

Soundings

All change? An early assessment of the new English Court disclosure regime

It has now been six months since the Business & Property Courts formally commenced a two year pilot scheme for documentary disclosure, though the principles underlying the scheme were being 'softly' applied in the final months of 2018. Although it is still early days, we reflect here on the initial impact of the scheme and what changes it may foreshadow going forwards.

Background to the pilot scheme

The aim of the pilot scheme, which commenced on 1st January, 2019, is to improve the current disclosure process by encouraging cooperation between litigating parties and more active supervision by the court to combat the perceived faults of the current disclosure regime.

For the past 20 years, English court proceedings have generally required the parties to provide 'standard' disclosure, which essentially involves the disclosure of all documents on which a party relies and all documents which either support or adversely affect its or another party's

case. Developments in commercial practice and increased use of electronic documents and communications have meant that the exercise of searching through all of a party's documents for items which are disclosable on the 'standard' basis has become very time- and cost- intensive. The new scheme seeks to address this issue in particular.

Summary of the scheme

The new scheme applies to all proceedings in the Business & Property Courts, which includes the Commercial Court, whether or not they were issued before the pilot scheme commenced. The regime is set out in [CPR Practice Direction 51U](#). It now divides disclosure into three stages: initial disclosure, disclosure review and extended disclosure.

- Initial disclosure requires the parties to provide a list and copies of the key documents together with their statements of case.
- The disclosure review involves the parties discussing and agreeing on any further disclosure that may be required.
- Any party may then request the court to consider an order for extended disclosure, which should be based on a selected disclosure model, which may range from limited disclosure of known adverse documents to a wide search-based disclosure of all relevant documents.

The duty to preserve documents extends to the electronic meta-data within them. This may pose certain challenges to companies without the technical know-how to address this and it may be necessary to obtain advice and implement procedures promptly. Electronic disclosure is not a new concept, but there is likely to be an increased focus in line with the new disclosure scheme and we are seeing ever more advanced document management platforms and tools being created.

Practical impact on litigants

Initial disclosure is to be welcomed in the sense that it will require litigating parties to consider and disclose the key documentary evidence in support of their case at an early stage. This should enable all parties to litigation to make earlier and more accurate assessments of the merits of their and their counterparties' cases. This is, in fact, a similar approach to that taken in London arbitration proceedings, so should already feel familiar to many. Although this is likely to result in an increase in upfront legal costs, it is intended to result in a reduction of overall costs.

The scheme imposes obligations on parties even before they become a litigant. As soon as a person becomes aware

that they "may become" a party to proceedings to which the scheme applies, that person and its legal advisers are under a duty to take "reasonable steps" to preserve all documents which "may be relevant to any issue in the proceedings."

This includes providing written notification to employees, former employees and third parties, such as brokers and local agents, of their duty to preserve documents.

Parties should engage proactively with the scheme and expect the court to do so as well. Parties who can demonstrate that they have embraced the scheme are likely to be looked on favourably by the court, whereas those who do not follow both the letter and the spirit of the scheme may find themselves sanctioned by the court by way of, for example adjournment of hearings, imposition of adverse costs orders against non-compliant parties or even criminal contempt proceedings.

Although parties may initially feel uncomfortable at the idea of turning down the opportunity to obtain extensive document records from their counterparty, it is in reality rare that disclosure turns up highly probative documents which would otherwise not have been produced in the litigation. This concern is likely to be outweighed by the benefits of a more focused and leaner disclosure exercise.

Crystal ball gazing

What then might the future hold for the scheme? As with any new procedural development, teething problems are inevitable and it remains to be seen what issues will come to light as the scheme is trialled. However, initial indications are that the court will take a sensible and purposive approach to the new regime, retaining what is worth keeping from the current rules while piloting the new scheme.

In an industry where arbitration agreements are the most common means by which disputes are resolved, it may not be immediately obvious that the disclosure pilot will have a significant impact on the shipping industry.

However, as arbitration becomes ever more 'legal' in nature and ever more expensive, if the adoption of the scheme leads to a new era of disclosure in court proceedings which reduces the overall documentary burden on litigants and focuses the minds of the parties up front, the English High Court may become a more appealing prospect.

Members are welcome to contact the Managers directly for any further advice and guidance.

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