CONSTRUCTION & ENGINEERING GUIDE

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e-Disclosure - A guide to your obligations

Developments in technology have revolutionised the way in which business is conducted. The increasing use of cloud services, mobile devices and social media have led to a dramatic rise in the volume of day-to-day business communication. The quantity of electronic documents that is now created can, however, become problematic in the context of disputes that reach the English courts.

Whilst this guide has been drafted specifically with domestic litigation in mind, many of the principles discussed apply equally to international arbitration. This guide can therefore be used as a guideline highlighting best practice in the context of international arbitration.

This guide examines the recent reform of e-Disclosure obligations introduced to tackle the demands of modern business disputes and offers practical tips to help you stay ahead of the game.

E-DISCLOSURE OBLIGATIONS IN THE ADVENT OF THE JACKSON REFORMS

Lord Justice Jackson's 2010 Review of Civil Litigation Costs recognised disclosure (and e-Disclosure specifically) as a major burden and source of expense for parties. Unsurprisingly, his review led to the implementation of a new practice direction that deals specifically with disclosure of electronic documents. But what has changed?

Following Jackson's reforms, standard disclosure is no longer the default position for multi-track claims (save for those involving a claim for personal injuries, or where the court orders otherwise).

Under the new CPR 31.5 (also known as the "Menu Option"), disclosure can be dispensed with completely, or restricted to certain issues or a chain of enquiry.

The new CPR 31.5 also provides for a specific procedure for all multi-track claims. Parties to a multi -track dispute are therefore required to do the following:

- file and serve a disclosure report, verified by a statement of truth, not less than **14** days before the first case management conference (**"CMC"**); and
- discuss, and seek to agree with the other party or parties, a proposal for the disclosure exercise that

meets the overriding objective (CPR 1.1), not less than **7** days before the first CMC.

These changes place increased emphasis on project management skills, planning and budgeting. The Court will decide what order to make for disclosure (based on the menu of options in CPR 31.5(7)) having in mind the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly.

When should I start thinking about e-Disclosure?

Do not delay! As soon as litigation is contemplated, it is vital that parties manage their obligations towards disclosure generally, including e-Disclosure. Above all, the preservation of documents is key.

Before the first CMC, you are obliged to:

- serve a Disclosure Report (Form N263) no later than **14** days before the CMC. Additionally an Electronic Documents Questionnaire (Form N264), if used (for more detail on this see below), should be served alongside the Disclosure Report;
- file and serve a budget (using Precedent H) no later than **7** days before the CMC. This must include the budget for disclosure (and e-Disclosure), including the cost of appointing any disclosure specialists;
- meet with the other party or parties to seek to agree a disclosure proposal no later than seven days before the CMC. Ideally, a disclosure meeting should take place significantly before this. Indeed a number of practitioners have suggested that these issues can be addressed at the pre-action meeting;
- file a first Case Management Information Sheet (together with a Case Management Directions Form) no later than **2** days before the CMC; and
- produce a skeleton argument setting out positions on those aspects of case management which have not been agreed.

The Disclosure Report

The Disclosure Report should address:

- what documents exist, or may exist, that are, or may be, relevant to the matters in issue in the case;
- where, and with whom, those documents are, or may be, located;
- how electronic documents are stored;
- estimate costs for different levels of disclosure; and
- proposed directions for scope and form of disclosure for yourself and the other parties.

The Electronic Documents Questionnaire ("EDQ")

The use of the EDQ is not compulsory. However, the wording of PD 31B makes it clear that the Court has a wide discretion to order completion of the EDQ. Used properly, the EDQ has the potential to be a really useful means of "kick-starting" the e-Disclosure dialogue process.

The EDQ covers:

- the extent of a reasonable search (Questions 1-5);
- methods of search (Questions 6-9);
- potential problems with the extent of the reasonable search and accessibility issues (Questions 10-12);
- preservation of electronically stored information (Questions 13-14);
- inspection (Questions 15-17); and
- the disclosure of other parties (Questions 18-23).

Importantly, the EDQ has to be verified by a statement of truth.

TECSA'S RESPONSE TO THE RECENT REFORM OF E-DISCLOSURE OBLIGATIONS

The Technology and Construction Court Solicitors Association (**"TeCSA"**), in conjunction with the Technology and Construction Bar Association (**"TECBAR"**) and the Society of Computers and the Law (**"SCL"**) has spent most of this year developing an e-Disclosure Protocol (**"Protocol"**) which was launched on 1 November 2013.

The new Protocol, including accompanying Guidelines and other useful documents, can be found on the TeCSA website.

Why is the Protocol needed?

TCC disputes are often particularly document heavy. Effective management of your e-Disclosure obligations is therefore key to ensure compliance with cost budgets and to minimise the risk of irrecoverable cost overruns. The Protocol is there to make this process easier, guiding parties through the e-Disclosure minefield.

Where does the Protocol fit in?

Parties to a dispute need to agree how e-Disclosure will be dealt with before the Disclosure Report is filed.

The Protocol can therefore form the agenda for the discussions and meetings that need to take place on e-Disclosure. It is a user friendly document to supplement the more lengthy EDQ and allows for the recording of the parties' agreement on e-Disclosure.

What is the status of the Protocol?

The Protocol does not currently have the status of a court rule or practice direction. It has however, been wholly endorsed by the TCC judges.

The Protocol will be formally adopted for use in the TCC from 1 January 2014.

Be aware that although use of the Protocol will not be mandatory, if you do not have a suitable alternative means of dealing with e-Disclosure, the Court will likely order use of the Protocol.

There is nothing to prevent you from agreeing with the other party or parties to a dispute suitable or case specific modifications to the Protocol (subject to court approval).

The court may also vary the terms of the Protocol if it considers it necessary.

Plans for future reform

The TCC has indicated that present arrangements will be changed so that the first CMC will not take place until 8-10 weeks following the acknowledgement of service. This will allow for an effective use of the Protocol and give a longer lead time for parties to discuss e-Disclosure and court budgets.

PRACTICAL TIPS TO CONSIDER

Preservation of Electronically Stored Information ("ESI")

At the outset of a dispute all disclosable documents must be preserved. It is therefore vital to review your document management policy and suspend your document destruction policy for the duration of a dispute. If ESI is destroyed the Court may draw adverse inferences relating to the reasons for destruction.

Organisation is Key

As soon as litigation is contemplated, you should:

- keep track of all ESI. ESI includes word documents, emails, charts and graphs, social media and data held on mobile devices;
- ensure that any devices containing ESI are not destroyed;
- identify all those who are or may be in possession of ESI and ascertain where ESI is located; and
- let technology do the work. Substantial time and costs can be saved by the use of filters which eliminate obviously irrelevant documents. Electronic service providers usually offer a de-duplication process; duplicate documents are removed prior to the document review stage reducing the number of documents that need to be reviewed.

CONTACTS

Edward Shaw
Legal Director
Construction & Engineering Group
T +44(0)20 7153 7716
edward.shaw@dlapiper.com

Jennifer Price
Associate
Construction & Engineering Group
T +44(0)151 237 4845
jennifer.price@dlapiper.com

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REALWORLD is our interactive online guide to real estate that provides answers to the key questions that arise when entering foreign real estate markets.

The site covers questions related to sale and purchase, real estate finance, leases, construction, planning and zoning, real estate taxes and corporate vehicles. It allows users to compare the way in which issues in any two (or more) different countries are dealt with and help evaluate the possible options.

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Many of our in-house clients are helping us shape the agenda so that it remains topical and relevant. Clients can join the discussion at www.dlapiperwin.com and tell us what topic areas are of interest for access to a master-class programme of targeted updates and educational networking events.

For more information or to request additional information on WIN please contact Richard Norman or Bethany Jennings via www.dlapiperwin.com.

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UK switchboard: +44 (0) 8700 111 111