservation practices and spoliation risks.

The 2015 amendments to the Federal Rules of Civil Procedure shifted the focus of spoliation as set out in Rule 37(e). Previously, U.S. case law was split as to whether negligence or intentionality was required to issue sanctions, but the 2015 amendment established that culpability only applies when the spoliator acted with intent to deprive the other party of the use of that information. The standard of culpability is now conformed and sanctions as such are less readily available. However, the Rule provides for remedial measures that may themselves prove as costly.

B. Request made through a lawyers' association

One of the most frequently used methods of pretrial discovery in Japan is making a request for evidence through a lawyers' association[167]. If information is in the possession of a public office or public/private organization, a lawyer may make a request through their lawyers' association for evidence[168]. The law does not, however, require the organization to forward the request to a party, and there are no delineated grounds for refusal, and no enforcement mechanism in the case of one[169]. Additionally, public offices may refuse to

[163] 民事訴訟法 [Code of Civil Procedure] 1996, art. 234-242.
[164] Id. at 235 (1), (2).
[165] Id.
[166] Id. at 238.
[167] Wagnild, supra, at 11.
[168] 弁護士法 [Attorney Act] 2005, art. 23-2.
[169] Id.

produce evidence if there is a conflict with recently enacted privacy laws. While this may be a frequently used method of discovery for Japanese lawyers, it may not have much practical use for an international litigant, due to its limited scope. Indeed, the majority of litigation will involve private parties, rather than public offices or public/private hybrid organizations.

C. Court ordered production of documents

Japanese courts may order a party to produce documents, with some caveats. Petitioners must request a document cited in the litigation, which is in the possession of the other party, but which must not fall into one of three exceptions:

(a) where a requested document contains information the holder of the document has a right to refuse to testify about;

(b) where a requested document contains information the holder owes a duty of confidentiality towards such as legal privilege or professional or trade secrets; and

(c) where a document was created solely for the use of the holder, sometimes called a "self-use document"[170].

This method has several limitations. A requesting party must be able to describe a requested document with enough specificity to identify it, which can be as specific as to require the requesting party to identify the date the document was created. In addition, the "created solely for the use of the holder" standard applies not just to individuals, but organizations[171]. This means that internal company documents could be exempt from production.

Case law has further defined the "self-use document" standard. In order for the document to be exempt from production the holder must show 1) the document was prepared solely for the use of the holder; 2) the document was never intended to be disclosed to others; and 3) production of the document would cause a disadvantage to the holder. A disadvantage to the company has been interpreted broadly, including if the production of a document would inhibit clear internal communication within a company in the future, or interfere with somewhat vaguely defined privacy concerns[172].

The broad application of the exemptions to production paired with the required specificity for identifying requested documents means that for practical purposes, court ordered production of documents will only occur in very limited circumstances.

D. Inquiry of a party

The Code of Civil Procedure includes a procedure analogous to interrogatories, which is available to parties that wish to directly request written responses on information required to assert proof of a matter[173]. Parties are required to respond unless an inquiry:

[170] 民事訴訟法 [Code of Civil Procedure] 1996, art. 220-227.
[171] Goodman, supra, at 160-162.
[172] Id. at 150-160.
[173] 民事訴訟法 [Code of Civil Procedure] 1996, art. 163.

(a) is not concrete or particular;

(b) embarrasses or insults the opposite party;

(c) is duplicative;

(d) seeks an opinion and not a fact;

(e) requires undue expense or time to answer; or

(f) relates to matters on which testimony may be refused (i.e.: self-incrimination, professional privilege, or privacy concerns)[174].

As the listed exceptions can be broadly interpreted, and there are no sanctions laid out by the Code for noncompliance, the usefulness of this avenue of inquiry depends on how cooperative an adverse party is, as the courts have previously been reluctant to issue sanctions[175].

IV. SPECIFIC GUIDANCE

A. Privilege

As Japan is not a common law jurisdiction and does not have a formal party discovery system, legal professional privilege does not exist in the common law sense in Japan. Like many civil law jurisdictions, Japan imposes a statutory duty not to disclose confidential communications between an attorney and client.

Under Japanese law, attorneys have an obligation to maintain the confidentiality of any facts learned in the course of the performance of their duties[176]. The Code of Civil Procedure further stipulates that attorneys can refuse to testify or produce documents regarding facts that were obtained during the course of their professional duties and should be kept secret[177]. These duties are extended to in-house counsel admitted in Japan, as Japanese law does not distinguish them from outside counsel, foreign attorneys registered in Japan, and *benrishi*, or patent attorneys[178].

U.S. courts have applied on comity grounds a concept of legal professional privilege between Japanese legal professionals and their clients in U.S. litigation that has much the same effect as U.S. style legal professional privilege[179], holding that if a document is subject to legal professional confidentiality under Japanese law, it should be exempt from production in U.S. litigation on the basis of legal professional privilege[180].

A potential pitfall that practitioners representing Japanese corporations in transnational litigation need to be aware of is that due to Japanese business practices and the historical dearth of admitted attorneys in Japan, not every corporate legal department will have admitted legal professional members. Even corporate general counsel may not be admitted, though that was more likely to occur in the past than it is today. Due to

[174] Id.
[175] Wagnild, supra, at 16.
[176] 弁護士法 [Attorney Act] 2005, art. 23.
[177] 民事訴訟法 [Code of Civil Procedure] 1996, art. 197(1)(ii), (iii) and 220(iv)(c).
[178] 弁護士法 [Attorney Act] 2005, art. 23.
[179] Knoll Pharms. Co. v. Teva Pharms. USA, Inc., No. 01 C 1646, 2004 WL 2966964, at *3 (N.D. Ill. Nov. 22, 2004) and Murata Mfg. Co. v. Bel Fuse Inc., No. 03 C 2394, 2005 WL 281217, at *2-*3 (N.D. Ill. Feb. 3, 2005).
[180] Eisai Ltd. v. Dr. Reddy's Labs., Inc., 406 F. Supp. 2d 341, 342 (S.D.N.Y.2005).

unfamiliarity with foreign law, a Japanese corporation may not volunteer relevant information about the professional status of its employees, so practitioners would be well served to proactively seek the status of any employee *bengoshi* (attorney), *benrishi* (patent attorney), or other registered legal professional under Japanese law.

B. Obtaining evidence in foreign proceedings

Japan is not a party to the Hague Evidence Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, which means foreign practitioners must rely on other means to take depositions, obtain testimony through letters rogatory, and request production of documents for foreign proceedings. A few jurisdictions, including the U.S., have bilateral treaties with Japan concerning the taking of evidence[181]. Japan is a signatory to the Hague Convention on Civil Procedure, which allows other party countries to route letters rogatory and other judicial requests through the Japanese Ministry of Foreign Affairs, to be executed by a Japanese Court according to the Code of Civil Procedure[182]. Unless a jurisdiction has a bilateral agreement with Japan regarding the taking of depositions, collection of evidence in this way is limited.

C. Obtaining evidence through the U.S. Japan Bilateral Agreement

Japan and the U.S. have signed a bilateral treaty, the U.S.-Japan Consular Convention of 1963, which allows for evidence be taken by a U.S. representative following the Federal Rules of Civil Procedure or by a Japanese court[183]. Depositions for use in U.S. legal proceedings must be taken at either the U.S. Embassy in Tokyo or the U.S. Consulate in Osaka-Kobe. There is no alternative means to take deposition within Japan that Japan does not consider to be a violation of its sovereignty[184]. Furthermore, the Treaty only allows evidence to be taken directly by a U.S. attorney with an appropriate visa, requires a U.S. court order, and teleconferencing is not permitted[185]. Only willing witnesses may be deposed[186].

Due to the limited availability of conference rooms at the U.S. Embassy and Consulate, the logistical issues parties must undertake in order to arrange for court reports, interpreters, and stenographers, as well as the fees associated with the use of U.S. embassy facilities and visa arrangements, taking depositions in Japan under the Treaty is cumbersome. As a practical matter, Practitioners might invite cooperative witnesses to be deposed in an alternative jurisdiction, though that presents its own cost concerns.

Under the Treaty, a letter rogatory may be issued, requesting the assistance of a Japanese court to compel the testimony of an unwilling witness before a Japanese judge[187]. Once a court has issued a letter rogatory, it must be transmitted through diplomatic channels, and any questioning of a witness must be done according to Japanese law[188]. As the examination of the witness is not done according to the Federal Rules of Civil

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[181] Masafumi Kodama and Jay Tyndall, "International Commercial Litigation in Japan," Inter-Pacific Bar Association, Manila, Phillipines (2000).

[182] International Conferences (The Hague), "Hague Convention Relating to Civil Procedure" (March 1954), available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=33

[183] U.S.-Japan Consular Convention of 1963, art. 17.
[184] Wagnild, supra, at 20.
[185] U.S. Embassy & Consulates in Japan, "Depositions in Japan" available at: https://jp.usembassy.gov/u-s-citizen-services/attorneys/depositions-in-japan/#det
[186] Id.
[187] Wagnild, supra, at 21.
[188] Jeffrey A. Soble and Masahiro Tanabe, "Conducting Discovery in Japan: Depositions, Letter Rogatory, and Production of Documents" (September 2012), available at:

Procedure, evidence acquired may not be admitted in U.S. proceedings[189]. Accordingly, it is not a popular method of evidence collection for foreign proceedings[190].

Finally, Article 17(1)(f) of the Treaty allows consular officers to obtain copies of documents from a public registry in Japan[191]. Any other request for documents from a third party falls under the Japanese Code of Civil Procedure, with the same limitations stated above.

V. IMPACT OF PRIVACY LAWS

In May 2017, the Amended Act on the Protection of Personal Information came into effect in Japan ("PIPA"). The law establishes the Personal Information Protection Commission (the "PPC"), which is tasked with the establishment and enforcement of privacy regulations, and created regulations regarding disclosure of personal information to third parties, international transfers, and the collection and use of personal information. Personal information is defined as information relating to a living person from which a specific individual can be identified. PIPA identifies a new concept of "sensitive information" as information on race, creed, social status, disability, medical history, criminal history, any history as a victim of a crime, and other information that may cause social discrimination, and requires the express consent from the individual at the time the sensitive information is collected.

One of the most relevant sections of PIPA deals with overseas transfer to third parties.[192] Foreign third parties include a parent company or other affiliated company and outsourcing vendors and express consent will be required to transfer data except in the cases where transfer is:

(a) to a country which is designated by the PPC to have legislation on personal information protection substantially similar to Japan, or

(b) to a party which has an internal personal information protection system equivalent to PIPA regulations. At the time of writing, the PPC has not yet designated any jurisdiction as having acceptably equivalent legislation, but there has been some progress with the PPC and European Commission working towards establishing a framework.[193]

The legislation also introduces record keeping obligations for third party transfers, requiring:

(a) date of transfer,

(b) names of transferees,

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http://www.mondaq.com/x/195740/disclosure+electronic+discovery+privilege/Conducting+Discovery+in+Japan+Depositions+Letter+Rogatory+and+Production+of+Documents

[189] Wagnild, supra, at 21.

[190] Id.

[191] U.S.-Japan Consular Convention of 1963, art. 17(1)(f).

[192] *See* Sebastian Ko and Nga Man Poon, "Electronic Discovery and Cross-border Data Transfer: New Frontiers in Singapore, China, and Japan," Singapore Law Gazette (December 2017), available at: https://lawgazette.com.sg/practice/tech-talk/electronic-discovery-cross-border-data-transfer-new-frontiers-singapore-china-japan

[193] In January 2019, Japan and the European Commission entered an adequacy arrangement, resulting in the PPC white-listing the 28 E.U. Member States as well as Norway, Liechtenstein and Iceland. *See* Personal Information Protection Commission, "The framework for mutual and smooth transfer of personal data between Japan and the European Union has come into force" (January 23, 2019), accessible at: https://www.ppc.go.jp/en/aboutus/roles/international/cooperation/20190123/

(c) name and other information which may identify individuals,

(d) items of personal information provided or received, and

(e) whether consent for the transfer has been obtained.

Record keeping is not required if the transfer is within Japan and meets certain requirements.

The PPC's enforcement powers include penalties for the theft or misappropriation of personal information of a fine of not more than ¥500,000 or imprisonment for not more than one year.

Due to the limitations on discovery in Japan, as well as the structural emphasis on non-litigation dispute resolution, Japan is not an attractive forum for transnational litigation. As a result of cultural and legal traditions, the vast gulf between common law jurisdictions and Japanese treatment of evidence collection for trial can create pitfalls which practitioners should be aware of when dealing with Japanese parties or witnesses to transnational litigation.

VI. LINKS TO RESOURCES

- The Constitution of Japan:
  http://www.japaneselawtranslation.go.jp/law/detail/?id=174&vm=04&re=02&new=1
- The Code of Civil Procedure:
  http://www.japaneselawtranslation.go.jp/law/detail/?id=2834&vm=&re=02&new=1
- The Attorney Act:
  http://www.japaneselawtranslation.go.jp/law/detail/?id=1878&vm=04&re=02&new=1
- US Embassy Guide to Depositions in Japan:
  https://jp.usembassy.gov/u-s-citizen-services/attorneys/depositions-in-japan/#dep
- Consular Convention Between the United States and Japan:
  http://www.jstor.org/stable/20689661
- Japan Federation of Bar Associations
  https://www.nichibenren.or.jp/en/
- The Supreme Court of Japan
  http://www.courts.go.jp/english/

KOREA

I. HISTORY AND STRUCTURE OF KOREAN COURTS

The modern judicial branch of the Korean government was established in 1948 by the Constitution of the Republic of Korea. The judiciary was instituted to be an independent branch of government, and the courts were organized into a three tier structure with the Supreme Court as the highest court. Specific guidelines on the organization and operation of the lower courts is laid out in the Court Organization Act, which has been amended numerous times since its original passage in 1949.

The Supreme Court is the highest court in the Republic of Korea. The High Court is the intermediate court, and District Courts are the lowest courts of first instance. The Court Organization Act establishes additional specialized categories of courts: the Patent Court, Family Court, Administrative Court, and Bankruptcy Court. These courts are all on the lowest tier, with the exception of the Patent Court, which is considered on the intermediate tier.

Separately, Korea established the Constitutional Court of Korea in 1988. This court is considered to be at the highest tier, on par with the Supreme Court. Judges sitting on other courts may refer cases involving fundamental rights to the Constitutional Court for adjudication. However, unlike in some other jurisdictions, challenges to Korean law can also be brought directly to the Constitutional Court by any individual Korean citizen who claims that their basic rights are being infringed. In such cases, the Constitutional Court can actually function as a court of first instance.

II. KOREAN CIVIL PROCEDURE

Civil proceedings in Korea are governed by the Korean Civil Procedure Act (KCPA).[194] Plaintiffs generally initiate an action by filing a complaint in the appropriate District Court. Whether the case is heard by a single judge or a panel of three judges depends on the amount in controversy. For cases where the size of the claim may exceed 200,000,000 KRW (approximately 200,000 USD), the matter will be heard by a panel of three judges. For cases where the claim is less than that amount, the case will be heard by a single judge.

Judgments are handed down in writing, and parties generally have 14 days to appeal before the decision becomes final and binding. If the case was heard before a single judge, then another court of the same tier may review with a three judge panel. If the case was heard by three judges, then a higher court will review. Appellate cases are reviewed de novo, and the lower court's decision is not considered binding on the reviewing judge. The reviewing judge is free to take the original court's decision into account, but is still free to hear new evidence and arguments.

As the Korean system borrows many elements from continental European civil law jurisdictions, there are many aspects of Korean civil procedure that are similar to the inquisitorial tradition. The judge sits as adjudicator of questions of both law and of fact. Thus, no common law discovery rules exist in Korean civil procedure. Judges are given authority to decide on evidentiary issues and order disclosure.

[194] English version of the Korean Civil Procedure Act is available online through the National Law Information Center at http://www.law.go.kr/

III. Korean Evidentiary Rules

As a civil law jurisdiction, Korea does not have a common law discovery rule like the United States where evidence can be requested directly from the opposing party. Rather, the courts are appointed as the primary fact finder. Per article 202 of the KCPA:

> *A court shall determine, by its free conviction, whether or not an allegation of facts is true, taking account of the whole purport of pleadings and the results of examination of evidence, on the basis of the ideology of social justice and equity in accordance with the principles of logic and experiences.*

Consequently, judges are vested with the power to compel disclosure via court order, and parties may request that the court issue production orders to the counterparty or third parties. The courts likewise are given the power to examine witnesses.

A. Disclosure of Documentary Evidence

Article 343 of the KCPA sets forth the general rule for documentary evidence.

> *When a party intends to offer any documentary evidence, he/she shall do so by a method of submitting the document, or by filing a request for an order to make the person holding the document submit it.*

Unlike in common law discovery, these requests are not made directly to the counterparty or third parties, but must be requested through the court.

Additionally, they cannot be general requests for all relevant documents as in the United States.[195] Rather, the request must state with specificity what document or documents are being requested, and the reasons for the request. Per Article 345 of the KCPA, the request must include:

1. Indication of the document;
2. Purport of the document;
3. Holder of the document;
4. Facts to be proved;
5. Causes of an obligation to submit the document.

The obligations of the holding party to submit requested documents are generally laid out in Article 344. The party receiving the document submission request "shall not refuse to submit it" when: (1) the party holds the document requested, (2) the applicant is legally entitled to have the document shown or transferred, or (3) the document has been prepared for the benefit of the applicant, or prepared as to a legal relationship between the applicant and the holder of the document.[196]

[195] United States Federal Rules of Civil Procedure, Rule 26(b) defines the scope of discovery as "any nonprivileged matter that is relevant to any party's claim or defense.'
[196] KCPA, Article 344(1)

B. Exceptions – Confidentiality Rules

Korean law recognizes limited exceptions to the obligation to submit evidence. In cases where certain government or public officials are asked to produce evidence that relates to official secrets, the document holder may need to obtain the consent of their respective government entity[197]. Consent may be refused for matters of national interest.[198] Current and former Presidents, Speakers of the National Assembly, and Chief Justices of the Supreme and Constitutional Courts may refuse to provide evidence.[199]

Professional confidentiality obligations are recognized as a limitation on the obligation to disclose evidence. The KCPA recognizes certain professional individuals in Article 315(1)1 as holders of a confidentiality duty:

- Attorney-at-law
- Patent attorney
- Notary public
- Certified public accountant
- Certified tax consultant
- Persons engaged in medical care
- Pharmacist, or
- A holder of other post liable for keeping secrets under statutes, or
- Of a religious post, or
- A person who used to be in such post

These individuals may refuse to disclose information if it falls under their official functions.[200] Similarly, the law recognizes "technical or professional secrets" as a category of information that can be protected from disclosure.[201] Note, these are confidentiality obligations and not privilege obligations in the vein of a full attorney-client privilege. The US common law concept of privilege does not exist in Korea. Thus, if a professional from the list above has been exempted from their professional confidentiality obligation, they can refuse to submit. This is different from how privilege operates, wherein the privilege is held by both the professional and their client.

Failure to comply with a court order for disclosure will result in sanctions from the court. Per Article 349, if a party fails to comply with a document production order, the court may admit as true the allegations made by the requesting party in their request. Per Article 350, if a party destroys, makes unusable, or prevents the use of the requested documents, the court may again admit as true the allegations made by the requesting party in their request.

IV. Recent Expansions in Discovery Rules for Patent Cases

As a result of the specificity requirements for submitting production order requests and the trade secret confidentiality provision, document disclosure in patent cases was naturally a challenge. To address this issue, Korea recently updated the evidentiary rules in patent cases to expand the scope of disclosure and increase the penalties for non-compliance.

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[197] KCPA, Article 305-306
[198] KCPA, Article 307
[199] KCPA, Article 304
[200] KCPA, Article 344(3)
[201] KCPA, Article 315(1)2

Patent litigation in Korea is heard before the Patent Court, and primarily governed by the Korean Patent Act (KPA).[202] In 2016, Article 132 of the KPA was substantially amended. Prior to the amendment, the Article was titled "Submission of Documents", and read in its entirety:

> *Upon receipt of a request from either party to legal proceedings on infringement of a patent or exclusive license, the court may order the other party to submit documents necessary for assessing losses caused by the relevant infringement: Provided, That the foregoing shall not apply where the person possessing the documents has a reasonable ground to refuse to submit them.*

The emphasis is on documents, and the scope is limited to those necessary for assessing losses. Additionally, the provision is punctuated with an exception that allows non-disclosure on reasonable grounds. Thus, the trade secret provision in the KCPA would apply, and this allowed parties to refuse to disclose information by claiming confidentiality.

After the amendment, the title of Article 132 was changed to "Submission of Materials." The word "documents" was replaced by "materials", expanding the scope beyond documents to include other forms of evidence, including digital evidence.

A subparagraph was added to specifically address the trade secret provision. Article 132(3) reads,

> *Where the materials that shall be submitted…falls under the trade secret … but it is necessary to prove the infringement or calculate the amount of losses, it shall not be considered a reasonable ground pursuant to the proviso of paragraph (1).*

By specifically removing trade secrets from the "reasonable grounds" for refusing a production order, the law strengthens the power of the court to gather potentially relevant evidence.

The 2016 update also establishes an in camera review process for the courts to review requested materials. Any time a party refuses to produce materials based upon the "reasonable grounds" provision, Article 132(2) reads:

> *Where a person possessing the materials argues that he/she has a reasonable ground to refuse to submit them pursuant to paragraph (1), the court may order the presentation of the materials to determine whether the argument is right or wrong. In such cases, the court shall not allow other persons to see such materials*

This language adds a requirement for the party claiming reasonable grounds to convince the court that the materials should indeed be withheld. To maintain a level of confidentiality, the provision allows the court to prevent viewing of the material by "other persons" during this review. Similar language is added to the trade secret provision, explicitly allowing the court to "designate a scope in which an inspection is allowed."[203]

Penalties for non-compliance with the document production order are added to Article 132 as well, reinforcing existing sanctions and adding an even stronger sanction when other evidence is not available. As an initial matter, paragraph 4 of the amended article re-iterates the sanction discussed earlier in the KCPA, that "the court may deem that the claim of the other party on the record of materials is true." This means that the allegations of fact regarding the contents of the requested material are presumed to be true by the court.

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[202] English version of the Korean Patent Act is available online through the National Law Information Center at http://www.law.go.kr/
[203] KPA, Article 132(3)

Going one step further, paragraph 5 adds that in circumstances where the requesting party is unable to make specific claims as to the content of the requested material, and no other evidence is available, then the allegations that the requesting party would have intended to prove with the requested evidence are also true. In essence, the requesting party is somewhat relieved of the specificity requirements when requesting evidence, and the party withholding evidence is at greater risk of having a negative inference levied against them if they do not provide any other evidence to counter the requesting party's allegations.

V. Data Privacy and Personal Information Protection Issues

Data privacy has been an important topic in recent years. As with many other jurisdictions around the world, Korea has been strengthening protections over personal information. Korean data privacy is primarily governed by the Personal Information Protection Act (PIPA).[204] PIPA was originally passed in 2011, and underwent a number of revisions including most recently in 2017.

Practitioners in Korea who work with data, or who need to handle data for cross border litigation, corporate investigations, or arbitration matters, will need to be mindful of Korea's expansive and strict data protection laws.

A. Jurisdictional Note

PIPA does not explicitly state a geographic jurisdictional requirement to limit coverage. Rather, Article 1 reads:

> *The purpose of this Act is to provide for the processing and protection of personal information for the purposes of protecting the freedom and rights of individuals, and further realizing the dignity and value of the individuals.*

Emphasis is on all "individuals". Prior versions of PIPA used the word "citizens" in Article 1, but it was amended in 2014 to clarify that the intent was to cover a broader range of individuals. The language leaves the law open for application extraterritorially and expands coverage to non-citizen individuals. This means that Korean nationals abroad may still be protected, and foreign nationals in Korea may still be protected.

B. Definition of Personal Information

Personal information is defined in Article 2 of the PIPA as:

> *Information relating to a living individual that makes it possible to identify the individual by his/her full name, resident registration number, image, etc. (including information which, if not by itself, makes it possible to identify any specific individual if combined with other information);*

Korea issues Resident Registration Numbers to all citizens and legal residents. These numbers are the primary piece of identifying information in Korea by default, but the definition of personal information under PIPA is far broader. It extends coverage to even items that may not identify an individual by themselves, but even information that can be used together with other information to identify an individual.

[204] English version of the Personal Information Protection Act is available online through the National Law Information Center at http://www.law.go.kr/

The act establishes an additional category of "sensitive information". Per Article 23:

> *A personal information controller shall not process any information prescribed by Presidential Decree (hereinafter referred to as "sensitive information"), including ideology, belief, admission to or withdrawal from a trade union or political party, political opinions, health, sexual life, and other personal information that is likely to threat the privacy of any data subject noticeably*

Other types of information have been added to this category by decree. For example, recent updates have added DNA information and criminal history to this list.[205]

C. Data Obligations

PIPA designates anyone who handles data as a "personal information controller". Per Article 2:

> *The term "personal information controller" means a public institution, legal person, organization, individual, etc. that processes personal information directly or indirectly to operate the personal information files for official or business purposes;*

Processing is defined as follows:

> *The collection, generation, connecting, interlocking, recording, storage, retention, value-added processing, editing, retrieval, output, correction, recovery, use, provision, and disclosure, destruction of personal information and other similar activities*

Personal information controllers are generally obligated under PIPA to inform the data subject of the purposes of the data collection, to collect the minimum amount necessary to accomplish that purpose, and to maintain security of the collected data. [206]

Data subjects are afforded basic rights over their personal information. Per Article 4:

> *A data subject has the following rights in relation to the processing of his/her own personal information:*
>
> 1. *The right to be informed of the processing of such personal information;*
> 2. *The right to consent or not, and to elect the scope of consent, to the processing of such personal information;*
> 3. *The right to confirm the processing of such personal information, and to request access (including the provision of copies; hereinafter the same applies) to such personal information;*
> 4. *The right to suspend the processing of, and to request a correction, erasure, and destruction of such personal information;*
> 5. *The right to appropriate redress for any damage arising out of the processing of such personal information in a prompt and fair procedure.*

[205] Enforcement Decree of the Personal Information Protection Act [Enforcement Date 19. Oct, 2017.] [Presidential Decree No. 28355]
[206] PIPA, Article 3, Article 15

In addition to the general obligations, personal information controllers generally need to obtain informed consent from data subjects prior to any processing or transfer of personal information. Separate and additional consent is required for sensitive information.

D. Transfers of Data and Overseas Transfer Considerations

Transfers of personal information to third parties are regulated by Article 17(3) of PIPA.

> *A personal information controller shall inform the data subject of the following matters when it obtains the consent... The same shall apply when any of the following is modified.*
>
> 1. *The recipient of personal information;*
> 2. *The purpose of use of personal information (where personal information is provided, it means the purpose of use by the recipient);*
> 3. *Particulars of personal information to be used or provided;*
> 4. *The period for retaining and using personal information (where personal information is provided, it means the period for retention and use by the recipient);*
> 5. *The fact that the data subject is entitled to deny consent, and disadvantage affected resultantly from the denial of consent.*

Although there is no express provision in PIPA regarding international transfers of data, any such transfers would have to satisfy the requirements above.

It should be noted, however, that international transfers are addressed in regulations covering specific industries. Telecommunications companies face additional requirements to protect personal information, and must obtain specific informed consent from customers when transferring data overseas.[207] Failure to comply with these regulations may result in additional penalties.[208] Likewise, companies in the financial sector and in the medical sector face restrictions on international transfer of data. As Korean data privacy laws continue to develop, it is entirely possible that additional regulations will be imposed.

VI. Summary / Conclusion

Although no common law discovery rules exist in Korea, legal practitioners and discovery professionals who conduct business in Korea will need to be mindful of Korean evidentiary rules. Korean civil procedure has recently taken a few small steps towards greater discoverability, with developments in evidentiary procedure for patent cases. This suggests that changes in civil procedure may be forthcoming as well, especially as Korean corporations continue to expand their exposure to overseas jurisdictions.

Particularly noteworthy for the practitioner is the ever-evolving body of Korean data privacy law. Korea is a member of the APEC Cross-Border Privacy Rules System, and is clearly moving towards more robust

[207] Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc [Enforcement Date 23. Sep, 2016.] [Act No.14080.]
[208] PICNUIP, Article 64-3

protection of personal information. The global privacy landscape poses new challenges for data handlers, and Korea is no exception.

VII. Further Resources

- Korean National Law Information Center - http://law.go.kr/

MALAYSIA

I. INTRODUCTION

Malaysia is a federation of 14 states comprising Peninsular Malaysia or West Malaysia and East Malaysia on the island of Borneo, the two being separated by the South China Sea. Malaysia follows a common law system that has been largely influenced by English laws, a testament to its English legacy. It has also been enriched by influences from other parts of the Commonwealth such as India, Australia and other jurisdictions. Malaysia has a dual justice system, consisting of Civil Courts, which are secular, and the Syariah Courts that administer Islamic law. This Chapter will be limited to the Civil system of justice. The Federal Constitution ensures a separation of powers exercised by the executive, legislature and the judiciary.

The Malaysian judicial system may be represented as a pyramid. At the apex of the judicial pyramid is the Federal Court which by Articles 128 and 130 of the Federal Constitution has both original as well as appellate jurisdiction. It acts in an advisory capacity on matters referred to it by His Majesty The Yang di Pertuan Agong and also reviews decisions referred from the Court of Appeal in both criminal and civil matters. Headed by the Chief Justice, it is the highest judicial authority and the final court of appeal in Malaysia. Established pursuant to Article121 (2) of the Federal Constitution, its decisions are binding on all lower Courts.[209] It operates on a single-structured judicial system consisting of two tiers - the Superior courts and the Subordinate courts. The subordinate courts are the Magistrate Courts and the Sessions Courts whilst the superior courts are the two High Courts of co-ordinate jurisdiction and status, one for Peninsular Malaysia and the other for East Malaysian , the Court of Appeal, and the Federal Court.

II. DISCOVERY IN CIVIL PROCEEDINGS

Malaysia's rules of civil procedure are derived from the previous English Rules of the Supreme Court 1965, embodied in the Rules of the High Court 1980 and Rules of the Subordinate Courts 1980. These were repealed and replaced with the Rules of Court (ROC) 2012, effective from 1 August 2012. The ROC deal with all procedural requirements in relation to all civil actions commenced in Court. Whereas under the previous rules there was provision for discovery by mutual exchange between the parties, under the ROC 2012, discovery is not a matter of right but must be ordered by the Court. Discovery of documents consists of three stages, namely (i) disclosure, (ii) inspection and (iii) production. This is normally dealt with at the first Case Management hearing. O.1 r.4 ROC 2012 defines a 'document' as:

[209] The Palace of Justice Inaugural Report of the Superior and Subordinate Courts in Malaysia (2004) p 15.

> anything in which information of any description is recorded and includes a claim, summons, application, judgment, order, affidavit, witness statement, or any other document used in a court proceeding.

Although the definition does not specifically refer to electronic documents or 'documents produced by a computer' the fact that it includes 'any other document used in a court proceeding' would by inference include 'documents produced by a computer'. Accordingly, any document as defined in section 3 EA1950 may be the subject of discovery including computer generated documents. Order 24 rule 3 (O.24 r.3) ROC 2012 sets out the necessary procedural requirements. However, 'eDiscovery' as such has yet to be established in Malaysia. Most 'electronic' documents take the form of computer printouts with the exception of audio and video files.

A. The Order for Discovery

Order 24 rule 3

(1) Subject to the provisions of this rule and of rules 4 and 8, the Court may at any time order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to give discovery by making and serving on any other party a list of the relevant documents which are or have been in his possession, custody or power, and may at the same time or subsequently also order the party to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.

The guidelines for discovery of documents were established in the precedent case of *Compagnie Financiere du Pacifique v. Peruvian Guano Co*.[210] To obtain discovery, the applicant had to prove that the documents were relevant and/or material either to benefit the defendant's case or damage the plaintiff's case. Breth LJ observed that:

> The documents to be produced are not confined to those which would be evidence either to prove or disprove any matter in question; … It seems to me that every document relates to the matter in question in the action which is reasonable to suppose contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.[211]

These principles have given way to a narrower requirement in **O.24 r. 3(4)** which provides that the documents that a party to a cause or matter may be ordered to discover are:

(a) the documents on which a party relies or will rely,

(b) the documents which could

(i) adversely affect his own case,

(ii) adversely affect another party's case; or

[210] [1882] 11 QBD 55.
[211] [1882] 11 QBD 55.

(iii) support another party's case.

The principal issues in discovery as discerned from a series of cases have been relevance, volume, possession, privilege and cost of production. In *ABX Logistics (Malaysia) Sdn Bhd* v *Overseas Bechtel (Malaysia) Sdn. Bhd.,*[212] an appeal by the defendant for discovery was dismissed as the procedure was not intended to be a means for a fishing expedition. In *Kerajaan Negeri Kelantan v Petroliam Nasional Berhad & Other Appeals*,[213] the Federal Court found that the documents sought for discovery were both extensive and irrelevant to the issue of liability. As the documents concerned the issue of quantum of damages rather than liability, discovery was not necessary at the stage of summary judgment. In *Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors.,*[214] it was held that the party seeking production had to satisfy the court that such production was necessary. In *Yekambaran s/o Marimuthu v. Malayawata Steel Bhd*.,[215] the Supreme Court held that there were three essential elements for an order for discovery. First, there must be a 'document'. Secondly, the document must be 'relevant'. Thirdly, the document must be or have been in the 'possession, custody or power' of the person against whom discovery is sought. The documents must then be 'relevant' or 'relate' to the factual issues in dispute. In *Tan Sri Dato' Sri Khalid Abu Bakar (Dig) & Ors. v Muhammad Farid Muntalib*,[216] on a charge of accepting a bribe the accused applied for discovery of an alleged report on a stolen Mercedes Benz and other related documents. The Court of Appeal disallowed the application as it was not relevant to the charge of accepting a bribe. In *Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors*.,[217] involving a negligence claim for severe and irreversible brain damage at birth, the Court allowed the Plaintiff's application for discovery of patient records from the Defendant. In *Alcim Sdn Bhd. v Toralf Mueller & 11 Ors*.,[218] the Plaintiff sought discovery of numerous emails from the Defendants. The Court however disallowed the application as most of the documents sought were already in the Plaintiff's possession and the Court was not convinced that the documents were necessary for the fair disposal of the case. Although discovery could be sought at any stage of the proceedings the Court took the view that under the circumstances, the application for discovery ought to have been made before the commencement of the proceedings so as not to prejudice the Defendants. In *Avnet,* the Court found that Plaintiff could have attempted to seek discovery of the email logs of Sapura to determine whether the email from IBM Singapore was received. The possibility of deletion by Sapura of the relevant emails would require further forensic searches and tests to establish this resulting in greater costs. The cost - benefit factor would have to be decided by Avnet.

B. The Scope of Discovery

Order 24 rule 4 empowers the Court to determine any issue or question in the cause or matter before making any order as to discovery.

These principles were followed by the High Court in *CMA CGM v Ban Hoe Leong Marine Supplies Sdn Bhd & Ors*.[219] In that case, the defendants sought extensive discovery of documents from the plaintiff. The High Court focussed on the issues of relevance and materiality to the claim. Having found in favour of the defendants on the issue of relevancy the next issue was the volume of documents. The Federal Court held in *Faber Merlin Malaysia v. Ban Guan Sdn Bhd.*[220] that relevant documents in the appellant's possession must be produced,

[212] [2003] 7 CLJ 357.
[213] [2014] 7 CLJ 597.
[214] [2002] 1 LNS 413; [2009] 5 MLJ 40.
[215] [1994] 2 CLJ 581; [1993] MLJU 96.
[216] [2015] 1 LNS 15.
[217] [2015] 1 CLJ 825.
[218] [2014] 1 LNS 523.
[219] [2014] 1 LNS 145.
[220] [1980] 1 LNS 189; [1981] 1 MLJ 105.

notwithstanding their large volume. The High Court accordingly found that because the Defendant had discharged its burden of proving both relevance and necessity of the documents sought for the fair disposal of the case, they should be produced regardless of their volume.

In *RHB Bank Berhad v. Mohd Niza Abdul Mubin & Anor*.,[221] involving a claim for the balance outstanding on a housing loan, a defendant claimed that her signature had been forged and applied for discovery of the loan documents. However, in view of the age of the case and the fact that the loan documents had already been made available to the defendant's counsel, the High Court disallowed the application as it would entail further delay.

C. The List of Documents

Order 24 rule 5 requires a list of documents under r. 3 to be listed in Form 38. The list should specify the documents in the adverse party's possession, custody and or power, and whether covered by privilege. The documents should be enumerated and classified in a convenient order, identified with a brief description and further compiled into a bundle of documents accompanied by an affidavit in Form 39. Court. O.24 r. 5(2) requires privileged documents to be identified in the list with sufficient information to justify the claim. Non-compliance does not attract any specific penalty except that the party will be precluded from tendering the document in evidence without the leave of the Court. The Court has a further discretion under O.24 r.16 to strike out the action or the defence and enter judgment accordingly. O.2 r.1 states that the overriding objective of ROC 2012 is to enable the Courts to deal with cases justly. As such the rules are only procedural and the non-compliance shall be treated as an irregularity and shall not nullify the proceedings. In *Syed Omar Syed Mohamed v Perbadanan Nasional Berhad,*[222] the respondent had in an earlier action been ordered to give discovery to the appellant. The Respondent breached the order and had its action against the appellant struck off. However instead of appealing the action the respondent commenced a fresh action against the Appellant on the same grounds on the basis that limitation had not set in. In the present appeal the questions were *inter alia* whether (i) where the plaintiff's first suit was struck off, for breach of a peremptory order to give discovery, the plaintiff could institute a second suit on the same grounds as the first suit on the basis that limitation had not set in. (ii) where the plaintiff had failed to appeal the striking out of its first suit and further its failure to comply with the discovery order remained unexplained, whether the commencement of a second suit on the same grounds as the first suit was an abuse of process. The Federal Court ruled in favour of the appellant on both questions with costs to the appellant.

Order 24 rule 6 requires all parties to the action to be served with the list of documents.

D. Possession, Custody or Power

Order 24 rule 7 enables a party to obtain a declaration from any party to the action as to whether any document(s) on the list are or have at any time been in their possession, custody or power, or if they have parted with it particulars on the same. An application under this rule should be supported by an affidavit stating the belief of the deponent that the party from whom the discovery is sought has or had the document or class of documents sought in his possession, custody or power. Further it should be a document that:

(a) a party relies or will rely on,

[221] [2013] 1 LNS 1227.
[222] [2013] 1 MLJ 461.

(b) could

(i) adversely affect the party's own case;

(ii) adversely affect another party's case; or

(iii) support another party's case.

(c) could lead the party seeking discovery to a series of inquiries leading to obtaining information which may

(i) adversely affect the party's own case;

(ii) adversely affect another party's case; or

(iii) support another party's case.

The Court when ordering discovery may limit discovery to only certain documents or certain classes of documents as deemed necessary and relevant to the cause or issue.

E. Pre- trial Discovery

Order 24 rule 7A(5) provides for pre-trial discovery against a third party. The rational is to assist a party who has been wronged but is unable to identify the wrongdoer without the help of a third party who is able to identify the wrongdoer. The information obtained is not meant to be used for evidentiary purposes but for deciding the existence or otherwise of a viable cause of action. Such an application will be by way of an Originating Summons with supporting affidavit stating the grounds for the application and whether the third party is likely to be made a party to proceedings. If satisfied that the application is necessary, the Court may make an order conditional upon security for costs or on such other terms as it deems just. The application may otherwise be dismissed. The third party responding to an order for discovery would have to furnish an affidavit stating whether the documents listed are or were in his possession, custody or power; if they are no longer available, the when the third party must state when it parted with the documents and what became of them. Generally, the Court will not order discovery against a non-party. The principle was developed in *Norwich Pharmacal Company v Customs and Excise Commisioners*,[223] where Lord Reid observed that:

> …if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong doing, he may incur no personal liability, but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identities of the wrongdoers.

This principle was applied in *First Malaysia Finance Bhd. v Dato Mohd. Fathi bin HA*,[224] where the Supreme Court held that discovery was limited to the identity of the wrongdoers and did not extend to documents in the hands of another. This was considered in *Teoh Pheng Phe v Wan & Company*,[225] where the identities of the company directors were already known. However, discovery was sought regarding the identity of those who actually received the loans. It was held that the applicant need only demonstrate that he had a viable case against the wrongdoer and that discovery was necessary to establish his action against the wrongdoer. In

[223] [1973] 3 WLR 164 at 168.
[224] [1993] 2 MLJ 497 Followed in Interfood Sdn. Bhd. v. Arthur Andersen & Co. & Anor (2000) 1 CLJ 511.
[225] [2001] 1 AMR 358.

Stemlife Bhd. v Bristol-Myers Squibb (M) Sdn Bhd.,[226] the plaintiff was granted a *Norwich Pharmacal* order for pre-action discovery against the defendant for the identity of two bloggers who had posted defamatory statements on the plaintiff's website. Likewise, in *Tong Seak Kan & Anor v. Loke Ah Kin & Anor.*,[227] Telekom Malaysia and TM Net as the network service providers were ordered to disclose to the Plaintiffs the identity of the registered subscribers of two IP addresses.

Be that as it may, as per Order 24 rule 8 the Court will only order discovery at any stage of the proceedings if it is satisfied that the discovery is necessary. Order 24 rule 8A ensures that the duty to discover continues throughout the proceedings. Order 24 rules 9, 10 and r.11 provide for the production of documents for inspection.

However, a party may refuse to produce documents that are:

(a) confidential communications between the party and their legal adviser covered by privilege under sections 126,127 and 129 EA1950;

(b) public or official documents, the production of which would be injurious to public interests such as State secrets or cabinet documents under sections 123 and 124 EA1950.228

F. Inadvertent Disclosure

Order 24 rule18 provides for the inadvertent disclosure of privileged documents. Where a party inadvertently allows a privileged document to be inspected, the party who inspected it may only use the contents with the leave of court. This is consonant section 126 *Evidence Act 1950* which prohibits a lawyer, without the express consent of his or her client, from disclosing at any time, any communication between them, whether oral or documentary, made in the course of and for the purpose of the professional engagement.[229] In *Dato' Au Ba Chi & Ors v Koh Keng Kheng & Or.*,[230] a privileged document was inadvertently included in the bundle of documents for trial. The court allowed the application for expungement as the document in question was clearly privileged and there was no consent or waiver to the disclosure by the party concerned. In any case, O.24 r.19 provides: "Where a party inadvertently allows a privileged document to be inspected, the party who inspected it may use it or its contents only if the leave of the Court to do so is first obtained". However, the privilege accorded by s.126 EA 1950 may be lost if:

(a) the communication is made in furtherance of an illegal purpose; or

(b) a fact observed by an advocate in the course of employment as such shows that a crime or fraud has been committed since the commencement of employment.

[226] [2008] 6 CLJ.
[227] [2014] 6 CLJ 904, [2014] 1 LNS 333.
[228] B.A.Rao Bros. v Sapuran Kaur & Anor. [1978] 2 MLJ 147; Wheeler v Le Merchant [1881] 17 CH.D 675.
[229] On what amounts to privileged documents see: Government of the State of Selangor v. Central Lorry Service and Construction Ltd. [1972] MLJ 202; Wix Corporation South East Asia Sdn. Bhd. v Minister for Labour Manpower & Ors. [1980] 1 MLJ 224; Chua Su Yin & Co v. Ng Sung Yee & Anor and other appeals [1991] 2 MLJ 348.
[230] [1989] 3 MLJ 445.

In *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor.*,[231] the Federal Court clarified that the common law maxim "once privileged, always privileged" had been endorsed by the House of Lords and Privy Council where the privilege was accepted as being absolute. This has been followed in Malaysia as seen in *Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors*.[232] Consequently a document cannot be admitted as evidence if it is privileged even if it is in the hands of the opposite party, and where it was inadvertently disclosed in discovery proceedings or otherwise it may be recovered or an injunction issued against its use.

G. DISCOVERY IN CRIMINAL PROCEEDINGS

Discovery in criminal proceedings is relatively new and was introduced into the Criminal Procedure Code (CPC) vide section 51A in 2006. Prior to 2006, the general right to disclosure of documents was governed by Section 51 CPC, where as opposed to 'discovery' the court had discretion to issue a summons or an order to produce the property or document deemed desirable for a fair trial of the matter. Section 51A continues to empower the Court with such discretion. The section provides for limited mutual discovery with exclusionary provisions weighted in favour of the prosecution. The prosecution is generally required to deliver to the accused or the accused's counsel a copy of the information sheet under section 107 CPC of documents to be tendered as evidence and any written statement of facts favourable to the accused's defence. However, the prosecution is exempted from supplying any information if its supply would be contrary to public interest. Under section 51A (3) non-compliance with these provisions by the prosecution will not render the document inadmissible. The Court also has discretion under section 51A (4) to exclude any document delivered if it finds bad faith. These provisions are complemented by case management for criminal trials introduced under Chapter XVIIA. A review of cases for criminal discovery under section 51A CPC shows the application of the provisions to be subjective and inconsistent.

In *Retnarasa Annarasa v PP*,[233] the High Court ruled that section 51A CPC was enacted to give effect to the changing trend in the administration of justice regarding pre-trial discovery. It was said that sections 51 and 51A CPC should be read together to give full effect to the disclosure process and that it should also extend to any criminal inquiry or other proceedings and not be limited to criminal trials only. Further any refusal to release or disclose documents must be justified with reasons for such a refusal. However this laudatory interpretation was not a binding precedent. In *PP v Mohd Fazil Awaludin,*[234] a drug trafficking case, the prosecution failed to deliver certain relevant documents to the accused before the commencement of the trial in breach of section 51A CPC. The question arose whether this was fatal to the prosecution's case. The High Court noted that unlike in the United Kingdom, the scope of section 51A in Malaysia was rather limited. It was 'not mandatory but merely discretionary in nature'. In *See Kek Chuan v PP*,[235] the accused was charged with trafficking in dangerous drugs. During the course of cross-examination one of the prosecution witnesses referred to CCTV footage which had not been tendered by the prosecution. The accused was convicted and on appeal, the Court of Appeal held that where documents are not supplied to the defence in accordance with section 51A**,** the prosecution is not barred from tendering those documents and the defence may be given time to study those documents. However, the non-production of the CCTV footage in evidence amounted to a withholding or suppression of critical evidence, invoking the adverse presumption against the prosecution under section 114(g) EA 1950.

[231] [2009] 3 CLJ 405 at pp. 419, 420, 422, 423 and 427.
[232] [1988] 1 LNS 188; [1989] 3 MLJ 445.
[233] [2008] 4 CLJ 90.
[234] [2009] 2 CLJ 862.
[235] [2013] 6 CLJ 98.

Conversely in *Dato" Seri Anwar Ibrahim v Mohamad Hanafiah Hj Zakaria & Ors*.,[236] the accused was given an undated copy of a written statement of facts favourable to the defence marked "TIADA" meaning 'none'. It was argued for the accused that this could be interpreted to mean either that there were no favourable facts or that favourable facts were being withheld pursuant to the public interest immunity provision under section 51A (2) CPC. The High Court refused the accused's application for leave for judicial review, holding that the written statement was not a "decision" subject to judicial review within the ambit of Order 53 rule 2(4). It was for the Public Prosecutor to decide whether or not there were facts favourable to the applicant. To subject his actions under section 51A(1)(c) CPC to judicial review would amount to interfering with the discharge of his duties. It would further give rise to the untenable situation where the court was asked to form an opinion on evidence at the pre-trial stage itself. Again in *Mohamad Karim Bujang v PP*,[237] the appellant , who was unrepresented, was convicted of trafficking in Indonesian nationals. In his appeal, he argued that section 51A CPC was not complied with as he was not served with the relevant documents in respect of the charge. The respondents submitted that the non-compliance was not fatal as the documents were explained to and understood by the appellant before being tendered as evidence. The High Court dismissed the appeal, holding that although the object of section 51A CPC was to prevent a 'trial by ambush', non-compliance did not vitiate the proceedings. Where an accused requests documents covered by the section, the prosecution must supply them. An unreasonable refusal by the prosecution could be viewed adversely. Where the accused did not make such request at the trial, but was given the opportunity to examine the documents beforehand he was not prejudiced by not being given the documents in advance. Consequently the trial was not a nullity. Thus as explained in *PP v Mohd Fazil Awaludin*, although the objective of section 51A was to give the accused a fair trial, the statutory provisions are 'not mandatory but merely discretionary' and weighted in favour of the prosecution. Non-compliance does not necessarily nullify the proceedings unless the court is satisfied that the accused has been prejudiced thereby.

[236] [2012 7 CLJ 609.
[237] [2014] 2 CLJ 755.

G. DATA PRIVACY AND DISCOVERY

Malaysia's Personal Data Protection Act 2010 (PDPA) came into force in November 2013. It recognises the rights of both data subjects and data users in relation to the collection, storing and use of personally identifiable data, whether in electronic or non-electronic format, in relation to a 'commercial transaction'. Certain classes of data users have to register with the Department of Personal Data Protection. [238] A 'commercial transaction' is broadly defined as 'any transaction of a commercial nature, whether contractual or not which includes any matters relating to the supply or exchange of goods or services, agency, investments, financing, banking and insurance'.[239] While the PDPA is premised on the European Union's (EU) principles covering collection and processing with consent, notice, disclosure, security, retention, security, data integrity and access, it nevertheless (pursuant to section 39 PDPA) permits disclosure of data other than for the declared purposes where required by law or where the data user 'reasonably believes that the data subject would have consented'. Further, a data user may by-pass the 'consent' requirement by merely issuing a written notice to data subjects of possible disclosure to third parties. In fact, the PDPA by default assumes a data subject's consent to the use of personal information unless he or she specifically opts out by notifying the data user under section 43 PDPA.[240]

The PDPA only applies to private organisations and specifically exempts from its ambit the Malaysian Federal and State governments and related bodies which form the bulk of data collectors in Malaysia, and credit reporting agencies and personal data processed outside Malaysia unless such data is intended to be further processed in Malaysia. In this respect, parties not established in Malaysia but using equipment in Malaysia to process personal data other than for purposes of transit through Malaysia will come under the purview of the PDPA 2010.[241] No time frame has been specified regarding the retention of data. It also fails to provide an aggrieved person the right to compensation for distress or damage caused by any breach of the provisions by a data user. A data subject may under section 104 PDPA complain in writing to the Commissioner about any data breach which will then be investigated. Where the Commissioner is satisfied that there has been a breach. a notice may be served to the data user to remedy the breach. A data user may appeal to Appeal Tribunal against any enforcement notice under section 93 PDPA 2010.

III. CONCLUSION

Discovery in civil proceedings is not an automatic right but subject to an order of court. Order 24 ROC 2012 facilitates an application for discovery in civil proceedings at any stage of the trial. This is subject to the Court's discretion on a finding of relevance and necessity for the fair disposal of an action. Penalty for a breach of a Court order for discovery ranges from precluding the party in breach from tendering the document in evidence except with the leave of the Court, to striking the cause of action or defence. Nevertheless the Court is empowered to revoke or vary the order subsequently.[242] A review of the cases reveals that a variety of documents including 'computer' generated documents have been the subject of discovery. However, neither the ROC 2012 nor Court Practice Directions have any provisions specifically related to 'computer' generated documents, or electronic records or ESI. Further, there has been no case to date on the issue of eDiscovery. As for discovery in criminal proceedings, although section 51A CPC facilitates this, it is of limited application

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[238] DLA Piper, '*Data Protection Laws of the World, Malaysia'* (2017), <file:///C:/Users/MU041646/Downloads/Data-Protection-Malaysia.pdf.> Accessed on 25 Oct. 2017.
[239] Section 4 *Personal Data Protection Act 2010*
[240] Ibid sections 43 -45.
[241] Sections 2 – 12, *Personal Data Protection Act 2010*.
[242] O.24 r. 16 ROC 2012.

and subject to the discretion of the Public Prosecutor and the Court. Once again no case has surfaced dealing with eDiscovery.

SINGAPORE

I. INTRODUCTION

The island republic of modern Singapore was founded 9 August 1965 when it formally ceded from its brief union with its neighbor Malaysia. Like Malaysia, it has inherited the English legacy of a common law system. In 1969, the Constitution established the Supreme Court of Singapore and ensured the separation of powers among the executive, the legislature and the judiciary. Article 93 of the Constitution of the Republic of Singapore vests the Supreme Court as the apex Court. The Chief Justice is the head of the Judiciary. The Supreme Court is made up of the Court of Appeal and the High Court, and hears both civil and criminal matters. The Singapore International Commercial Court is the division of the High Court which deals with international commercial disputes.[243]

II. DISCOVERY IN CIVIL PROCEEDINGS

General provisions for discovery and inspection of documents in civil proceedings are contained in the Singapore Rules of Court, Order (O.) 24 and rules (r.) thereunder. The right to discovery is not automatic but by an order of Court. The basis of discovery as per O.24 r. 1 is that:

> the Court may at any time order any party to a cause or matter … to give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power, and … may also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.

The documents a party may be ordered to give discovery of are as follows:

(a) documents on which the party relies or will rely; and

(b) documents which could

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case.

A. 'Possession, Custody or Power'

The term 'possession, custody or power' was addressed in *Dirak Asia Pte Ltd and another v Chew Hua Kok and another,*[244] an employment dispute case. The question arose as to whether emails in the possession of an email service provider were in the "possession, custody or power" of the email user. The plaintiffs alleged that the defendants had, in the course of their employment, made unauthorised disclosure of the plaintiffs' confidential information to various third-party competitors. In particular, it was contended that Soo during the

[243] Supreme Court of Singapore< https://www.supremecourt.gov.sg/about-us/the-supreme-court/structure-of-the-courts>.
[244] [2013] SGHCR 1.

course of his employment with the Plaintiffs had diverted orders from the Plaintiffs' customers to one Suzhou Euro-Locks (SEL), a wholly owned subsidiary of the UK-based Euro-Locks & Lowe & Fletcher Ltd. (ELLF). On 7 April 2011, the Plaintiffs obtained an initial discovery order against the defendants for documents relating to, *inter alia*, the defendants' employment agreement with SEL; invoices and purchase orders showing the revenue earned by SEL from sales of competing products made using the Plaintiffs' designs; and relevant communications between the parties' customers relating to the sales of competing products made using the plaintiffs' designs. Subsequently they asked for the same documents found in the Defendants' respective SEL email accounts. The Defendants' counsel in reply averred that the email account stored in the server of ELLF, was not owned by them and consequently the emails were not in their 'possession, custody or power'. The Court in analysing the issue noted the question before the court was whether emails in the possession and custody of ELLF were in the defendants' "power". Unlike physical printouts, discovery of electronic copies of emails stored in the 'cloud' raised the issue of the extent to which a cloud user could be said to have "power" over the ESI in the possession and custody of a cloud provider. The email user did not technically have possession and custody over the emails, as these were stored on mail servers and data centres sited in remote locations. Unless the user had downloaded and saved emails in his or her computer or other device, the user did not have possession of the email itself, but only the username and password to access the emails in the possession of the email provider. Plaintiffs' counsel argued that this did not bar the granting of a discovery order, as the defendants had the practical ability to access the emails in their email accounts. The Court undertook a semantic examination of the term 'power' through a review of leading cases. It referred to the *Lonrho* definition of "possession, custody or power" as meaning a "presently enforceable legal right to obtain from whoever actually holds the document, inspection of it without the need to obtain the consent of anyone else". It also noted the current departure of this approach in the US cases of *Tomlinson v. El Paso Corp.*,[245] and *Re NTL Securities Litigation*, [246] as well as the English cases of *Schlumberger Holdings Ltd v. Electromagnetic Geoservices AS*,[247] *North Shore Ventures Limited v. Anstead Holdings Inc.,*[248] and other cases. The approach taken in these cases was that "'control' does not require the party to have legal ownership or actual physical possession of the documents in issue; rather, documents are considered to be under a party's control when that party has the 'right, authority, or practical ability' to obtain the documents from a non-party to the action".[249] The Court then embarked on a careful analysis of the terms "power" as used in ROC O.24, with the term "control" and opined that it did not preclude a contextual examination of the relationship between the producing party and the third party in possession and custody of the documents. Depending on the context in which that practical ability is found, the producing party could have a sufficient degree of "control" envisaged as "power" under ROC O. 24. However, "control" should not be automatically equated with "power" but examined in the light of the contextual relationship in which the legal right and practical ability is found. On the facts the Court found the emails to be both relevant and as a practical matter accessible by the defendants.

Under r.3 a list of documents with a brief description, enumerated in a convenient order, must be submitted in Form 37. The same also applies to bundles of documents. Any claims of privilege must be declared and justified in the list of documents. Further, an affidavit in Form 38 must also be submitted verifying the list of documents.

r. 5 facilitates the application for discovery of specific documents that follow the principle in r.1, this is, documents that an adverse party has or had in its possession, custody or power which:

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[245] 245 F.R.D. 474, 477 (D. Colo. 2007).
[246] 244 F.R.D. 179 (S.D. N.Y. 2007).
[247] [2008] EWHC 56.
[248] [2012] EWCA Civ 11.
[249] Re NTL Securities Litigation, 244 F.R.D. 179 (S.D. N.Y. 2007).

(a) the party relies or will rely on; or

(b) a document which could -

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; or under

(c) a document which may lead the party seeking discovery of it to a train of inquiry based on the above principles may also be requested.

B. Pre-trial Discovery

O.24 r. 6 provides for pre-trial discovery against a party who has not been made a party to proceedings. Such an application must be by way of an originating summons supported by an affidavit for the purpose of identifying possible parties to any proceedings. The Court may on such an application make any order it deems just. In *Ching Mun Fong v Standard Chartered Bank,*[250] an appeal for pre-action discovery in contemplation of an action in contract or tort, the appellant had applied for discovery of:

(a) Complete set/s of account opening forms (including but not limited to those relating to Account no. 108518-1) including the terms and conditions thereof, which the Plaintiff has or may have had with the defendant;

(b) All records, including mechanical, audio, written and computer records, of the purported trades effected by the defendant in respect of any or all of the Plaintiff's accounts with the defendant on three specific dates; and

(c) All records, documents, memos and correspondence related to specific deals on those dates.

The respondent, through its solicitors, provided the appellant with the documents it thought the appellant was entitled to receive, leaving outstanding documents or materials under (iii) above. The Court noted that the appellant was only seeking the voice-logs of the communications she had with the respondent's representatives relating to two specific deals. The Court noted that the appellant was attempting to determine the viability of her cause of action against the respondents and not determining her pleadings against the respondent. Such discovery could be made after the commencement of action in the normal course. Consequently the appeal was dismissed.

La Dolce Vita Fine Dining Co Ltd and another v Deutsche Bank AG and another,[251] was a successful application for pre-action discovery against two banks. The Plaintiff companies had acquired shares in a business owned by an individual (the "Founder", or Mdm Zhang). They later alleged that the Founder had fraudulently manipulated accounting information to create a higher valuation for the business. The Plaintiffs commenced arbitration proceedings in the China International Economic and Trade Arbitration Commission ("CIETAC"). Simultaneously, they also commenced court proceedings in Hong Kong and Singapore, obtaining injunctions prohibiting the Founder from disposing of her assets. The current application arose over

250 [2012] SGCA 38.
251 [2016] SGHCR 3.

concerns that the Founder had transferred funds from her Hong Kong bank account to Singapore bank accounts in the name of Success Elegant Trading Limited ("SE") held with Deutsche Bank Aktiengesellschaft ("DB") and Credit Suisse AG ("CS"). The Plaintiffs believed that the Founder was the owner of SE, The present application for pre-action discovery was to:

(a) identify third parties for the potential commencement of proceedings against them;

(b) ascertain the full nature of the wrongdoing perpetrated by Mdm Zhang and to enable the Plaintiffs to plead their case properly; and

(c) trace assets in support of the Plaintiffs' proprietary claim against Mdm Zhang and third parties who have received the monies from her.

The court thus had to determine:

(i) Whether the requirements for pre-action discovery had been satisfied; and

(ii) Whether exceptions to the banking secrecy rules had been satisfied.

The court ruled that it has the power to order pre-action discovery against a non-party under O24 r.6(5) of the Rules of Court, or under its inherent jurisdiction to make an equivalent *Norwich Pharmacal* order following the principles set out in *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd and others*.[252] The requirements are:

(a) The person holding the money must have been involved in the wrongdoing, whether innocently or otherwise;

(b) The applicant must show an arguable or prima facie case of wrongdoing against the person of whom information is sought; and

(c) The discovery order must be necessary, just and convenient.

The court also acknowledged that it had the jurisdiction to make a "*Banker Trust order*"[253] derived from the case of *Bankers Trust Co v Shapira and others*,[254] to compel non-parties to provide documents to assist with the applicant's tracing claim where there is a prima facie case of fraud. In this case, the court found that the Plaintiffs had fulfilled the requirements for a *Norwich Pharmacal/Banker's Trust order* because:

(a) There was evidence that the Founder intended to transfer funds out of the jurisdiction, and that she had actually transferred funds to SE's CS account. It was further found to be

[252] [2006] 4 SLR(R) 95

[253] Slaughter and May, 'Bankers Trust orders: tracing misappropriated funds' (April 2009) <https://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/client-publications-and-articles/b/bankers-trust-orders-tracing-misappropriated-funds/> accessed on 15 11 2016.

A Bankers Trust order is a type of disclosure order that requires a bank to provide details ordinarily protected by the bank's duties of confidentiality. The order enables defrauded parties to trace funds through bank accounts and thereby offer an effective way of policing freezing injunctions. However there must be clear evidence of fraud.

[254] [1980] 1 WLR 1274

probable that she had similarly transferred funds to SE's DB account. This was sufficient to fulfil the requirement of involvement.

(b) There was a prima facie case of fraudulent misrepresentation against the Founder, which may entitle the Plaintiffs to rescind the sale agreements and obtain a proprietary claim against the Founder. The court held that it was not necessary for the Plaintiffs to prove actual wrongdoing or that there was an existing proprietary claim. Further, there was a prima facie case that SE's CS and DB accounts were beneficially owned by the Founder, as SE at no point even challenged the freezing of its accounts under the injunction made against the Founder.

(c) It was necessary and just to order disclosure against the banks as the Plaintiffs would otherwise be unable to trace or the Founder's funds.

The court also dealt with the question of whether it had the jurisdiction to make the discovery order in light of the fact that the main proceedings were not based in Singapore, but were CIETAC arbitrations. It held that this did not deny the court of jurisdiction under O24 r. 6(5) as the discovery proceedings themselves were commenced in Singapore, and it was likely that further proceedings would be commenced if the monies were indeed in SE's Singapore bank accounts. Otherwise, the court would in any event have jurisdiction to make the relevant discovery orders under its inherent jurisdiction.

While banks are subject to banking secrecy under section 47 of the *Banking Act*, they are permitted to disclose documents in the circumstances stated in the Third Schedule of the *Banking Act*. This includes where disclosure is necessary to comply with an order of court pursuant to Part IV of the Evidence Act. To comply with the requirements of the Evidence Act, specifically section 175 which provides for inspection of bankers' books, it must be shown that:

(a) Separate legal proceedings have been commenced by the applicant; and

(b) The inspection is for the purposes of such proceedings.

On the facts, the court held that the Plaintiffs had complied with the requirements.

(a) The Plaintiffs had commenced CIETAC arbitrations, which fall within the definition of legal proceedings.

(b) The inspection would be for the purposes of the CIETAC proceedings.

If the Plaintiffs successfully rescinded the agreements and obtained a proprietary remedy, the requested discovery would assist in tracing the Founder's money. Therefore, the court granted the discovery orders sought by the Plaintiffs, while also confining the discovery to documents necessary to trace the funds.

C. The Court's Discretion to Order Discovery

Under r. 7 the Court has discretion to refuse discovery as r.13 states that discovery should only be ordered if necessary. Under r.8 the duty to give discovery continues throughout the proceedings. Under r.15 disclosure may be withheld on the grounds that it would be injurious to the public interest. On a failure to comply with a discovery order the Court is empowered under r.16, to order as it deems just either dismissal of the action or

that the defence be struck out and judgment entered accordingly.[255] The party and/or the party's solicitor may also be committed for contempt of Court. *Teo Wai Cheong v Credit Industriel et Commercial*,[256] illustrates the seriousness of discovery obligations. This was the third in a series of three appeals for discovery of documents. The Respondent, Credit Industriel et Commercial, a French Bank (the "Bank") claimed payment on certain financial transactions executed on behalf of the Appellant, Teo Wai Cheong ("Teo"). Teo denied instructing the Bank to enter into these transactions, and therefore denied payment liability. Similar to the English case of *Earles v Barclays Bank*, [257] the Bank failed to produce "highly relevant" transcripts of telephone conversations and other documents in its possession to support its case. The subsequent disclosure of documents that should have been disclosed earlier could not compensate for the consequences of the initial failure. The Bank and its lawyers had to account for their failure to disclose discoverable documents. The Bank replied that: (a) it was not aware or had overlooked; (b) that it had relied on legal advice that it had received from its solicitors that some of the documents were irrelevant; and (c) it had, on its own, considered some of the documents to be irrelevant. Chief Justice Sundaresh Menon taking a stern view established certain minimum standards of discovery compliance under ROC O. 24:

(a) minimum standards of discovery compliance should be established. Otherwise the Bank, may face censure and penalties;

(b) even if the decision not to disclose was the result of its receiving incorrect advice from its solicitors, the Bank remains responsible as it is a party to the litigation. The Bank had with its in-house legal team could have made reasonable inquiries to initiate elementary steps to understand the Bank's discovery obligations;

(c) Solicitors owe a special duty to Court in the administration of justice;

(d) general discovery advice by solicitors to clients on the terms of ROC O.24 was inadequate. Solicitors would have to:

  (i) identify classes or types of documents that the Bank should search for and produce,

  (ii) examine what the Bank had in fact produced and

  (iii) consider what classes of documents were missing;

(e) the solicitor's duty extends to ensuring that relevant persons in the corporation know and appreciate the scope of the discovery obligations;

(f) in the case of corporate clients, the solicitor should visit the client's premises to learn how the client's business is administered, how and when documents are generated, and the people involved. The solicitor could also generally explain the disclosure process to relevant employees, and enquire into the existence of any relevant files or documents;

(g) Costs could also be ordered against Solicitors personally as per Myers and Elman,[258] for failure to discharge their duty to Court.

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[255] *K Solutions Pte Ltd v National University of Singapore* [2009] SGHC 143.
[256] [2013] SGCA 33.
[257] [2009] EWHC 2500.
[258] [1940] AC 282.

Although on the facts of the case the lawyers were not penalised, it is a stern warning to lawyers and litigants that breaches of discovery obligations could result in serious repercussions.

In the case of inadvertently disclosed documents r.19 provides that the party who inspected it may use it or its contents with the leave of the Court.

Alliance Management SA v Pendleton Lane P(LPP) & Anor.,[259] an early case on eDiscovery, dealt with the production of the original hard drive of a Dell laptop. In the absence of local precedents, ROC and PD dealing with the principles relating to electronic discovery, Belinda Ang J referred to cases from the USA for guidance. She undertook a careful analysis of discovery rules in relation to electronic documents. As far as discovery was concerned, she found that the concept of a "document" under O. 24 included both the material stored in the hard drive of a computer and the hard drive itself. Secondly, she noted that the court must be satisfied that the hard disk was in the possession, custody or power of LPP and thirdly the court must be satisfied that the production and inspection was necessary for the fair disposal of the case or to save costs. She then went on to examine the court's discretion to order production for the purposes of inspection and found that the words "produce to the Court" in O. 24 r. 12(1) had to be read together with O. 24 rules 1 and 5, enabling the court to incorporate safeguards for the inspection of documents. Accordingly, she ordered that the appropriate safeguards for the production of the hard drive of a computer by the defendants for inspection by the plaintiff included:

(a) the appointment of a computer expert by the plaintiff to make an exact copy of the hard drive under the supervision of parties;

(b) liberty to the defendants to object to the choice of appointment of the computer expert nominated by the plaintiff;

(c) an undertaking of confidentiality by the computer expert to the court; and

(d) the creation of an electronic copy from the cloned copy of the hard drive by the computer expert which was to be first made available to the defendants for review for the purpose of claiming privilege, if any, before release to the plaintiff for inspection. The defendants were to list the documents to which privilege was claimed.

She further cautioned that in the absence of any agreement between parties on the use of the electronically generated documents at trial, these would be subject to proof of authenticity. On appeal the Court of Appeal affirmed the decision of the High Court.

The Rules of Court are supplemented by the Supreme Court Practice Directions (PD). The first PDs dealing specifically with ESI were issued on 30 July 2009. These were known as PD3 Part IVA of 2009. These were amended in 2012.

D. Supreme Court Practice Directions 2009

The eDiscovery PD adhered to the traditional concepts of relevance and necessity by requiring documents to be material and disclosure to be proportionate and economical. PD3 introduced guidelines to litigants on the existing discovery rules to electronically stored documents and also preservation of documents in digital format

[259] [2007] 4 SLR 343.

throughout the trial life cycle.[260] PD3 Part IVA para 43A(1) permitted the eDiscovery process to be optional, in response to requests for a more gradual introduction to eDiscovery.[261] On the question of whether all parties had to agree to the eDiscovery, *Deutsche Bank AG v Chang Tse Wen*,[262] clarified that the eDiscovery PD could apply either by way of mutual agreement of parties or by way of an application to the Court by a party that wished to opt into the electronic discovery framework. On the other hand, if the Court was of the view that eDiscovery was unnecessary or oppressive to the objecting party it could dismiss the application or tailor it more appropriately.

In *Surface Stone Pte Ltd v Tay Seng Leon and another*,[263] the High Court exercised its inherent power to order PD3 discovery although neither party had applied for it. The Court set out an analytical framework for determining the relevancy of documents sought to be discovered under O. 24 r. 5(3)(c) and the factors to be considered when ordering discovery and inspection of "compound documents".[264] In this case it required the specific discovery and inspection of the Defendant's Toshiba laptop and a Western Digital 250GB hard drive.[265] Para 43A(2) recognises a wide range of locations where ESI may be found and acknowledges the need for computer forensic tools or techniques to discover and recover these.

In *Sanae Achar v Sci-Gen Ltd.*,[266] the Court clarified that the objectives of PD3 were to promote the exchange of ESI in a text searchable electronic form thereby benefitting from technologies such as file management and keyword searches whilst avoiding paper printing by supplying e-documents in their native format and preserving the metadata. Para 43B require parties in accordance with O.25 r.8(1)(a) to engage in good faith collaboration after the close of pleadings. Parties are required to submit an agreed eDiscovery protocol in the summons for directions. The Court may approve this or make such order as it thinks just for the expeditious and fair trial of the action.

In *Fermin Aldabe v Standard Chartered Bank,*[267] the Court advised that efforts at good faith collaboration could save time and resources, and avert legal costs. This was reiterated in *Deutsche Bank* and *Sanae Achar,* a case involving specific discovery, as it would help to minimise potential disputes over parties' discharge of their discovery obligations. In *Robin Duane Littau v Astrata (Asia Pacific) Pte Ltd*. [268] parties were directed to discuss and attempt to agree on a list of keywords necessary for the performance of a 'keyword search' for relevant documents. In fact good faith collaboration is central to the eDiscovery framework in PD3. The guidance given by the Court for effective good faith collaboration and search methodologies in *Sanae Achar* and *Robin Duane Littau* are highly instructional and may be summarised as follows:[269]

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[260] Yeong Zee Kim and Serena Lim, '*Electronic Discovery: An Evolution of Law and Practice'*, Proceedings from E-Litigation Conference 2011, Singapore Academy of Law (2012) 96.
See PD3<https://www.supremecourt.gov.sg/data/doc/ManagePage/temp/4nuc3c45i15f0f45uffl1b55/practice_direction_no.3_of_2009.pdf > accessed on 1 May 2015.
[261] Yeong Zee Kim,'Electronic discovery in Singapore: A quinquennial retrospective' Digital Evidence and Electronic Signature Law Review, 11 (2014) 3.
[262] [2010] SGHC 125.
[263] [2011] SGHC 223.
[264] "Compound documents" are composed of a container document and embedded documents. For example, a Word document may contain an embedded spreadsheet. *<http://help.lexisnexis.com/litigation/ac/law/law6.6/compound_documents.htm> accessed on 2 May 2015.*
[265] [2011] SGHC 87.
[266] [2009] SGHC 194.
[267] [2010] SGHC 119.
[268] [2011] SGHC 61.
[269] Tan Hee Joek, 'Developments in Law of Discovery of Electronic Documents' (2011) Singapore Law Gazette < http://www.lawgazette.com.sg/2011-11/248.htm> accessed on 2 May 2015.

(a) PD3 para 43C(2)(a) when specifying the physical or logical locations, media or devices that the search should cover, keyword searches should not reach into unallocated space unless discovery of the recording device had been given and an order for forensic inspection obtained.

(b) para 43C(2)(b) to specify the search time periods when the electronic documents were created, received or modified;

(c) to select the keywords in the search for relevant documents;

(d) to agree on the capabilities of the search engine or software to be used to conduct the search;

Further in the selection of keywords it is advisable:[270]

(a) to avoid commonly used words to avert unnecessarily voluminous search results;

(b) to avoid keywords that are part of common words or only be used where the search engine is capable of identifying their occurrence as a discrete word and not as part of the word.

(c) to do preliminary searches specifically for identifying the number of hits based on proposed keywords to help determine the suitability of a particular keyword and refine or restrict, the searches after relevance had been determined.

It is also important to note that Para 43C(3) states that requests for deleted data should not be made unless a request for the discovery of the electronic medium or electronic device on which the forensic inspection is to be conducted has been applied for under para 43F. Para 43C(8) places responsibility on the party providing discovery to review the files for any privileged documents. However, the party is prohibited from deleting, removing or editing the metadata therein. In fact, para 43G of PD3 specifically prohibits the deletion, removal or alteration of metadata without the consent of the relevant parties or leave of court. Para 43 D gives guidance on the factors to be considered when ordering discovery including the volume, nature, complexity, cost and relevance. Para 43H is in consonance with O.24 r.19 on the issue of inadvertently disclosed ESI. Appendix E Parts 1, 2 and 3 provide a well-structured agreed eDiscovery Protocol for parties to adopt.

Para 48, Part V of the PD provides a non-exhaustive list of factors for consideration in this context.

E. The Amended PD3

The introduction to Part IVA Para 43A of the amended PD3 states that it provides a 'framework for proportionate and economical discovery, inspection and supply of electronic copies of electronically stored documents'.[271] It is observed that the Singapore provisions do not use the term ESI but prefer the term 'electronically stored documents' although the terminology does not bear any practical significance.

The main thrust of the amendments are to:

[270] Tan Hee Joek, 'Developments in Law of Discovery of Electronic Documents' (2011) Singapore Law Gazette < http://www.lawgazette.com.sg/2011-11/248.htm> accessed on 2 May 2015.

[271] Part IVA: Discovery and Inspection Of Electronically Stored Documents <https://www.supremecourt.gov.sg/data/doc/ManagePage/4122/Part%20IVA%20Practice%20Directions%20Amendment%20No%201%20of%202012%20CLEAN.pdf> accessed on 15 May 2015.

(a) clarify the Court's powers to order the parties to adopt an eDiscovery plan either by application to court or voluntarily;

(b) clarify the distinction between inspection of database and 'forensic' inspection;

(c) clarify that ESI not reasonably discoverable will only be ordered to be discovered if it is reasonably relevant and material and the balancing of costs burden justifies it;

(d) provide a new optional format for conducting discovery through exchange of softcopies in native format.[272]

A notable feature is the identification of relevant documents using search and indexing technology including 'key word' searches, date ranges and other criteria. Para 43A(1A) removed the previous 'opt-in' provisions. It provides guidance on the type of cases suitable for electronic discovery and Appendix E gives a checklist for counsels to follow and exchange in pursuance of 'good faith collaboration'. The concept of proportionality and economy are the main thrust of Part IVA.[273]

F. When to use PD3

Para 43A (1A) identifies three circumstances when PD3 would be applicable i.e.:

(a) where the claim or the counterclaim exceeds $1 million; or

(b) where documents discoverable by a party exceeds 2,000 pages in aggregate; or

(c) where documents discoverable in the case or matter comprise substantially of electronic mail and/or electronic documents.

Para (1B) further clarifies that these provisions also apply to 'pre-action discovery, discovery between parties in a pending cause or matter, and third-party discovery'.[274]

The tone of the new directions appears to be more mandatory than the previous 'opt-in' provisions. The previous term 'opt-in' had caused confusion as it was construed to mean that PD3 was only applicable where both parties mutually consented to its application. However the prerogative power of the Courts' to order the application of PD3 was clarified in *Deutsche Bank* and again in *Surface Stone*. In fact the amendment now specifically clarifies that the court's power to order the application of Part IVA is not limited to cases where all parties have consented to its application. Consequently lawyers will have to discuss the eDiscovery provisions with their clients and opposing counsels as a matter of course or face penalties.

Para (IB) (2) elaborates on the locations where electronically stored documents may reside. These include storage management systems, folders or directories in storage locations, electronic media or recording devices, including folders or directories where temporarily deleted files are located (for example, the Recycle Bin folder or Trash folder). Electronically stored documents or parts thereof may also reside in the unallocated file space

[272] Serena Lim, 'Significant Modifications to Singapore E-Discovery PD3 of 2009' ELitigation Blog, 14 March 2012. < http://litigationedge.asia/2012/03/14/modifications-to-singapore-e-discovery-pd3/> accessed on 5 May 2015.
[273] Serena Lim & Chen Jun Bin, 'Commentary on the 2012 Modifications to PD3 of 2009' Litigation Edge 14 March 2012. <http://litigationedge.asia/en/2012/03/14/modifications-to-singapore-e-discovery-pd3/> accessed on 2 July 2012.
[274] See PD3 Part IVA Para 43A (1B).

or file slack on an electronic medium or recording device as deleted files or file fragments which may be recovered through the use of computer forensic tools or techniques.

G. Definitions

PD3 has been reorganised and revised with new terminologies. Para 43A(4) has introduced three new terms namely "metadata"; "Not Readily Accessible Documents" (NRAD) and "forensic inspection". NRAD is defined as deleted documents and archived documents which has to be read with the new provision Para 43D(2). This specifies that any party seeking to search NRAD must demonstrate that the relevance and materiality of the electronically stored documents justify the cost and burden of retrieving and producing them.

Para 43A(5) defines the term forensic inspection. Forensic searches and inspection are specifically dealt with in paras 43G and 43H. The amendment clarifies that forensic inspection applies to electronic media or recording devices and not computer databases.

H. EDiscovery Plan

To ensure a smooth eDiscovery process, the revised PD3 requires an "E-Discovery Plan" as opposed to the previous "E-Discovery Protocol". The change of terminology indicates a move towards collaborating to achieve "proportionate and economical discovery", rather than a procedural protocol.[275] In fact Para 43A(1) expressly states that 'proportion and economy' are the fundamental concepts for the discovery, inspection and supply of electronic copies of documents. Thus the previous test of 'necessary either for disposing fairly of the cause or matter or for saving costs' has to be applied subject to the twin test of 'proportion and economy'.

Para 43B(1) encourages parties to collaborate in good faith within two weeks of the close of pleadings to agree on a range of issues relating to eDiscovery. Appendix E Part 1 provides a "Check list" of issues for good faith collaboration and a sample eDiscovery plan to guide the parties. These include the scope, limits, inspection, whether there is to be voluntary disclosures, preservation of specific documents or class of documents, search terms to be used in reasonable searches, whether preliminary searches and/or data sampling are to be conducted and the giving of discovery in stages according to an agreed schedule, as well as the format and manner in which copies of discoverable documents shall be supplied. Parties should exchange their checklists prior to commencing good faith discussions. The Checklist is similar to the English EDQ though less technical. It improves upon the previous PD3 by including issues that have surfaced in recent eDiscovery cases such as questions of document preservation, the use of preliminary searches and data sampling as part of the search methodologies, whether or not to digitise documents and render them searchable through Optical Character Recognition (OCR) technologies. Each of the 7 primary items in the Checklist, starting with "Scope of Reasonable Search" is accompanied by sub-items, guidance notes and illustrations, which are also highly instructive.

Appendix E Part 2 provides a comprehensive sample Electronic Discovery Plan with a sample protocol for preliminary search and data sampling while clarifying that NRAD is not within the scope of general discovery. Further following the ruling in *Sanae Achar* the party providing eDiscovery is not obliged to undertake a relevance review of the searched results. A useful sample tabulated list of documents has been provided to assist lawyers to adapt and modify the Sample Plan as necessary with justification.

[275] Serena Lim, 'Significant Modifications to Singapore E-Discovery PD3 of 2009' ELitigation Blog, 14 March 2012. < http://litigationedge.asia/2012/03/14/modifications-to-singapore-e-discovery-pd3/> accessed on 5 May 2015.

Paragraph 43E lists the considerations in relation to the issue of proportionality and economy. Lawyers should consider whether:

(a) the number of electronic documents involved;

(b) the nature of the case and complexity of the issues;

(c) the value of the claim and the financial position of each party;

(d) the ease and expense of retrieval of any particular electronically stored document or class of electronically stored documents, including—

(i) the accessibility, location and likelihood of locating any relevant documents,

(ii) the costs of recovering and giving discovery and inspection, including the supply of copies, of any relevant documents,

(iii) the likelihood that any relevant documents will be materially altered in the course of recovery, or the giving of discovery or inspection; and

(e) the availability of electronically stored documents or class of electronically stored documents sought from other sources; and

(f) the relevance and materiality of any particular electronically stored document or class of electronically stored documents which are likely to be located to the issues in dispute.

Para 43F specifies the form of the discovery list. It requires that when providing discovery parties should provide:

(a) the name of the electronic file constituting or containing the electronic document; and

(b) the file format of the electronic document.

Where a party objects to any metadata being provided on the grounds that it is privileged he must state this in the list and also state whether he objects to the production of the electronically stored document without the privileged metadata. If he does not object then he must enumerate such documents on a separate sheet in Part 1 Schedule 1 to the list of documents. Documents objected to must be stated in a separate section in Part 2 of Schedule 1 clarifying whether he objects to the disclosure of the whole or just the metadata information in those documents. Duplication of documents should be avoided. Parties are also required to specify the medium of storage and list of documents in these.

Para 43G provides for the inspection of electronically stored documents in their native format under O.24 ROC. Where inspection of databases is required an inspection protocol should be followed to ensure that the inspecting party does not trawl through the entire computer database but is restricted to only necessary information. A party providing discovery of databases is entitled to review information for privilege but is prohibited from deleting, removing or altering the metadata information.

Para 43H provides for the forensic inspection or electronic media or recording devices. Once again an inspection protocol as per Appendix E Part 3 is applicable to ensure access to only necessary information. The party providing discovery is entitled to review the information for privilege but shall not remove, delete or alter the information. However, Para 43I provides an exception in that metadata may be removed with the specific agreement of parties or an order of Court.

I. Orders for Cost Saving Exchange of Electronic Copies

Para 43J(1) – This is a new provision which empowers the Court to order that discovery be given by the supply of electronic copies of discoverable electronically stored documents in lieu of inspection, where to do so would facilitate the just, expeditious and economical disposal of the matter. Additionally, para (2) maintains consistency of discovery rules by providing that the electronic documents must be in the parties' possession, power or custody.

Para 43J(3) provides a significant procedural assurance in that:

For the avoidance of doubt, nothing in this paragraph requires parties to agree to adopt an electronic discovery plan or conduct reasonable searches for electronically stored documents under this Part. An order may be made under this paragraph in proceedings where parties have identified discoverable documents pursuant to the procedure set out in Order 24 of the Rules of Court.

This offers parties a flexible alternative and the means of avoiding complex eDiscovery issues. EDiscovery may be used where it falls within the given ambit in Para 43Q (1A). Parties may also adopt cost-saving electronic evidence management and exchange methodologies or protocols.

Global Yellow Pages Limited v Promedia Directories Pte Ltd and another suit,[276] concerned copyright infringement of street directories produced by the Plaintiff, Global Yellow Pages (GYP). EDiscovery was initiated by the GYP, at the general discovery stage. The appeal turned on the selection of keywords to be used in the search for discoverable documents. Justice Lee provides a useful summary of the principles relating to keyword search methodologies, garnered from earlier cases such as *Sanae Achar* and *Nichia Corporation.* With the burgeoning volume of discoverable documents and the ease of deduplication the "leave no stone unturned" approach would actually defeat justice. The objective is to achieve proportionality.

The interests of efficiency require that a case gets to trial as soon as possible with the best set of documents that can be amassed to assist in arriving at a decision on the merits… Efficiency seeks to cull the volume of documents to be disclosed and it employs the scythe of proportionality and economy... The Holy Grail is to arrive at a set of documents of the right size containing all relevant documents without expenditure of disproportionate costs.[277]

The cost-effort balance in searching for documents must be commensurate with the complexity of the dispute, size of the claim and the financial resources of the parties. The solution lies in the use of TAR to achieve efficiency and proportionality in eDiscovery. Whilst acknowledging the limitations of keyword searches in being both potentially over and or under inclusive Justice Lee observes that:

(a) The key to unlocking the full potential of keyword searches lies in:

(i) the refinement of keyword terms through a combination of the iterative review and negotiation process by the parties in arriving at a mutually acceptable keyword list as advocated in the Supreme Court PD, and

(ii) the familiarity of counsel with the capabilities of the search engine;

[276] [2013] SGHC 111.
[277] Lee Seiu Kin J [2013] 3 SLR 758.

(b) A preliminary search using disputed keywords to identify the number of hits in cases where keywords are disputed would provide a cost effective way of identifying and eliminating irrelevant and privileged documents while refining search conditions or keywords;

(c) On the issue of relevancy and accuracy in relation to keywords, the salient question is whether it has high accuracy, ie is it able to maximise the number of relevant documents and minimise the number of irrelevant documents within the resulting subset of searched documents. The use of unique reference numbers, specific project names, significant events or locations, product names or unique phrases as keywords, could be useful depending on the facts and issues in the dispute;

(d) Generally, it has been found that false positives (ie over-inclusion) are a much more prevalent problem than false negatives;

(e) Parties should bear in mind that keyword searches, is intended to relieve them of the burden of reviewing all documents in their possession, custody or power for relevance and/or privilege. Hence, where there is a dispute about keywords, the courts should, in resolving such disputes, favour the party seeking discovery, since the party providing discovery would be deemed to have discharged his discovery obligations so long as he complies with the court order, regardless of whether such search results are over or under inclusive vis-a-vis the identification of relevant documents.

(f) Parties could also explore alternative search technologies such as predictive coding.

The solution to problems caused by technology lies in the use of advanced technology itself to achieve proportionality, a cost-effective balance and efficiency in litigation without compromising justice.

Para 43K provides that where privileged information has been inadvertently allowed to be inspected O.24 r.19 ROC shall apply. Accordingly, where a party inadvertently allows a privileged document to be inspected, the party who inspected it may only use it or its contents with the leave of the Court.[278]

Inadvertent disclosure presents a perennial problem especially where it is introduced by a third party. In *Gelatissimo Ventures (S) Pte Ltd and Others v Singapore Flyer Pte Ltd.*[279] the Court was called to undertake an examination of circumstances under which privilege could be lost. This concerned the inadvertent disclosure of a privileged communication contained in an email chain. The defendant was the operator of the Singapore Flyer ("the Flyer') while the plaintiffs were tenants at the retail terminal. On 23 December 2008, the Flyer stopped revolving due to a technical malfunction. Consequently operations were suspended for one month. The plaintiffs subsequently applied for pre-action discovery against the defendant pursuant to SROC O.24 r. 6(1). The defendant countered, *inter alia*, that the plaintiffs already had sufficient information to commence proceedings. Further it was an abuse of the process of the court as the motive was to seek publicity as evidenced in the affidavit of one Yeo, the Centre Manager of the Flyer, which referred to an email thread between the plaintiffs and their solicitor NS. The defendant received the email thread from one Mr Jawahar Ali a former co-plaintiff and tenant of the defendant when he notified parties of his intention to withdraw from the action. NS applied to expunge the email communication as being covered by litigation privilege. The defendant did

[278] Singapore Rules of Court O.24 r.19 .
<https://www.supremecourt.gov.sg/data/doc/ManagePage/97/roc_o24.htm#1145584977-003118> accessed on 2 June 2015.
[279] [2009] SGHC 235.

not challenge the privileged nature of the email thread but instead claimed that the privilege had been waived when Mr Jawahar forwarded the email to the defendant without reservations. The following issues were raised:

(a) What was the status of the email thread?

(b) Had the privilege in the email thread been waived?

(c) What was the effect of inadvertent disclosure of a privileged document to an adversarial party?

(d) Did the email thread fall within the ambit of the fraud exception under s. 128(2) EA?

The Court opined that on the facts of the case the email thread was covered by legal advice privilege under s. 128 EA between a lawyer and his client. It also qualified as litigation privilege under s.131 EA as it was prepared for the predominant purpose of litigation against the defendant as established in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and Other Appeals*.[280] Mr. Jawahar and the other plaintiffs had jointly retained NS. In the circumstances though it was not clear whether Mr. Jawahar had intended to waive the privilege there was certainly no waiver from the others. Consequently following *Re Konigsberg (A Bankrupt)*,[281] and *The Sagheera*,[282] privilege could not be waived without consensus from all the plaintiffs. Further *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd and Others*,[283] had clearly established that inadvertent secondary disclosure of a privileged document did not compromise its privileged status. However, privilege under s.128 EA may be lost in respect of communication made in furtherance of any illegal purpose or any crime or fraud committed since the commencement of the lawyer's employment. Similarly, s.131 EA protects all confidential communication unless the lawyer offers himself as a witness in which case they may be compelled to disclose such communication as required by the Court to explain any evidence which he has given, but not others. The Court with reference to the established precedents opined that both legal advice privilege and litigation privilege under ss. 128 and 131 EA were subject to the fraud exception. Having established that, it remained to be considered whether an intention to obtain discovery for ulterior motives constituted a fraud. *Hong Lam Marine Pte Ltd and Another v Koh Chye Heng,*[284] established that an application for pre-action discovery that is made for other collateral and improper purposes amounts to an abuse of process. However, each case turns on its own facts and the Court has to undertake a balancing exercise between the public policy of professional privilege against the gravity of the charge of fraud or dishonesty. On the facts the Court found that no dishonesty had been established and dismissed the defendant's appeal with costs to the plaintiffs.

Para 43L provides that other than third party, or pre-action orders for discovery, costs for discovery and inspection shall be borne by the party giving discovery and disbursements incurred in providing copies shall be reimbursed by the party requesting these. However, the Court has an inherent power under ROC O.92 rules 4 and 5 to order the party entitled to discovery to bear the entire or part of the costs where it is necessary to prevent injustice or an abuse of the process of the Court.

Privacy and Data Protection

[280] [2007] 2 SLR 367.
[281] [1989] 1 WLR 1257.
[282] [1997] 1 Lloyd's Rep. 160.
[283] [2009] 1 SLR 42.
[284] [1998] 3 SLR 833.

Personal data in Singapore is protected under the *Personal Data Protection Act 2012* (PDPA), introduced in a phased implementation between 2013 and 2014.[285] Other related legislation includes the Info-communications Media Development Act 2016

The PDPA governs the collection, use, disclosure and care of personal data balancing the rights of individuals to protect their personal data, including rights of access and correction, against the needs of organisations to collect, use or disclose personal data for legitimate and reasonable purposes. The PDPA applies to personal data stored in both electronic and non-electronic forms and is generally based on the European General Data Protection Regulations though not as stringent. The PDPA applies to the private sector and excludes individuals acting in their personal domestic capacity, employees acting in the course of their employment with an organisation; a public agency or an organisation in the course of acting on behalf of a public agency in relation to the collection, use or disclosure of the personal data and business contact information.[286] Further, although sections 13 and 14 PDPA require consent for collection and use of personal data, section 15 provides for a 'deemed' consent where information is publicly available; relates to news activities; is for the beneficiaries of trust and insurance policies; or it is collected by a bank or a credit bureau for the purpose of creating a credit report. Nevertheless, consent can be withdrawn under section 16 PDPA.

As far as enforcement is concerned the Personal Data Protection Commissioner (PDPC) is empowered to investigate and enforce the Do Not Call (DNC) provisions. In March 2019, Singapore's Personal Data Protection Commission issued a statement announcing that it intended to introduce a mandatory breach notification regime as part of the proposed amendments to the PDPA.

The PDPA allows for cross-border data transfers subject to the transferor ensuring that the recipient has legally enforceable obligations to protect such data comparable to the PDPA.

III. CONCLUSION

EDiscovery in Singapore has come a long way in a very short time. The basic principles of discovery and inspection of documents are contained in the ROC O. 24. Discovery under O.24 r.1, is not an automatic right but subject to an order of Court. Discovery may be ordered to be given of documents on which the party relies or will rely that could adversely affect his own case or adversely affect or support another party's case. Thus the 'no stone unturned' approach of *Peruvian Guano* has given way to a more focused approach based on relevance and materiality. This is further qualified by requiring a party to give discovery of documents in his 'possession, custody or power'. In *Dirak Asia* this was interpreted using a contextual approach as meaning, having a 'practical ability to produce'.

The ROC was supplemented in 2009 with the Supreme Court PD3 to cater specifically for eDiscovery. As these were new concepts PD3 Part IVA para 43A(1) permitted the eDiscovery process to be optional to facilitate a gradual introduction to eDiscovery. Various cases came before the Courts, with eDiscovery issues ranging from the practicalities of eDiscovery to more technical questions. The Courts rose to the challenge in providing well analysed and nuanced judgments. This experience led to amendments in 2012 to introduce a more 'user-friendly' framework that would assist lawyers in understanding and fulfilling their eDiscovery duties. The opt-in provision was replaced with an obligation to undertake d-discovery. Appendix E provides a helpful systematic checklist for eDiscovery to achieve the objective of proportionality and economy in

[285] Personal Data Protection Commission Singapore, <https://www.pdpc.gov.sg/Legislation-and-Guidelines/Personal-Data-Protection-Act-Overview>.

[286] Personal Data Protection Commission Singapore, 'Overview of Personal Data Protection' <https://www.pdpc.gov.sg/Legislation-and-Guidelines/Personal-Data-Protection-Act-Overview>.

eDiscovery by requiring pre-case management good faith collaboration between parties and agreement on an eDiscovery plan. *Credit Industriel* sent a clear message on the seriousness of counsel's eDiscovery duties. A key introduction is the discovery and production of electronically stored documents in their native format facilitating greater cost savings. TAR is also encouraged to facilitate costs of review and minimise the problems of inadvertent disclosure of privileged information. Singapore has taken very proactive and robust role in ensuring a smooth eDiscovery process.

NEW ZEALAND

I. INTRODUCTION – LEGAL SYSTEM AND COURT STRUCTURE[287]

The New Zealand Court structure of general jurisdiction comprises the Supreme Court (final appellate court), Court of Appeal, High Court and District Court. A large portion of criminal and civil matters are heard in the District Court, while claims above NZ $350,000 and more serious criminal and complex civil matters are brought before the High Court. Leave to appeal is required to bring a matter before the Supreme Court,[288] which will generally only hear matters that raise a significant question of law or are of public importance. In addition to their courts of general jurisdiction, there are a number of specialist courts and tribunals, including the Maori Land Court, Environmental Court and Waitangi Tribunal. In prescribed circumstances, courts of general jurisdiction may hear appeals from these specialist courts and tribunals.

II. EDISCOVERY – RULES AND PRINCIPLES

In Common law courts, such as New Zealand's, discovery is an essential process in facilitating judicial fact-finding and decision making, by giving parties the opportunity to avoid trial by ambush and increasing the likelihood of a court producing an outcome based on merits.[289] The previous High Court Rules, rules 293 to 312 and 317A, set out the relevant rules for discovery, including notice for discovery, compliance, order limiting discovery, expenses, and inspection. Most importantly, the old regime required parties to give documents "relating to any matter in question in the proceeding".[290] This phrase traces its heritage to the English Supreme Court Rules 1875[291] and its effects are encapsulated in the judgment of Brett LJ in *Compagnie Financiere du Pacifique v Peruvian Guano Co*.[292] New Zealand law recognises the "right to discovery of *Peruvian Guano* width",[293] requiring parties to produce documents relating to the case "either directly or indirectly".[294] Treated as authoritative in New Zealand, the formula has been subject to "controversy",[295] and has produced a train of concerns for the Law Commission, including the disproportionate and excessively high cost of general discovery. This rule has also attracted judicial dissatisfaction for its "expansive" breadth, with the courts noting that the test is "monumentally inefficient"[296] and that "it is easier to criticise the *Peruvian Guano* rule than to come up with a better one".[297] It is noteworthy pointing out that courts do have the power to order for "particular" discovery under rule 300,[298] that is, the production of some document or class of document that may be relevant to the matter. However, this is subject to the applicant satisfying the court that an order for one is necessary.[299] The philosophical principles underlying the *Peruvian*

[287] *Thank you to Andrew King's for his review and input on an earlier version of this paper and Charrie Mata for her research.
[288] *Senior Courts Act 2016* (NZ) SR 2016/48, s 74 sets out the criteria for 'leave to appeal'.
[289] C Cameron and J Liberman, 'Destruction of Documents Before Proceedings Commence—What is a Court to Do?' (2003) 27 *Melbourne University Law Review* 273, 275. See also Explanatory Note, *High Court Amendment Rules (No 2) 2011* (NZ) SR 2011/351.
[290] New Zealand Law Commission, *General Discovery*, Report 78 (2002) 16.
[291] New Zealand Law Commission, *General Discovery*, Report 78 (2002) 1.
[292] (1882) 11 QBD 55.
[293] New Zealand Law Commission, *General Discovery*, Report 78 (2002) 5.
[294] *Compagnie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 62-63.
[295] *ANZ National Bank Ltd v Commissioner of Inland Revenue* [2009] NZCA 150, [6].
[296] *Whitehouse Watson, Watson, Trustees of the Watson Whitehouse Family Trust and Others v Wellington City Council* [2005] NZHC 158, [14].
[297] *BNZ Investments Ltd v Commissioner of Inland Revenue* [2008] 1 NZLR 598, 606.
[298] New Zealand Law Commission, *General Discovery*, Report 78 (2002) 7.
[299] New Zealand Law Commission, *General Discovery*, Report 78 (2002) 7-8.

Guano rule pierces the heart of discovery, but as the court in *BNZ Investments Ltd v Commissioner of Inland Revenue*[300] noted:

[T]he rule can bring into the discovery net too many documents, with associated unnecessary expense for both discovering and inspecting parties and the risk that the odd relevant needle may become lost in haystacks of irrelevancies.[301]

A. An Overview of the New Discovery Rules[302]

Over the years, reconsiderations were made in relation to New Zealand's approach to discovery but the vehicle for change came in the form of the *High Court Amendment Rules (No 2) 2011*.[303] This was not only a "good example" of "the trend against trial by ambush"[304] but is a part of a much larger "civil justice reform movement".[305] This includes the "drive for efficiency", which has become "a central pillar of modern civil justice reform initiatives,"[306] and the incorporation of principles designed to keep costs in check with the complexity of a case.[307] The HCR sought to address the deficiencies associated with discovery, especially in relation to the *Peruvian Guano* "train of inquiry" approach, favouring a "more issue-oriented test of relevance".[308] It is, however, important to bear in mind that the new rules function more "as a 'menu' of options for discovery" rather than a "one size fits all" solution.[309] The principles of co-operation, proportionality, practical arrangements, and the efficient use of technology and case management are deeply embedded in the new rules.[310] These expectations on parties seek to minimise the tactical behaviours often exhibited in litigation and ensure that the costs of discovery are proportionate. This is achieved by employing tools and protocols designed to streamline the process.

Along with the new rules and principles, Schedule 9 serves as a "practical road map"[311] to parties in proceedings. It comprises two parts, namely, a Discovery Checklist and a Listing and Exchange Protocol. These initiatives aim to shift the "continuing love affair between lawyers and the photocopier"[312] and towards the adoption of technology in discovery.[313] The Discovery Checklist provides parties with assistance by listing the considerations that parties should keep in mind during litigation. This includes assessing proportionality and encouraging co-operation between parties. The Listing and Exchange Protocol sets the foundation on how

[300] [2008] 1 NZLR 598.
[301] [2008] 1 NZLR 598, [32].
[302] The *new rules* refers to the amendments made by the *High Court Amendment Rules (No 2) 2011* (NZ) SR 2011/351 to the existing *High Court Rules 2016* (NZ) (*'HCR'*).
[303] *High Court Amendment Rules (No 2) 2011* (NZ) SR 2011/351. (*'HCR'*) or (*'new rules'*) are used interchangeably and also refers to the *High Court Rules 2016* (LI 2016/225).
[304] *ANZ National Bank Ltd v Sheahan and Lock* [2013] 1 NZLR 674, [65].
[305] Trevor CW Farrow, 'Proportionality: A Cultural Revolution' (2012) 1 *Journal of Civil Litigation and Practice* 151, 152.
[306] Ibid 153.
[307] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 13.
[308] Ibid 44.
[309] Ibid 7.
[310] Ibid 11. See HCR r 8.2, where parties are required to cooperate to ensure that discovery is proportionate and facilitated by agreement on practical arrangements.
[311] Ibid 11.
[312] Ibid citing Grainger, Fealy & Spencer, *Civil Procedure Rules in Action* (2nd ed, Cavendish, London, 2000) ch 17.
[313] See Explanatory Note, *High Court Amendment Rules (No 2) 2011* (NZ) SR 2011/351 where a party may be exempt from this rule where a party obtains exemption from a Judge that electronic discovery would be impracticable or would be unjust.

parties should exchange documents[314] and is the default procedure, save for when a discovery order states another alternative.[315] These new rules and principles of discovery are broadly outlined below.

B. Electronically Stored Information and the Duty to Preserve

In addition to the new rules and concepts introduced by the HCR, it is a fundamental starting point to define the most commonly used terms in discovery and how they are afforded meaning by the new rules for the purpose of discovery. Under r 1.3, electronically stored or recorded information is captured within the meaning of a "document"[316] and they are divided into two categories: primary data and non-primary data.[317] The former refers to "active data" that is readily "retrievable",[318] whereas the latter describes data that is not readily retrievable.[319] There is no requirement obliging parties to "discover electronically stored information that is not primary data".[320] However, it would be prudent for prospective parties to "err on the side of caution",[321] as a judge possess discretionary power to order a party to discover information "that is not primary data".[322] The inclusion of electronically stored information (*ESI*) within the definition of a "document" also brings the new rules in line with the *Evidence Act 2006*, which also captures ESI within the meaning of a "document".[323] In addition to this, the new rules also consider the inclusion of metadata where the circumstances of the case demands it.[324] Preference is given to exchanging documents in their original form, known as native format, as it lessens the costs of converting these to other formats for review. These are important considerations especially in relation to the duty of parties under r 8.3 to "preserve documents that are, or are reasonably likely to be discoverable".[325] This rule is triggered once "a proceeding is reasonably contemplated"[326] and obligations, including identifying documents likely to be discoverable, follows soon afterwards.[327] Metadata refers to "embedded information about the document that is not readily accessible once the native electronic document has been converted" into a portable document format (PDF) or another type of file.[328] Thus, lawyers acting for parties must ensure that their clients take steps to preserve potentially relevant documents and data, and have them in a "readily retrievable form".[329] These may include data or documents controlled by third parties such as messaging services like WhatsApp. An understanding between parties should also be reached with regard to the preservation and use of metadata and whether it should be included for discovery.[330] Although the Discovery Checklist is silent as to the duties of the parties to cooperate in preserving documents,

[314] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 52.
[315] Ibid.
[316] HCR r 1.3.
[317] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 20.
[318] HCR r 8.12(6).
[319] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 20.
[320] HCR r 8.12(4).
[321] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 27.
[322] HCR r 8.12(5).
[323] *Evidence Act 2006* (NZ) where document means '(b) information electronically recorded or stored, and information derived from that information.'
[324] Part 3 Glossary of the HCR (No 2) 2011 Sc 9 Pt 3 defines metadata and states that 'depending on the circumstances of the case, metadata may be discoverable'; David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 21.
[325] HCR r 8.3(1).
[326] HCR r 8.3(1).
[327] HCR r 8.3(1). David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 24-25.
[328] HCR Sch 9 Pt 3.
[329] HCR r 8.3(2).
[330] Michael Legg and Lara Dopson, 'Discovery in the Information Age - The Interaction of ESI, Cloud Computing and Social Media with Discovery, Depositions and Privilege' (2012) *University of New South Wales Law Research Series* 11.

it is recommended that they do so at the first case management conference as it will assist them in demonstrating that "reasonable steps" were taken.[331]

In practice, the storage of documents in today's digital age raises various potential challenges, including accessibility, control and the preservation of metadata. Questions also attaches to the interpretation of the phrase "reasonably contemplated" and "likely to be discoverable". In *Public Trust v Hotchilly Ltd*,[332] it was noted that the "question of whether a proceeding was reasonably anticipated" involves looking at a "reasonable person" and whether in their position, they would have considered the commencement of a litigation "as probable". [333] It was suggested by Friar, King and O'Gorman, that r 8.3 requires preservation steps "proportionate to the contemplated proceeding".[334] This includes weighing the costs involved in preserving the documents against the benefits of doing the exercise.[335] A starting point for a prospective party should be an assumption for an order for standard discovery under r 8.7 and this involves identifying the types of documents that parties may need to disclose.[336]

C. Early Stages: Co-Operative Approach and Costs

The explanatory memorandum of the new rules reinforces the principle of co-operation noting that "parties must co-operate with each other at an early stage" in conducting a "reasonable search that is proportionate to the proceeding".[337] Thus, parties "must co-operate" in order to ensure that the processes of discovery and inspection are "proportionate" and "facilitated by agreement on practical arrangements".[338] This includes the requirement for parties to "discuss and endeavour to agree" on an appropriate discovery order at least 10 days before the first case management conference.[339] The term "practical" is open to interpretation by the parties, but it may be read as requiring both parties to communicate their respective systems in the proceeding.[340] The principle is further reinforced in the Discovery Checklist where parties are required to communicate with each other to "assess and discuss" the estimated costs of the exercise,[341] "endeavour to agree" on the methods to be used,[342] and "seek to agree" on any modifications to the listing and exchange protocols.[343]

In practice, "co-operation" between parties may appear to be contradictory with a lawyer's duty to act in the best interest of his or her client.[344] However, this statutory duty to "co-operate"[345] cultivates open dialogue

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[331] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 27.
[332] [2010] BCL 344.
[333] *Public Trust v Hotchilly Ltd* [2010] BCL 344, [20], citing Guardian Royal Exchange Assurance of NZ Ltd v Stuart [1985] 1 NZLR 596, 599-606.
[334] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 26.
[335] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 26.
[336] Ibid 25. Under the HCR r 8.7 states that standard discovery requires 'each party to disclose documents that or have been in that party's control and that are (a) documents on which the party relies, or (b) documents that adversely affect that party's own case, or (c) documents that adversely affect another's party's case, or (d) documents that support another party's case.'
[337] HCR Explanatory Note.
[338] HCR r 8.2(1)(a)-(b).
[339] HCR r 8.11.
[340] David Harvey, 'Reasonable and proportional discovery in the digital paradigm: The role of lawyers and judges in the context of the New Zealand discovery rules' (2014) 2 *Journals of Civil Litigation and Practice* 103, 108. See also *High Court Amendment Rules (No 2) 2011* (NZ) SR 2011/351 Explanatory Note.
[341]HCR Sch 9 Part 1 cl 1(d).
[342] HCR Sch 9 Part 1 cl 3(2)(a).
[343] HCR Sch 9 Part 1 cl 4(1)(a).
[344] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 11-12; *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008* (NZ) SR 2008/214 ss 5.1-5.2.
[345] See also HCR r 8.2(2) which states that 'the parties must, when appropriate, (a) consider options to reduce the scope and burden of discovery; and (b) achieve reciprocity in the electronic format and processes of discovery and inspection; and (c) ensure technology is

between parties, an approach previously cited by The Sedona Conference Cooperation Proclamation as in the clients' interests as it limits "gamesmanship".[346] Parties are encouraged to communicate with each other to avoid misunderstanding at a later stage about the scope and protocols involved in the exercise. Thereby, limiting the wastage of resources on "unnecessary disputes".[347]

A judge may also order a party to meet the costs of discovery in advance where it is "manifestly unjust" for a discovering party to have to meet the costs of complying with the order.[348] This cost-shifting rule employs a "test of manifest injustice"[349] where it would be "manifestly unjust not to order a cost-shifting" order.[350] Thus, courts are less likely to grant an order for particular discovery where there is evidence to suggest that such an exercise will be disproportionate and expensive.[351] Where a potential applicant's proposal for discovery is rejected by the other party, the Court in *Southland and Building Society v Barlow Justice Limited*[352] indicated that an applicant's application may have stronger prospects if an applicant offers to accept a costs-shifting arrangement.[353]

D. Initial Disclosure

After filing a pleading, parties are required to serve to the other party a bundle of documents that was referred to in the pleading.[354] This bundle is referred to as an "initial disclosure" and requires parties to disclose documents that are referred to in the pleading and to satisfy the following requirements under r 8.4(1)(b). There are essentially four prerequisites in addition to the disclosure of documents referred to in the pleading: that the party must have "used" the document when preparing the pleading, "intends to rely" on the documents at the trial or hearing, that the documents are "principal documents" and that they are in the "filing party's control".[355] The bundle must be served at the same time as the pleading.[356] However, this rule is not so inflexible in a sense that a party need not comply where "the circumstances make it impossible or impracticable".[357] Where this is the case, a party is required to file and serve a certificate that is signed by counsel at the same time as the pleading, setting out their reasons for non-compliance.[358] This bundle must then be served within 10 days of the service of the pleading.[359] A party unable to comply also has the option to come to an agreement with the other party to disregard initial disclosure,[360] or apply for a court order varying the initial disclosure requirement within 10 working days of the service of the pleading or agree with the other party to extend the period as to when to serve the bundle.[361] Parties will also need to list or otherwise identify

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used efficiently and effectively and (d) employ a format compatible with the subsequent preparation of an electronic bundle of documents for use at trial.'

[346] The Sedona Conference Working Group Series, *The Sedona Conference Cooperation Proclamation* (July 2008) The Sedona Conference, 1 <https://thesedonaconference.org/node/35>.

[347] The Sedona Conference Working Group Series, *The Sedona Conference Cooperation Proclamation* (July 2008) The Sedona Conference, 1 <https://thesedonaconference.org/node/35>.

[348] HCR r 8.22(1); Southland and Building Society v Barlow Justice Limited [2013] NZHC 1125, [45].

[349] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 78.

[350] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 78.

[351] HCR r 8.22(1); *Southland and Building Society v Barlow Justice Limited* [2013] NZHC 1125, [45].

[352] [2013] NZHC 1125.

[353] *Southland and Building Society v Barlow Justice Limited* [2013] NZHC 1125, [48]

[354] High Court Rules 2016 (NZ) r 8.4.

[355] HCR r 8.4(1)(b); David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 36.

[356] HCR r 8.4(1).

[357] HCR r 8.4(2).

[358] HCR r 8.4(2)(b).

[359] HCR r 8.4(3).

[360] HCR r 8.4(3).

[361] HCR r 8.4(3).

the documents[362] in this bundle, given that the schedule appended to the affidavit of documents requires documents from the initial disclosure to be included.[363] In addition, parties must take into account the consequences associated with non-compliance of the rules.[364] For instance, it may give rise to an order that a judge thinks "just".[365] However, courts generally take a "benevolent" approach and will typically have a claim or defence struck out.[366] This is then followed by compliance and enforcements being dismissed with costs to the applicant.[367]

E. Preparation for First Case Management Conference and the Discovery Checklist

Prior to the first case management conference, parties must endeavour to come to an agreement on an appropriate discovery order and the way in which inspection will take place.[368] This requires parties to the proceeding to consult and address the matters in the Discovery Checklist.[369] Part 1 of the Discovery Checklist details five considerations that parties must consider, with each being reflective of the principles introduced by the new rules. Lawyers must liaise with their clients in addressing the Discovery Checklist and this must be done "not less than 10 working days before the first case management conference".[370]

The five considerations are as follows:

1. Assessing proportionality, which includes identifying the pleadings to identify the categories of documents that needs to be discovered;

2. Extent of search, which involves assessing the methods to be employed in locating electronic material efficiently;

3. Whether tailored discovery is appropriate;

4. Listing and exchange protocols; and

5. Presentation of documents at trial.[371]

In assessing proportionality, parties are required to undertake five steps. Firstly, parties must review the pleadings and lawyers must work with their client in identifying the categories of documents that would be required if a standard discovery order was made under r 8.7.[372] In this circumstance, "a dialogue is necessary"[373] between lawyer and client as to ensure that clients have a good understanding of the claim and that their lawyer is aware of the documents that exist.[374] This exercise may include estimating the volume and

[362] HCR r 8.15(2)(e).
[363] HCR r 8.16(4).
[364] See r 8.4(4) where if a party fails to comply with rr 8.4(1) and 8.4(3), a Judge may make any of the orders specified in r 7.48.
[365] See r 7.48 for the different types of enforcement orders that the Judge may exercise. Examples includes staying the proceeding in whole or in part and sealing a judgment.
[366] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 38.
[367] Ibid 38.
[368] HCR r 8.11.
[369] HCR Explanatory Note.
[370] HCR r 8.11(1).
[371] HCR Sch 9 pt 1.
[372] HCR (NZ) Sch 9 pt 1 cl 1(a).
[373] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 49.
[374] Ibid 49.

cost of discovering electronic and hard copy documents and assembling them if they need to be redacted, for instance.[375] Parties must then "assess and discuss" with the other parties whether that estimated cost is proportionate to the sums in issue or the value of the rights in issue in the proceeding.[376] This is a proportionality exercise where parties need to estimate the overall costs involved with the discovery. This may mean that parties may need to "share relevant information on a co-operative basis"[377] in coming to an agreement about the categories of documents, methods and protocols to be employed in searching for documents and whether a staged approach may be more appropriate.[378]

Secondly, parties must identify the likely location of these documents.[379] These may be, for example, in their accountant's possession or in another party's control. Parties are required to "make a reasonable search for documents".[380] In interpreting what is "reasonable",[381] regard will be given to the factors, such as the nature and complexity of the matter, number of documents involved, the cost of retrieval, the significance of any document likely to be found and whether discovery would be proportionate to the subject matter of the proceeding.[382] In addressing this part of the Discovery Checklist, parties must keep in mind r 8.3 which involves the preservation of documents as soon as proceeding is reasonably contemplated. This is because orders may be made at the case management conference. Thus, parties must preserve and have primary data at a "readily retrievable archival data".[383]Although r 8.12(4) does not specifically require a party to discover ESI that is not primary data,[384] a judge may nonetheless order a party to discover them if they are satisfied that the "need for and the relevance and materiality of the data" justify the cost and burden of retrieving them.[385] However, the incorporation of the principles in the new rules means that there is now more emphasis on the cost involved in producing the data and how it must be "justified before it needs to be undertaken".[386]

Thirdly, where the cost is disproportionate or having regard to rules 8.8 and 8.9,[387] the interests of justice require the making of a tailored discovery order, parties should seek an order for one. This reflects the court's traditional position in discovery where time and costs are balanced against the value of the process in determining whether a discovery order would be oppressive.[388] The principle of co-operation is embedded in this part. Parties are required to "endeavour to agree"[389] on the methods to be employed for discovery including the categories of documents required[390] and methods and strategies for locating the documents.[391] This may include the use of Technology Assisted Review (TAR). Parties must also "discuss" in considering whether a

[375] HCR Sch 9 pt 1 cl 1(c).
[376] HCR Sch 9 pt 1 cl 1(d).
[377] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 50.
[378] Ibid 51-51.
[379] HCR Sch 9 pt 1 cl 1(b).
[380] HCR r 8.14(1).
[381] HCR r 8.14(2).
[382] HCR r 8.14(2)(a)-(e).
[383] HCR r 8.12(6).
[384] HCR r 8.12(4).
[385] HCR r 8.12(5).
[386] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 51.
[387] HCR r 8.8 states that 'tailored discovery must be ordered when the interests of justice require an order involving more or less discovery than standard discovery would involve'. R 8.9 states that 'it is to be presumed, unless the Judge is satisfied to the contrary, that the interests of justice require tailored discovery'.
[388] Southland and Building Society v Barlow Justice Limited [2013] NZHC 1125, [17] citing Karam v Fairfax New Zealand Ltd [2012] NZHC 887, 137-142.
[389] HCR Sch 1 pt 1 cl 3(2)(a).
[390] HCR Sch 1 pt 1 cl 3(2)(a)(i).
[391] HCR Sch 1 pt 1 cl 3(2)(a)(ii).

staged approach may be more appropriate in addition to the categories and methods to be adopted by the parties.[392]

Fourthly, parties must consider the exchange and listing protocols as required by rules 8.12(2) and 8.27(2), save for when a discovery order states otherwise.[393] Parties must also "consider" whether "any modifications" are needed to the listing and exchange protocol[394] and "what special arrangements will be necessary for inspection".[395] Where parties agree to modify the listing and exchange protocol, they must have the agreement in writing but it is not necessary to include the specific modifications in the discovery order or for a Judge to consider it for approval.[396] Parties are encouraged to make practical arrangements and consider proportionality in reducing unnecessary cost of listing documents. This includes using native electronic versions of documents as much as possible to save costs on conversion, using the extracted metadata from native electronic documents, rather than manually listing documents, converting documents to image format only when it is decided they are to be produced for discovery and if the image format documents are to be numbered, to only number those images if they are to be produced for discovery.[397] There may be instances where an electronic exchange is not appropriate and this may be remedied by advising the judge of the variation that has been agreed,[398] or vary the protocol at the case management conference.[399] Where a discovery order exempts a party from giving discovery inspection electronically, the party must list the documents in the affidavit of documents and make them available for inspection in hard copy form.[400]

Fifthly, parties must consider how documents are to be presented at trial[401] and ensure that the format adopted for listing and exchange of documents is compatible with any such uses.[402]

Prior to the first case management conference, parties must also file, under r 7.4, a "joint memorandum or a separate memoranda" and set out the terms of the discovery order that the judge is requested to make and the reasons for a discovery order in those terms.[403] Where each party files a separate memorandum, the party must address the following provisions listed under r 7.3(3).[404]

At the case management conference, a Judge must make a discovery order for a proceeding, save for when he or she considers that the proceeding can be justly disposed of in the absence of discovery,[405] or there is a good

[392] HCR Sch 1 pt 1 cl 3(b).
[393] HCR Sch 1 pt 1 cl 4(1). R 8.12(2) discovery orders may 'incorporate the listing and exchange protocol set out in Part 2 of Schedule 9; or vary that protocol; or contain other obligations that are considered appropriate'. R 8.27(2) addresses the inspection of documents states that 'documents must be exchanged in accordance with the listing and exchange protocol in Part 2 of Schedule 9'.
[394] HCR Sch 1 pt 1 cl 4(1)(a).
[395] HCR Sch 1 pt 1 cl 4(1)(b).
[396] HCR Sch 9 pt 1 cl 4(2).
[397] HCR Sch 9 pt 1 cl 4(3)(a)-(d).
[398] HCR r 8.11(3) states that 'if the parties agree to vary the listing and exchange protocol set out in part 2 of Schedule 9, they need advice the Judge only that variation has been agreed, not the details of that variation'. See also David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 53.
[399] HCR r 8.12(2) states that 'the discovery order may (a) incorporate the listing and exchange protocol set out in Part 2 of Schedule 9; or (b) vary that protocol; (c) or contain other obligations that are considered appropriate'.
[400] HCR r 8.27(3) states the rules for the inspection of documents where 'if a discovery order exempts a party from giving discovery and inspection electronically, that party must make the documents listed in the affidavit of documents available for inspection in hard copy form, and must promptly make those documents available for copying if requested'.
[401] HCR Sch 9 pt 1 cl 5(a).
[402] HCR Sch 9 pt 1 cl 5(b).
[403] HCR r 8.11(2).
[404] HCR r 8.11(2). Also see HCR r 7.4(3) which sets out the requirements for separate memoranda. For example, 'the plaintiff must file the first memorandum not later than 15 working days after the statement of defence is filed'.
[405] HCR r 8.5(1).

reason for making the order at a later stage.[406] The rules further provide that the court has discretion[407] to make either a standard or tailored discovery order during the case management conference.[408] The rationale for this is to "ensure that each side is fairly informed of the case"[409] and it "assumes significance" because this is when discovery orders are generally made.[410] The requirement for parties to "discuss and endeavour to agree"[411] may be as "simple as a telephone call or exchange of emails" discussing the methods to be employed for standard discovery.[412] However, each matter is different and parties should discuss according to the complexity of the case.

F. Discovery Orders

One notable amendment made to the HCR is the adoption of r 8.7 for standard discovery. R 8.7 sought to narrow the scope of the *Peruvian Guano* test[413] by requiring each party to disclose documents that are or have been in that party's control.[414] For standard discovery orders, the "adverse documents approach"[415] means that parties are required to disclose documents on which the party relies or documents that adversely affect that party's own case, or affect another party's case.[416] However, there is no requirement to disclose documents that form part of the matter's narrative, which may be relevant, but not necessary.[417] Thus, the burden rests on the parties' solicitors to "cull out their own client's irrelevant documents" and "follow trains of inquiry to locate the admissible adverse documents".[418] Moreover, there exist a residual discretion for *Peruvian Guano* type discovery orders, as noted by the court in *Radio Tarana (NZ) Limited v 5TUNZ Communications Limited*.[419] The Plaintiff in this case was seeking a *Peruvian Guano* type discovery but the court refused to exercise its discretion, noting that such orders will be "rare" and may only be made in instances where there is doubt that standard discovery will suffice.[420] This may include cases involving fraud[421] or where it is appropriate to grant one in the "new discovery climate".[422] Orders for tailored discovery were also amended, removing the hurdle previously faced by applicants to satisfy the court that an order for one was "necessary".[423] R 8.19 gives the court a discretion to order for particular discovery in circumstances where a party has provided discovery but is found to be "deficient".[424] This represents a "significant relaxation"[425] of the former rule. A party relying on this rule must, however, establish that the document sought "should have been discovered".[426]

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[406] HCR r 8.5(2) See also HCR r 8.12(1)(a)-(c) which lists down the orders that may be made by a Judge at the case management conference.
[407] *Radio Tarana (NZ) Limited v 5TUNZ Communications Limited* [2014] NZHC 1870, [64].
[408] HCR r 8.6.
[409] *BNZ Investments Ltd v Commissioner of Inland Revenue* [2008] 1 NZLR 598, [48].
[410] John Turner, 'Civil Procedure' [2014] *New Zealand Law Review* 709, 710.
[411] HCR r 8.11.
[412] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 54.
[413] *Radio Tarana (NZ) Limited v 5TUNZ Communications Limited* [2014] NZHC 1870, [63].
[414] HCR r 8.7.
[415] *Westpac New Zealand v Adams* [2013] NZHC 3113, [27].
[416] HCR r 8.7.
[417] *Rapid Metal Developments NZ Ltd v Access One Scaffolding Ltd* [2017] NZHC 204, [5].
[418] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 44.
[419] [2014] NZHC 1870, [65].
[420] *Radio Tarana (NZ) Limited v 5TUNZ Communications Limited* [2014] NZHC 1870, [65].
[421] Ibid. See HCR r 8.9.
[422] Westpac New Zealand v Adams [2013] NZHC 3113, [27].
[423] Ibid. See also *Managh (as liquidator of Titan Building (HB) Limited (in Liq)) v Hasselman* [2012] NZHC 1287, [6].
[424] *Southland Building Society v Barlow Justice Limited [2013] NZHC 1125, [13] citing Managh (as liquidator of Titan Building (HB) Limited (in Liq)) v Hasselman* [2012] NZHC 1287.
[425] Ibid.
[426] *Southland Building Society v Barlow Justice Limited* [2013] NZHC 1125, [26].

Although the party seeking discovery "does not need to prove" the existence of the documents, there should at least be a "prima facie indication" that the documents are or have been in the party's control.[427]

An order for tailored discovery may be more extensive or less than standard discovery.[428] Tailored discovery is "presumed,"[429] save for when a judge is satisfied to the contrary, that the interests of justice requires it.[430] This includes circumstances where the costs "would be disproportionately high",[431] or the case is on the commercial list or on the swift track,[432] or the case involves allegations of fraud or dishonesty,[433] or where the total sum or assets in issue exceeds $2,500,000.[434] It will also be "presumed" that the interests of justice requires it where there is an agreement between parties to have a tailored discovery.[435] Moreover, r 8.10 sets out an obligation on the party ordered to make tailored discovery to disclose documents in categories,[436] or in another classification that facilitates the identification of particular documents. R 8.18 requires a party to discover a document where, in the course of complying with tailored discovery, the party becomes aware of a document that adversely affects that party's own case or adversely affects another party's case, or supports another party's case.[437] Thus, parties cannot use tailored discovery orders to avoid disclosing adverse documents of which they later become aware in the course of their discovery exercise.[438] Friar, King and O'Gorman suggested that parties should seek to have an agreement in place for the categories that addresses the relevant issues and which captures documents with "probative evidence on those matters".[439] In addition to this, parties should also define each category with "sufficient factual particularity" and qualify them by the degree of relevance so as to avoid having a categorisation approach that is more than or as onerous as standard discovery.[440]

G. Predictive Coding in Discovery

The High Court Rules supports the use of predicted coding in discovery[441] and this aligns with its objective to "secure the just, speedy, and inexpensive determination of any proceeding".[442] Predictive coding works by having the first set of documents reviewed by humans and the "same relevancy calls are then carried forward" to the remaining sets of documents. The documents are then prioritised by a software using the first set of human-reviewed documents as a foundation for subsequent reviews.[443] The initial process of TAR may be seen as time-consuming given that documents must be manually reviewed first by human reviewers who have knowledge about the matter.[444] However, once this stage is complete the remaining process is handled by a

[427] *Radio Tarana (NZ) Limited v 5TUNZ Communications Limited* [2014] NZHC 1870, [31].
[428] HCR r 8.8. See *Gillespie v Guest* [2013] NZHC 668, [25].
[429] HCR r 8.9.
[430] HCR r 8.8. See *Westpac New Zealand v Adams* [2013] NZHC 3113, [27].
[431] HCR r 8.9(a).
[432] HCR r 8.9(b).
[433] HCR r 8.9(c).
[434] HCR r 8.9(d)-(e).
[435] HCR r 8.9(f).
[436] See also HCR Sch 9 Pt 1 cl 3(2) which sets out examples of identifying categories of documents such as specifying the documents subject matter, date range or types.
[437] HCR r 8.18(2)(a)-(c).
[438] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 46.
[439] Ibid 46.
[440] Ibid 47.
[441] HCR Sched 9 Pt 3 states that 'predictive coding means technology that analyses the decisions of a human review of a sample set of documents. The software then prioritises/ranks the remainder of documents based on the decisions made on the sample documents, which allows the most relevant documents to be identified first'.
[442] HCR r 1.2.
[443] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 64.
[444] Ibid.

software that then prioritises the documents using the sample set as a baseline. Under clause 3(2)(a)(ii) of the Discovery Checklist, parties may use "methods and strategies" such as TAR to reduce costs.[445] The use of TAR can reduce the cost of discovery and produce a more effective document review by providing accurate results.[446] This is largely attributed to the software's ability to overcome human fallibility, such as tiredness which may at times lead to mistakes.[447] Akin to all man-made structures, TAR is not without its flaws and general reliance on document prioritisation technology is "no substitute for human review".[448] This is because a party cannot simply "dump" documents produced using electronic tools and techniques and leave the receiving party to manually review the documents.[449] Where this is the case, a Judge may order the party to correct "any errors or omissions" by conducting discovery again.[450] Thus, solicitors must ensure that their clients "understand their [discovery] obligations" and ensure that they "fulfil those obligations".[451]

H. Discovery Process

Electronic discovery essentially replicates traditional discovery[452] in that it involves processes generally linked with traditional discovery, such as the exchange of information relevant to the case. However, electronic discovery goes beyond the traditional means of discovering documents in the "paper-based world" by extending its application to Electronically Stored Information (ESI).[453] Further to this, eDiscovery removes the burden and costs associated with traditional discovery, for instance, reducing or eliminating the need to print documents for manual review.

In conducting eDiscovery, parties are required to adhere to r 8.2(1)(b), which requires parties to "co-operate" in ensuring that the processes of discovery and inspection are "proportionate" and "facilitated by agreement on practical arrangements".[454] Where appropriate, this exercise involves giving consideration to the ways in which parties could "reduce the scope and burden of discovery", "achieve reciprocity in the electronic format" and employing a format compatible with subsequent preparation of documents for use in the trial.[455] Parties must keep in mind the principles of proportionality and co-operation throughout the process of identifying documents, collecting them, conducting a reasonable search and considering the methods and strategies to be employed during the review. These principles are embedded in the Discovery Checklist in which parties are required to consider. Given that "human review is very expensive",[456] parties are required to come to an agreement on the methods and strategies to be used in conducting searches. This includes using the appropriate keywords and recognising when or where specialist assistance is required.[457]

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[445] Ibid 63.
[446] Ibid) 64.
[447] Andrew King, *Why are we holding TAR to a higher account?* (12 April 2016) E-Discovery Consulting <https://www.e-discovery.co.nz/blog/why-are-we-holding-tar-to-a-higher-account.html>.
[448] Edge Protection Ltd v Bank of New Zealand [2013] NZHC 2592, [45].
[449] Ibid
[450] HCR r 8.23;
[451] *Edge Protection Ltd v Bank of New Zealand* [2013] NZHC 2592, [45]. Also see HCR r 8.13 for a solicitor's discovery obligations.
[452] Andrew King, *Adding the 'e' to discovery* (04 June 2015) Law Society of New Zealand <http://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-866/adding-the-e-to-discovery>.
[453] Andrew King, *Adding the 'e' to discovery* (04 June 2015) Law Society of New Zealand <http://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-866/adding-the-e-to-discovery>.
[454] HCR r 8.2(1)(a)-(b).
[455] HCR r 8.2(2)(a)-(d).
[456] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 61.
[457] HCR Sch 9 Part 1 (Discovery Checklist) cl 3(2)(a)(i)-(ii). Cl 3(b) further requires parties to have a discussion on the appropriateness of a staged approach in conjunction with the other methods adopted by the parties.

In conducting discovery, parties are required to make a "reasonable search for documents" within the discovery order's ambit.[458] The term "reasonable" in this instance will depend on the circumstances and considerations given to the nature and complexity of the proceeding,[459] number of documents,[460] the costs,[461] the significance of finding any document,[462] and the need for discovery to be proportionate to the subject matter.[463] Given that there is "no one size fits all approach", parties should tailor searches and their review according to the needs of their case. This may mean considering automated searches such as concept searching and de-duplication.[464] Proportionality plays a central role in balancing the need for discovery[465] and the increasing costs associated with the modern reality of litigation.[466] The review stage is often the most costly and parties need to bear in mind the importance of having an accurate assessment as to the costs involved with discovery.[467] Clause 1(c) of the Discovery Checklist requires parties to estimate the cost in assembling and discovering documents and whether there is a need to bring in a specialist to assist in making informed decisions.[468] Friar, King and O'Gorman stated that parties who have an accurate assessment of costs at an early stage will be at an advantage because they will be "better prepared for their mandatory discussions".[469]

In addition to the above, a party may also apply to vary an existing discovery order under r 8.17 provided they satisfy the court that there is a need for a variation or where the circumstances of the case justifies it.[470] In addition to these, parties also have continuing obligations to give discovery and offer inspection at all stages of the proceeding.[471] This is because the "needs of litigation often evolve".[472]

I. Inspection of Documents

A party must make the documents that are listed in the affidavit and in their control available for inspection by way of exchange, as soon as the party who is required to make discovery has filed and served an affidavit of documents.[473] In accordance with the listing and exchange protocols, this rule requires physical copies of documents to be scanned and uploaded in order for it to be exchanged electronically.[474] However, parties may be exempt from this where the documents in question are privileged or confidential.[475] Where a document contains privilege and non-privileged information, a party may redact the document but must make the document available for inspection.[476] In addition to this, a party who has received electronic copies of the

[458] HCR r 8.14(1). Discovery Checklist cl 1 for proportionality and cl 2 for the extent of the search.
[459] HCR r 8.14(2)(a).
[460] HCR r 8.14(2)(b).
[461] HCR r 8.14(2)(c).
[462] HCR r 8.14(2)(d).
[463] HCR r 8.14(2)(e).
[464] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 62.
[465] John Turner, 'Civil Procedure' [2014] *New Zealand Law Review* 709, 713.
[466] Trevor CW Farrow, 'Proportionality: A Cultural Revolution' (2012) 1 *Journal of Civil Litigation and Practice* 151, 155.
[467] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 65
[468] HCR Sch 9 Part 1 cl 1(c)(ii) and (iii).
[469] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 65.
[470] HCR r 8.17. See also *Southland and Building Society v Barlow Justice Limited* [2013] NZHC 1125, [27].
[471] HCR r 8.18.
[472] *Southland and Building Society v Barlow Justice Limited* [2013] NZHC 1125, [24].
[473] HCR r 8.27(1).
[474] HCR r 8.27(2).
[475] HCR r 8.28 states that a party is not required to make privileged documents available for inspection.
[476] HCR r 8.28(2). Further, r 8.28(3) states that 'a party may limit inspection of confidential documents to the persons specified in the affidavit of documents, subject to the restrictions proposed in the affidavit'.

documents may still require the party giving discovery to make available the original documents for inspection.[477]

J. Listing and Exchange Protocols

The listing and exchange protocols, along with the discovery checklist, aims to "assist parties in carrying out discovery" by detailing the practical requirements for listing and exchanging documents.[478] Parties are required to file and serve an affidavit of documents and in the affidavit of documents, the party must comply with r 8.16 and the listing and exchange protocols in listing down or otherwise identifying documents required to be discovered under the order.[479] The protocols are mandatory,[480] but they may be subject to modifications or directions contained within a discovery order.[481] The rules recognises the complexity involved in litigation, where the default protocols may not be appropriate in achieving results proportionate to the case. Thus, the principles of proportionality and co-operation play a central role in ensuring that the discovery process is conducted in a "more efficient and proportionate" manner.[482]

R 8.16 complements r 8.15, in that it requires parties to list or otherwise identify documents that are in the control of the party giving discovery[483] or have been but are no longer in the control of the party giving discovery[484] or have not been in the control of the party but which the party knows would be discoverable if that party had control of them.[485] Clause 4 of the Discovery Checklist notes the requirement for parties to use the listing and exchange protocols, save for when a discovery order states otherwise.[486] In addition to this, parties are encouraged to "reduce unnecessary costs of listing documents".[487] An example of this is using native electronic versions of documents as much as possible and using its extracted metadata.[488]

The protocol requirements oblige parties to list the details of each document in a spreadsheet. The details should include the unique identifier for each document called document ID, date, document type, author, recipient, and parent document ID and privilege category.[489] The documents should be exchanged electronically by way of a single, continuous table or spreadsheet including the details for each document and have multi-page images in PDF format.[490] The document ID plays an important role in discovery as it acts as a reference number for each document. Thus, this gives parties to a proceeding a sense of "certainty" in knowing the exact reference for each document and convenience when it comes to locating documents.[491] In

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[477] HCR r 8.27(4).
[478] HCR Sched 9; David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 75.
[479] HCR r 8.15(2)(e).
[480] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 69.
[481] HCR r 8.15(1).
[482] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 52.
[483] HCR r 8.16(1)(a)-(c). These sub-sections relates to documents that are in the control of the party giving discovery but where privilege or confidentiality may apply. R 8.16(1)(a) applies to documents where the 'party does not claim privilege or confidentiality'; r 8.16(1)(b) applies to documents 'for which privilege is claimed, stating the nature of the privileged claimed'; r 8.16(1)(c) applies to documents 'for which confidentiality is claimed, stating the nature and extent of the confidentiality'.
[484] HCR r 8.16(1)(d).
[485] See HCR r 8.16(1)(e); David Harvey, 'Reasonable and proportional discovery in the digital paradigm: The role of lawyers and judges in the context of the New Zealand discovery rules' (2014) 2 *Journals of Civil Litigation and Practice* 103, 110.
[486] HCR r 8.12(2) states that the discovery order may 'incorporate the listing and exchange protocol' and r 8.27(2) states that 'documents must be exchanged in accordance with the listing and exchange protocol in Part 2 of Schedule 9'.
[487] HCR Sched 9 Part 1 cl 4(3).
[488] HCR Sched 9 Part 1 cl 4(3)(a)-(b). HCR Sched 9 Part 1 cl 4 further encourages parties to '(c) convert documents to image format only when it is decided they are to be produced for discovery; and (d) if document images are to be numbered, only number those images if they are to be produced for discovery'
[489] HCR Sched 9 Part 2 cl 6.
[490] HCR Sched 9 Part 2 cl 6.
[491] David Friar, Andrew King and Laura O'Gorman, *New Discovery Rules* (New Zealand Law Society, 2011) 70.

formatting the documents' descriptions, clause 7 details the protocols to be followed such as the document ID format, how the date should appear, document type which parties may modify, author, recipient of the document, list of documents subject to a claim for privilege and where applicable, parent document ID.[492] There is no requirement on parties to list the documents in a chronological order if an alternative order would be more convenient.[493] Moreover, parties may also agree to use agreed metadata material that is extracted from the electronic files, instead of listing face value descriptions for electronic documents.[494] For specific documents, the rules also provides guidance on how duplicate documents should be treated and the reasonable steps that parties must take in removing them.[495] There are also directions for emails[496] and attachments,[497] consistency of names,[498] using native electronic formats[499] and colour documents.[500] There are also protocols for the exchange format, for example, the document must be in a table or spreadsheet and they must be provided as multi-page PDF images unless agreed otherwise.[501] There are also other options that parties may agree to, such as an agreement to provide documents as searchable images.[502]

III. PRIVILEGE

Prior to the enactment of the *Evidence Act 2006*, early cases in this area of law "were generally sympathetic to disclosure either as best practice or as a legally enforceable obligation".[503] However, the trail of cases following the enactment of the legislation indicates that "priority" is given to the legal professional privilege".[504] There are two types of privilege in New Zealand, the first being the legal professional privilege and the second type is litigation privilege.[505] Legal professional privilege covers communications made between a lawyer and a person for the purpose of obtaining or giving professional legal services.[506] The latter has been described as being the "fruits of effort" arising from "the part of the litigants in preparing for [a] case".[507] New Zealand law also employs the "dominant purpose" test[508] in line with other common law countries like Australia. The High Court in *Minister of Education v H Construction North Island Limited*[509] stated in relation to the dominant purpose that:

If litigation is but one of two or more equally important purposes, it is not the dominant purpose. It is a question of fact what is the dominant purpose.

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[492] HCR Sched 9 Part 2 cl 7.
[493] HCR Sched 9 Part 2 cl 7(2).
[494] HCR Sched 9 Part 2 cl 7(4). However, the clause further states that 'in all cases…the method must be agreed. This is to ensure parties' descriptions are consistent with each other'.
[495] HCR Sched 9 Pt 2 cl 8(1).
[496] HCR Sched 9 Pt 2 cl 8(2).
[497] HCR Sched 9 Pt 2 cl 8(3).
[498] HCR Sched 9 Pt 2 cl 8(4).
[499] HCR Sched 9 Pt 2 cl 8(5).
[500] HCR Sched 9 Pt 2 cl 8(6).
[501] HCR Sched 9 Pt 2 cl 11.
[502] HCR Sched 9 Pt 2 cl 11(5).
[503] *The Attorney-General v Institution of Professional Engineers Inc* [2018] NZHC 74, [39].
[504] Ibid.
[505] *Evidence Act 2006* (NZ) ss 54 (privilege for communications with legal advisers) and 56 (privilege for preparatory materials for proceedings). Also see Simes *v Legal Services Commissioner* [2017] NZHC 2331, [89].
[506] Evidence Act 2006 (NZ) s 54.
[507] *Minister of Education v H Construction North Island Limited* [2017] NZHC 3147, [7].
[508] *Guardian Royal Exchange Assurance of NZ Ltd v Stuart* [1985] 1 NZLR 596 (CA).
[509] [2017] NZHC 3147, [7].

The High Court in *Minister of Education v H Construction North Island Limited*[510] noted that the Evidence Act "is concerned with what evidence may be given in a court hearing to determine facts in issue".[511] New Zealand courts are also afforded with the responsibility of weighing the "public interest and legal professional privilege".[512] Section 67 of the *Evidence Act 2006* empowers a judge to disallow privilege in certain instances, such as where the information was prepared for a dishonest purpose[513] or where the communication "is necessary to enable [a] defendant in a criminal proceeding to present an effective defence".[514] The New Zealand's Law Commission based its rationale on Toohey J's dissenting judgment in the High Court of Australia that the privilege "is not an end in itself but exists to promote the public interest by assisting the administration of justice".[515] Section 67 has also been described as embodying the "common law's 'innocence at stake' exception to privilege".[516]

Under the rules, documents subject to a claim for privilege or that are confidential are not required to be disclosed during Initial Disclosure.[517] However, the listing and exchange protocol expects parties to co-operate and come to an agreement in relation to the listing and exchange of any specific privileged documents. These documents may be "group listed"[518] and given a description, save for when a description would disclose privileged information.[519] Redactions may also be made but parties are required to preserve the original document and make it available for inspection if required.[520]

IV. IMPACT OF PRIVACY LAWS

The Office of the New Zealand Privacy Commissioner administers the *Privacy Act 1993* which regulates the collection, use, disclosure and access to personal information by agencies and businesses. An amended Privacy Bill was introduced to parliament on 20 March 2018, and is expected to become law in 2019. New Zealand was the only country in the Asian region to have received an adequacy ruling from the European Commission until Japan also received an adequacy ruling in 2019. The Bill includes stronger powers for the Privacy Commissioner, the mandatory reporting of harmful privacy breaches, and new offences and increased fines.

V. SUMMARY

New Zealand has shifted the focus of discovery to the start of a matter, and although it loads costs into the beginning, the costs it saves throughout the life of the matter is significant. In a new approach, New Zealand requires the parties to meet and co-operate with each other and agree to each stage of the document collections and processing including TAR. Many other jurisdictions include these concepts and similar language in their rules, but rarely enforce them. New Zealand is serious about its rules and expects that the parties will comply.

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[510] [2017] NZHC 3147.
[511] *Minister of Education v H Construction North Island Limited* [2017] NZHC 3147, [17].
[512] *R v Liev* [2017] NZHC 1352, [9].
[513] *Evidence Act 2006* (NZ) s 67(1).
[514] Evidence Act 2006 (NZ) s 67(2).
[515] *R v Liev* [2017] NZHC 1352 citing Law Commission *Evidence* (NZLC R55, 1999) at [323]-[324]. The Court in *R v Liev* at [13] also noted the shortage of cases on s 67(2).
[516] *R v Liev* [2017] NZHC 1352, [14] citing Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Brookers) at [EA 67.4] in approval.
[517] HCR r 8.4(5). Also note r 8.4(6) where the following are also excluded from disclosure including documents 'subject of a claim of public interest immunity; or is reasonably apprehended by the party to be the subject of such a claim'.
[518] HCR Sch 9 cl 9(2).
[519] HCR Sch 9 cl 9(3).
[520] HCR Sch 9 cl 10.