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Contents

Walker Morris LLP handles a wide range of work for clients with diverse business interests and requirements, including multi-million pound disputes. Core skills encompass UK and international litigation and arbitration, mediation, expert determination or other forms of alternative dispute resolution. Although based in Leeds, most of the firm's UK-based litigation work is conducted through the courts in London. The firm's litigation department covers a broad range of practice areas and types of work, from real estate and banking litigation, commercial contract disputes and employment, through to construction and engineering, intellectual property and corporate and partnership disputes. The team's eDisclosure work encompasses a wide variety of cases across the board.

Authors

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1. Litigation System

The civil litigation system within the jurisdiction of England and Wales is a common law, adversarial system where the default method of resolving disputes is via the High Court (or the County Court for smaller value claims). The High Court is divided into three parts (the Chancery Division, the Queen's Bench Division and the Family Division) and has a number of specialist courts, many of which, as from 4 July 2017, fall within the umbrella jurisdiction of the new 'Business and Property Courts'. The Business and Property Courts encompass the Commercial Court, the Admiralty Court, the Circuit Commercial Courts (formerly the Mercantile Court), the Technology and Construction Court (TCC) and the courts of the Chancery Division, including those dealing with financial services, intellectual property, competition and insolvency.

The litigation process is governed by the Civil Procedure Rules (CPR), and there are various specific guides that apply to the conduct of litigation in particular divisions or specialist courts. There is an appellate system, whereby a decision of the High Court can be appealed to the Court of Appeal and ultimately to the Supreme Court of the United Kingdom, and the decisions of the higher courts are authoritative and binding on the lower courts. The civil litigation system of England and Wales is therefore multi-tiered, but it is not a dual court system (federal/local), as in the United States, for example.

2. Electronically Stored Information (ESI)

The law relating to disclosure of documents (including ESI) derives from both the CPR (and any applicable court guide) and case law. It is subject to continual review and development. The law of disclosure considered in this document is that which applies in respect of larger, 'multi-track' cases. (Simplified rules set out in the CPR apply for smaller cases, and are outside the scope of this document.)

A 'document' for the purposes of disclosure means anything that records information of any description. It is a very wide definition, including not only hard copy, paper records such as contracts, diaries, reports, notes and letters but also electronic documents (or edocuments) such as texts, blogs, tweets, posts and all related metadata, including temporary files, data that might have been deleted, and all other ESI. Where the terms 'document' and 'disclosure' are used within this document, they include edocuments/ESI and edisclosure respectively. It is worth noting that, where a copy document contains annotations or amendments not shown on the original, the copy is itself a separate document for these purposes.

3. Case Law or Rules Relating to ESI

Over the last decade or so, with the exponential growth in the use of electronic devices, a body of procedural rules and case law relating specifically to the disclosure of ESI (known in England and Wales as edisclosure) has come into being.

The main edisclosure rules are contained within the following:

- CPR 31 and Practice Directions (PD) 31A and 31B, including the electronic documents questionnaire (EDQ) which is annexed to PD 31B and available in court form N264;
- privacy-related legislation, which can affect whether and how documents are collected, reviewed or disclosed (see **15 Privacy Statutes & Rules or Regulations**, below); and
- case law.

A two-year mandatory disclosure pilot scheme came into operation in the Business and Property Courts across England and Wales on 1 January 2019. The pilot scheme encompasses new procedural rules, set out in CPR Practice Direction 51U, which are designed to facilitate a new, more co-operative, proportionate and efficient approach to disclosure (which has, historically, been a cost-heavy part of the litigation process). A detailed summary of the disclosure pilot scheme is set out in **4 Discovery/Disclosure of ESI**, below.

The following key cases have been instrumental in shaping CPR 31 and PD 31A and 31B, and comprise authoritative and practical guidance for practitioners and for the courts on how to approach edisclosure in any given case.

Digicel (St Lucia) Ltd & Ors v Cable & Wireless plc & Ors[2008] EWHC 2522 (Ch)
This case decided that edisclosure can extend to the restoration and search of back-up tapes. It also confirmed that proportionality is to be taken into account when additional keyword searches are requested, and that parties should meet early in a case to discuss edisclosure issues, including seeking to agree keywords. Proportionality was also relevant to the question of whether the back-up tapes should be restored and searched. These principles have effectively been incorporated into the CPR (in particular CPR 1 and 31 and PD 31A and 31B), although the procedural rules go somewhat further, and so the law is now more prescriptive than it was when this important case was decided.

(CPR 1 requires the court and both parties to give effect to the 'overriding objective' of dealing with cases 'justly and at proportionate cost'. As part of widespread procedural reforms to the CPR introduced in April 2013, the addition of the words 'and at proportionate cost' embodied the courts' new emphasis – when it comes to disclosure and all other

aspects of case management and procedure in civil litigation in England and Wales – on proportionality of cost, bearing in mind factors such as the amount or value of any money or property involved, the importance of the matter to all the parties, the particular complexity of the matter, and so on. See also CPR 44.)

Earles v Barclays Bank plc [2009] EWHC 2500 (Mercantile)
This case confirmed that anyone practising civil litigation in England and Wales without being aware of and practising the rules on edisclosure is guilty of 'gross incompetence'. The case therefore serves as a salutary warning to litigation lawyers that they risk being guilty of professional negligence if they do not know and properly follow edisclosure rules.

Gavin Goodale & Ors v Ministry of Justice & Ors [2009] EWHC B41 (QB)
This was the first known case in which the parties were required by the court to complete what was then a draft form of the EDQ, which now forms part of the CPR (see the schedule to PD 31B). The case also contains a useful reminder of the general approach to edisclosure that should be adopted, including emphasising the importance of the 'staged' approach to considering edisclosure, which is now codified in PD 31B.9 (3) (g), PD 31B.23 and CPR 31.5 (8) (that is, with disclosure initially being given of limited categories of documents and those categories potentially being subsequently extended or limited, depending on the initial results).

West African Gas Pipeline Co Ltd v Willbros Global Holdings Inc. [2012] EWHC 396 (TCC)
In this case, the court imposed costs penalties for edisclosure failures and highlighted the importance of parties assembling a consistent and complete set of disclosure documents (specifically including ESI) with no duplication, and of enabling a proper review. Compliance with the EDQ now assists greatly with that process.

Mueller Europe Ltd v Central Roofing (South Wales) Ltd [2012] EWHC 3417 (TCC) and CBS Butler Ltd v Brown & Ors [2013] EWHC 3944 (QB)
These are two seemingly contrasting High Court decisions regarding whether or not the edisclosure exercise should be carried out by a specialist external IT consultant. In fact, in any given case, the answer will depend on how best the overriding objective is served. A significant factor will, of course, be proportionality in terms of the cost of the edisclosure consultant's involvement as against the value of the case.

Smailes & Anor v McNally & Anor [2015] EWHC 1755 (Ch)
This case highlighted a particularly important practical quality control issue. The low quality of optical character recognition (OCR) copies of scanned documents brought into doubt whether searches had identified all or most of the keyword-responsive documents. In this particular case, that led to a breach of the disclosure order and emphasised to parties and practitioners alike the need to ensure sufficient quality control when it comes to edisclosure, so that the process does not become vulnerable to criticism, as criticism of a party's searches/disclosure can lead to the process having to be repeated, resulting in significant wasted time and cost.

Pyrrho Investments Ltd & Anor v MWB Property Ltd & Ors [2016] EWHC 256 (Ch) and Brown v BCA Trading Ltd [2016] EWHC 1464 (Ch)
These cases concerned the use of predictive coding, a form of technology assisted review (TAR), which is where, in its simplest form, a sample data set is reviewed by (probably senior) lawyers acting on the case and coded, with that coding then effectively being applied by specialist technology to review the remaining documents. Pyrrho was the first reported case in the courts of England and Wales to approve the use of predictive coding, and acknowledged that it can be particularly useful as it can improve consistency within the disclosure/review exercise and can be at least as accurate as a manual review. In Brown v BCA, the court went so far as to order the use of predictive coding despite a party's objection.

Whilst the courts have been careful to make clear that whether predictive coding is appropriate in a case will depend on the individual circumstances, taking into account proportionality, efficacy and suitability, it seems clear that, in today's technology-driven world, the use of TAR in various forms will become increasingly prevalent.

National Bank of Abu Dhabi PJSC v BP Oil International Ltd [2016] EWHC 2892 (Comm)
The Business and Property Courts, in appropriate cases, now offer the Shorter and Flexible Trials schemes, under which key elements of the civil litigation process are shortened, tailored or even dispensed with altogether, in order that trials can be heard and judgments delivered earlier and at less cost than would otherwise be possible. The recent case of National Bank of Abu Dhabi PJSC v BP Oil International Ltd [2016] EWHC 2892 (Comm) was the first trial to take place under the Shorter Trials scheme. The case is particularly interesting because it was fully resolved within just a few months from commencement of the claim and following a trial of just one day, despite the claim being worth over USD68 million. The case covered the correct interpretation of just two contract documents. The parties agreed that the case could suitably be dealt with under the Shorter Trials scheme, witness evidence was dispensed with and, crucially, there was very limited disclosure. The court praised the parties for this co-operative and commercial approach, and the costs incurred by each party amounted to significantly less than if the case had been fought under traditional rules (where the disclosure exercise can often be one of the most costly and time-consuming stages). This case demonstrates

that the need for extensive disclosure does not necessarily correlate with the value of a claim.

Aircraft Purchase Fleet Ltd v Compagnia Aerea Italiana SPA (2017, unreported)
In this case, a high-value contractual dispute arose between the parties and the matter was listed for a three-week trial. The defendant sought disclosure of documents from 2008 to 2013 concerning the claimant's alleged breach of contract. Although all of the documents sought by the defendant were potentially relevant, the court decided that it was actually appropriate, by reason of proportionality (and despite the substantial value of the claim), to restrict disclosure to edocuments from just 2011, and to those arising from a list of no more than five agreed search terms.

Apart from the CPR and the cases discussed above, various legal bodies have issued a number of reports, guidelines and protocols that are helping to shape the development of edisclosure procedure in England and Wales. Whilst such guidance is not necessarily authoritative and binding, it may be taken into account by the courts, especially where it can assist by demonstrating potential options for resolving edisclosure issues. For example, the Technology and Construction Court Solicitors' Association (TeCSA), the Technology and Construction Bar Association (TECBAR) and the Society of Computers and the Law (SCL) produced an edisclosure pack, including an edisclosure protocol and guidelines, all of which have informed the approach of parties and the courts to edisclosure since their publication in 2013. In fact, the protocol has been adopted by the TCC to the extent that it is now referred to in the TCC Guide and has applied to cases in the TCC since 1 January 2014.

4. Discovery/Disclosure of ESI

The courts of England and Wales are increasingly placing a significant emphasis on alternative dispute resolution (ADR), which encompasses a range of dispute resolution options available over and above litigation/court proceedings, including negotiation, mediation, arbitration, expert determination, and others. Accordingly, ADR is encouraged by various means, one of which is that the CPR contain a number of protocols (compliance with which is enforced via case management and costs sanctions) specifying the pre-action conduct required of parties. In many instances, complying with pre-action protocols and engaging in meaningful ADR attempts will involve the parties agreeing to exchange key evidence and documents – a process which, in practice, can be tantamount to disclosure.

Consistent with the drive to resolve disputes without the parties incurring the time and cost of litigation where possible, the CPR also allow parties to apply to the court for an order that documents which would be disclosable if proceedings were on foot should be disclosed pre-action, if that would be desirable to dispose fairly of the anticipated proceedings, to assist in the resolution of the dispute without court proceedings, or otherwise to save costs. Making an application for pre-action disclosure can be a helpful and efficient tactical step in appropriate cases.

In some circumstances, the CPR and case law provide that the courts may make orders for disclosure against persons who are not (and are not likely to be) a party to court proceedings. Such orders can be made prior to or alongside active court proceedings. For example, CPR 31.17 allows disclosure against non-parties where the documents sought are necessary to deal with the claim fairly or to save costs, and issuing a witness summons under CPR 34.2 can compel a witness to produce documents. A Norwich Pharmacal order (named for the case that established jurisdiction for this type of order) can be granted against a person who will not be party to subsequent proceedings so as to identify another person (for example, a wrongdoer or a potential beneficiary) or to identify the nature of a wrongdoing, who or which will be the subject of subsequent proceedings. However, Norwich Pharmacal orders involve an invasion of privacy and place a burden on the receiver, who may have become involved inadvertently and innocently; they must therefore not be used as a 'fishing expedition', and are an equitable remedy, which means they are issued entirely at the court's discretion.

Another example of a disclosure order made against a non-party is a Chabra order (again, named for the case that established the jurisdiction) whereby the court may order disclosure of documents, ancillary to a freezing order made against a non-party who appears to hold assets on behalf of the defendant. Finally, a bank may be ordered to disclose documents relating to the account of a customer who has been guilty of fraud, to enable a claimant to trace its assets.

In terms of formal disclosure once court proceedings are in process, as soon as a defence to a claim is filed, the court will serve a notice on the parties requiring them to complete and file a directions questionnaire, and will set a date for a costs and case management conference (CCMC). The legal and practical issues of dealing with disclosure must be considered by the parties at this early stage. The directions questionnaire asks for certain information relating to ESI in particular, and the parties are required to discuss and seek to agree an appropriate approach to disclosure (and ideally to agree directions in that regard) and to file their proposed draft directions for the case management of the proceedings along with the questionnaire. CPR 31.5 (5) requires that the parties must, no less than seven days before the first CCMC discuss and seek to agree a proposal in relation to disclosure that meets the overriding objective, at a meeting or by telephone. PD 31B.8 and 31B.9 impose mandatory requirements for communications between the parties before the first CCMC in relation to the use of technology

in the management of ESI and in relation to the disclosure of edocuments.

As mentioned briefly in **3 Case Law or Rules Relating to ESI**,above, the EDQ is annexed to PD 31B and this specifically helps parties to address practical and technical issues relating to ESI. Completion of the EDQ (which may be voluntary or may be ordered by the court – see below) deals in some detail with the following:

- the extent of a reasonable search for ESI (including consideration of appropriate date ranges, the custodians of ESI and what different types of ESI are likely to be involved in the case);
- different search methods (including keyword searches and other types of automated/TAR searches);
- preservation of ESI; and
- accessibility/compatibility of ESI.

Completion of the ESI section of the directions questionnaire and the EDQ will, in most cases, require input from parties themselves, and probably their IT specialists and/or document management/edisclosure consultants, as well as legal representatives.

No fewer than 14 days before the CCMC, the parties are also required to file a Disclosure Report, which provides an outline of their proposed approach to disclosure. The Disclosure Report describes what documents exist or may exist that are or may be relevant; where or with whom they are or may be located; where edocuments are stored; an estimate of the costs involved in giving standard disclosure (including the costs of searching for and disclosing any edocuments); and which disclosure orders will be sought at the CCMC. The Disclosure Report must be signed with a statement of truth. Contempt of court proceedings may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

At the CCMC, the judge will make an order that sets out the case management directions, effectively a timetable of the steps that must be undertaken to take the case to trial. Included within that will be an order for disclosure, which will impose the continuing duty of disclosure and define the scope of the duty with which the parties must comply. In cases involving significant ESI, the disclosure order may require the parties to complete the EDQ, if they have not done so already. Where it is exchanged between the parties, the EDQ must be signed with a statement of truth.

The disclosure order will generally specify the times by which each party must complete its searches for all disclosable documents and give disclosure by serving its List of Documents (Form N265) on the other party or parties. The List identifies all documents that are disclosable, and indicates which of them the party claims to be entitled to withhold from inspection, either because they are privileged (see below for further explanation) or because they are no longer within the party's custody, possession or control. The List includes a disclosure statement that explains the extent of the searches undertaken. Contempt of court proceedings may be brought against a person who makes, or causes to be made, a false disclosure statement without an honest belief in its truth.

The disclosure order usually also specifies the time for inspection of disclosed documents (if it does not, CPR 31.15 contains default provisions on the timing for inspection). Inspection usually takes place by exchange of photocopies of documents, by inspection of originals at a pre-arranged time and location, and/or by electronic exchange, in the case of ESI specifically. Practical and technical details concerning electronic exchange should have been discussed by the parties prior to the CCMC and/or addressed in the EDQ. Under CPR 31.14, a party may inspect a document that has been referred to in a statement of case (for example, the particulars of claim or defence) and certain other documents in the proceedings, such as witness statements.

Where a party suspects that another has not provided full disclosure, it is possible for that party to make an application to the court for specific disclosure of the suspected missing item[s], pursuant to CPR 31.12.

Disclosure Pilot Scheme

As mentioned in **3.1 Case Law or Rules Relating to ESI**, above, a two-year mandatory disclosure pilot scheme came into operation in the Business and Property Courts across England and Wales on 1 January 2019. This pilot scheme, set out in CPR PD 51U, is designed to facilitate a new, more co-operative, proportionate and efficient approach to disclosure.

Under the pilot scheme, the usual menu of disclosure options is replaced by initial disclosure of key documents with the parties' statements of case and, where appropriate, extended disclosure comprising a new list of 'models', ranging from disclosure of known adverse documents only, to wide search-based train of enquiry disclosure. Importantly, there is no automatic entitlement to search-based disclosure in the pilot scheme, or indeed to any form of extended disclosure, and the Disclosure Working Group is clear that the court should not accept without question the disclosure model proposed by the parties. The court may also order extended disclosure using different models for different issues for disclosure in the case.

Another key feature of the pilot scheme is that it expressly sets out more onerous and prescriptive duties for parties and their legal representatives than those contained in CPR Part 31 and PDs 31A and 31B. (The duties are set out at para-

graphs 2 to 4 inclusive of PD 51U.) For example, the duty in relation to the preservation of documents includes obligations to: suspend relevant document deletion or destruction processes for the duration of the proceedings; send a written notification to all relevant employees and former employees which identifies the documents or classes of documents to be preserved and notifies the recipient that they should not delete or destroy those documents and should take reasonable steps to preserve them; and take reasonable steps so that agents or third parties who may hold documents on the party's behalf do not delete or destroy documents that may be relevant to an issue in the proceedings. Each party must confirm in writing when serving their particulars of claim/defence that steps have been taken to preserve potentially relevant documents in accordance with the client's/legal representative's duties of preservation. Regardless of any order for disclosure made, the parties are under a duty to disclose known adverse documents, unless they are privileged.

If/when an order for extended disclosure is made (and following any initial disclosure), one of the steps involved in complying is the provision of a Disclosure Certificate (in the form set out in Appendix 4 to PD 51U). As part of that, the party giving disclosure is required to certify that it is aware of, and to the best of its knowledge and belief has complied with, its duties. There is a note at the end of the certificate which explains that, if the party making disclosure is a company or other organisation, the person signing the certificate should be *"someone from within the organisation with appropriate authority and knowledge of the disclosure exercise,"* and that they will have *"received confirmation from all those people with accountability or responsibility within the company or organisation either for the events or circumstances which are the subject of the case or for the conduct of the litigation, including those who have since left the company or organisation, that they have provided for disclosure all adverse documents of which they are aware."* The role of the person signing is then specified, with an explanation as to why he or she is the appropriate signatory. Proceedings for contempt of court can be brought for signing a false Disclosure Certificate.

The procedure under the pilot scheme is, in short:

Initial Disclosure

When serving their particulars of claim or defence, parties are required to give Initial Disclosure of key documents relied on by the disclosing party in support of the claims or defences advanced in its statement of case and key documents necessary for other parties to understand the claim or defence they have to meet. This obligation could however be dispensed with by agreement, or by the court, and it would not apply where a party concluded that it would involve any party providing more than 1000 pages or 200 documents (whichever is larger).

Extended Disclosure

Within 28 days of the final statement of case each party should state, in writing, whether or not it is likely to request Extended Disclosure (apart from under Model A – see below) on one or more issues. If so, then before the first CCMC the parties must discuss and seek to agree a draft List of Issues for Disclosure and jointly complete the Disclosure Review Document (DRD). 'Issues for Disclosure' are defined at paragraph 7.3 of PD 51U. These are not necessarily the same as the pleaded issues in the case. For example, issues for disclosure may not include issues which are purely questions of law, or issues which need to be decided solely on the basis of witness evidence, and the like. The court will determine, at the CCMC, whether to order Extended Disclosure which may take the form of one or more of the Disclosure Models (importantly, there is no 'default' option):

- model A – Disclosure confined to known adverse documents;
- model B – Limited disclosure. This is essentially Initial Disclosure without limit as to quantify, plus known adverse documents, in accordance with the duty referred to above. There is no obligation to carry out a search for documents;
- model C – Request-led search-based disclosure. This is an order to disclose particular documents or narrow classes of documents in response to requests from the opposing party (similar to the approach often adopted in international arbitration). The obligation to disclose known adverse documents would also apply;
- model D – Narrow search-based disclosure, with or without 'narrative documents'. This is broadly equivalent to standard disclosure. Narrative documents, defined as those which are relevant only to the background or context of material facts or events, would only be disclosed if specifically stated in the order. The obligation to disclose known adverse documents would also apply; or
- model E – Wide search-based disclosure. This is essentially old-fashioned Peruvian Guano, or full train of enquiry, disclosure, which would only be ordered in an exceptional case. The obligation to disclose known adverse documents would also apply.

Disclosure Review Document

Not later than five days before the first CCMC, the claimant must file a finalised single joint DRD (which, in pilot scheme cases, replaces the Disclosure Report and the EDQ). The DRDsets out the List of Issues for Disclosure and proposals for the appropriate model for Extended Disclosure, and shares information about how documents are stored and how they might be searched and reviewed (including with the use of technology, and if so which).

The parties must each file a signed Certificate of Compliance (in the form set out in Appendix 3 to PD 51U) as soon as reasonably practicable after the claimant has filed the finalised

single joint DRD but in any event in advance of the CCMC. Where parties are legally represented, the Certificate of Compliance should be completed by the legal representative.

The Order for Disclosure
At the first CCMC, the court will consider, by reference to the DRD, which of the Extended Disclosure models should apply to which of the Issue[s] for Disclosure (or to all of them).

The court will only order Extended Disclosure where it is persuaded that it is appropriate to do so in order fairly to resolve one of more of the Issues for Disclosure. An order for Extended Disclosure would have to be reasonable and proportionate having regard to the overriding objective including certain factors set out in paragraph 6.4 of PD 51U (the nature and complexity of the issues in the proceedings, the importance of the case, the likelihood of the existence of documents with probative value, the number of documents, the ease and expense of their retrieval, the financial position of each party and the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost).

Where the chosen model requires searches to be undertaken, the parties must discuss and seek to agree, and the court may give directions, on limiting the scope of the searches and the use of software or analytical tools and coding strategies (including to reduce duplication).

Disclosure Guidance Hearing
There are also provisions allowing the parties to *"seek guidance from the court by way of a discussion with the court"* at a Disclosure Guidance Hearing of up to 30 minutes, either before or after a CCMC, concerning the scope of Extended Disclosure or the implementation of an order for Extended Disclosure.

5. Obligations to Preserve ESI

As officers of the court first and foremost, solicitors owe a positive duty to ensure that their clients understand their duty of disclosure (as a matter of case law, professional conduct and under PD 31A.4.4). In many cases, that will be right at the outset of a solicitor's instruction; in other cases the duty might arise as soon as it appears that a matter is becoming contentious, such that litigation might follow. A solicitor's duty is to advise his or her client on the following:

- what constitutes a document and the potential scope of disclosure;
- what is legal professional privilege (and how to avoid waiving that important legal protection – for more information, see below); and
- the duties owed by the client and the solicitor in respect of the preservation of potentially disclosable documents (ie, documents that may be relevant to the matter and could therefore fall within the scope of disclosure).

In terms of additional practical advice, solicitors should advise their clients on the management of existing documents, the need to control the creation and circulation of new documents, and the need to avoid bringing a third party's documents into their possession.

PD 31B.7 specifically requires legal representatives to notify their clients of the need to preserve disclosable documents, as soon as litigation is contemplated, including ESI that would otherwise be deleted in accordance with any document retention policy or in the ordinary course of business. Parties' disclosure obligations include the duty to preserve potentially disclosable documents from the point at which their solicitor advises them, and to disclose documents in accordance with the order for disclosure (which itself specifies the scope of the particular disclosure obligation in any given case).

The scope of the obligation to preserve documents, including ESI, is very wide indeed. In particular, it is categorically not limited to documents that support the particular party's case, but rather should cover all documents that are relevant – or even potentially relevant – to any and all aspects of the case and issues at hand. That is because, whilst the particular extent of an obligation to disclose documents in any given case is specified within the disclosure order that is made at the CCMC (see **4 Discovery/Disclosure of ESI**, above), the duty to preserve is anticipatory to that and it is possible in many cases that the disclosure order will require the parties to give what is known as 'standard disclosure'. More detailed information is provided below, but standard disclosure means that a party is required to disclose the documents on which it relies as well as documents that adversely affect its case, adversely affect another party's case or support another party's case (CPR 31.6). This stems from the fact that, whilst the litigation system within England and Wales is adversarial, the parties' disclosure obligations (and the obligations of the parties' legal representatives, as officers of the court) are nevertheless duties primarily owed to the court.

The obligation to disclose (and, working back from that, the scope of the obligation to preserve) also pertains to all documents within a party's 'control'. That is much wider than just documents within a party's physical possession and includes, for example and non-exhaustively, documents held by subsidiaries, agents, ex-employees, and the like (CPR 31.8).

It is essential to note that these disclosure duties are ongoing and continue until judgment or settlement of the proceedings (CPR 31.11). That means that any new disclosable documents relating to the case must be disclosed on an ongoing basis.

In respect of proceedings which may be commenced in the Business and Property Courts (and therefore fall within the new disclosure pilot scheme), the parties' and legal representatives' specific duties in relation to preservation are set out in PD 51U.

6. Sanctions and Penalties

As explained in **5 Obligations to Preserve ESI**, above, solicitors are required to notify their clients of the need to preserve disclosable documents, including ESI, as soon as litigation is contemplated (or, if instructed after litigation is contemplated, at the point of instruction). Failure to comply could amount to a breach of the professional conduct rules (the Solicitors Regulation Authority Code of Conduct 2011), which could lead to disciplinary action and potentially even being struck off the roll of solicitors. The solicitor could find themselves facing a professional negligence action and/or being on the wrong end of a wasted costs order.

A party's failure to preserve ESI can have serious consequences, and there are numerous possible sanctions and penalties available, including:

- the imposition by the court of a range of costs sanctions;
- the drawing of adverse inferences of fact;
- the striking out of a party's case altogether or in part;
- a court order (and any associated costs sanction) for the forensic recovery of deleted data;
- contempt of court proceedings, which could lead to imprisonment in extreme cases; and
- punishment (including a fine/imprisonment) for committing the common law offence of obstructing or perverting the course of justice.

As noted in **4 Discovery/Disclosure of ESI**, above, the EDQ specifically asks about the preservation of ESI and, when it is exchanged between the parties, it must be signed with a statement of truth. Contempt of court proceedings may be brought where the statement is signed without an honest belief in its truth. A party's failure to give the instruction to those who may hold relevant documents to preserve ESI, or any delay in giving it, is likely at the very least to attract the criticism of the judge.

Judges in civil proceedings have very wide case management powers under CPR 3.1 and, following the significant procedural reforms of 2013, the emphasis is now very much on strict compliance with the CPR, PD and court orders. The court's powers to impose costs sanctions and make a wide range of orders derive from the CPR (see, for example, CPR 3.3 regarding the court's power to make an order of its own initiative, CPR 3.4 regarding the court's power to strike out a statement of case, and CPR 44.2 regarding the court's wide discretion as to costs). Applications and proceedings in relation to contempt of court are dealt with in CPR 81. A failure to comply with court orders can in itself lead to contempt of court proceedings in extreme cases.

7. Timing and Extent of Sanctions

The general duty to preserve potentially disclosable documents (including ESI) arises once litigation is contemplated (it is not necessary for the court to have made a specific order relating to disclosure). The timing is arguably earlier under PD 51U. Failure to preserve documents before that time may lead to the imposition of costs sanctions (under CPR 44 in relation to a party's conduct before commencement of proceedings). In Earles v Barclays Bank [2009] EWHC 2500 (Mercantile), the judge said that there would have to be some clear evidence of deliberate spoliation (ie, destruction/alteration) in anticipation of litigation before adverse inferences could be drawn. Following Douglas v Hello (No 3) [2003] EWHC 55 (Ch), the court's intervention will depend on whether the destruction amounted to an attempt to pervert the course of justice (this principle is taken from Australian case law).

Once the general duty to preserve arises, adverse inferences may be drawn where there is a failure to preserve. This can have a damaging effect on a party's case. The other party may apply to strike out the defaulting party's case on the basis that such conduct means that it is no longer possible for the court to hold a fair trial. There is also a risk of exposure to contempt of court proceedings. In LTE Scientific v Thomas [2005] EW HC 7 QB, Mr Thomas was sent to prison for contempt after deleting files from a computer which the court had ordered him to produce.

As mentioned in **6 Sanctions and Penalties**, above, the court generally has wide case-management powers and discretion as to costs. When and to what extent sanctions or penalties will be imposed by the court will differ on a case-by-case basis.

There is a growing body of case law that deals specifically with applications for relief from sanctions for failure to comply with the CPR, a PD or court order in a disclosure/edisclosure context (where there have been deficiencies in a party's disclosure, including a failure to preserve). Typically, this arises where a party has breached the initial disclosure order (and possibly also subsequent orders, for example granting extensions of time) to the point where the court has made an 'unless' order compelling the party to comply by a certain time, failing which its case will be struck out. Whether or not relief from sanctions will be granted will be assessed by reference to the three-stage test identified by the Court of Appeal in the Denton [2014] EWCA Civ 906 case:

- Stage 1: Is the breach 'serious or significant'?

- Stage 2: If it is, why did the default occur?
- Stage 3: Consider all the circumstances of the case in order to deal with the application 'justly', including:

  (a) the need for litigation to be conducted efficiently and at proportionate cost; and
  (b) the need to enforce compliance with rules, directions and court orders.

- In Micheal & Ors v Phillips & Ors [2017] EWHC 142 (QB), the defendants had failed to disclose documents by the date set in an unless order, and the court found that the failures to provide electronic disclosure and to account for the destruction of data were serious breaches of the order. The defendants' defence and counterclaim were struck out by the court and the defendants were debarred from defending the claims.

8. Costs of Discovery/Disclosure of ESI

The general rule for the recovery of costs incurred in civil litigation in England and Wales (and, as part of that, the costs of disclosure) is that the unsuccessful party will be ordered to pay the costs of the winning party overall (CPR 44.2). However, the court may make any different order it sees fit, as it has a wide discretion.

One area in which a different order might be appropriate is that of disclosure (and, in particular, edisclosure), especially where there is a significant imbalance in the number of documents that the respective parties have, and therefore in the likely cost and complexity of the search and disclosure exercise. In such cases, where one party requests disclosure of documents that are difficult or costly for the other to recover and produce, the court may order that the requesting party should bear some or all of the costs of preserving, searching for and disclosing them. This approach mirrors the US case of Zublake v UBS Warburg LLC, 2003, in which a former employee with relatively few documents required very extensive disclosure, including edisclosure, from UBS. The court apportioned the costs of UBS's disclosure between the parties, thus establishing the principle of 'costs shifting' in this context.

9. Obligations of Parties to Meet and Confer

As mentioned in **4 Discovery/Disclosure of ESI**, above, the legal and practical issues of dealing with disclosure, including dealing with ESI, must be considered by the parties prior to the first CCMC. In particular, CPR 31.5 (5) requires that the parties must discuss and seek to agree a proposal in relation to disclosure that meets the overriding objective, no less than seven days before the first CCMC, at a meeting or by telephone. PD 31B.8 and 31B.9 impose mandatory requirements for communications between the parties before the first CCMC in relation to the use of technology in the management of ESI and in relation to the disclosure of edocuments. For cases proceeding under the new disclosure pilot scheme, PD 51U also imposes certain obligations.

10. Scope of Party's Obligation Regarding Electronic Documents

Prior to April 2013, the CPR usually required parties to give 'standard disclosure' in court proceedings, meaning that a party is required to disclose the documents on which it relies as well as documents that adversely affect its case, adversely affect another party's case or support another party's case. As mentioned earlier, this stems from the fact that, whilst the litigation system within England and Wales is adversarial, the parties' disclosure obligations (and the obligations of the parties' legal representatives, as officers of the court) are nevertheless duties which are primarily owed to the court. Since wide-ranging reforms to the CPR came into effect in April 2013, the court now gives more detailed consideration to the 'menu' of alternative approaches to the duty of disclosure set out at CPR 31.5 (7) (of which standard disclosure is still one). The courts will now increasingly seek to limit the scope (and therefore the cost) of disclosure on a case-by-case basis. See the National Bank of Abu Dhabi v BP Oil International and Aircraft Purchase Fleet cases explained in **3 Case Law or Rules Relating to ESI**, above for examples of this in practice.

Where the order is for standard disclosure, a party is required by CPR 31.7 to make a 'reasonable' search for documents. The factors relevant in deciding the reasonableness of a search include the number of documents involved; the nature and complexity of the proceedings; the ease and expense of retrieval of any particular document; and the significance of any document that is likely to be located during the search. A party's duty is also limited to documents that are or have been in its control.

PD 31B.21 gives examples of factors that might be relevant, specifically in relation to what is a reasonable search in the context of ESI. As well as mirroring the wording of CPR 31.7, PD 31B.21 mentions the following (a non-exhaustive list):

- accessibility of edocuments on servers, back-up systems and other devices or media that may contain ESI, taking into account developments in systems and technology;
- the location of ESI;
- the costs of recovering, reviewing, disclosing and providing inspection of ESI;
- the likelihood of locating relevant, disclosable documents;
- the likelihood/risk of documents being altered or corrupted in the process; and

- the availability of the same documents or contents from other sources.

11. Requirement to Certify that Search Carried Out

As mentioned briefly in **4 Discover/Disclosure of ESI**, above, there are a number of rules requiring a party to certify the scope or completeness of a search for edocuments.

CPR 31.5 (3) requires that a Disclosure Report must be signed with a statement of truth, and must provide an outline of the party's proposed approach to disclosure and describe what documents exist or may exist that are or may be relevant; where or with whom they are or may be located; where edocuments are stored; an estimate of the costs involved in giving standard disclosure (including the costs of searching for and disclosing any edocuments); and which disclosure orders will be sought at the CCMC. A statement of truth is a statement that the facts stated within the document are true; contempt of court proceedings may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Whilst there is no prescribed form of wording for the Disclosure Report and the statement of truth to be used in it, court form N263 (Disclosure Report) was introduced in April 2013 and includes a simple and acceptable form of statement of truth. There are no prescribed rules as to who should sign the statement of truth on the Disclosure Report, but Form N263 seems to envisage that either the party or its legal representative will sign. Careful thought should be given to the appropriate signatory, and consideration of rules relating to the signing of the EDQ and the List of Documents (see below) may assist.

When it is exchanged between parties, the EDQ must be signed with a statement of truth, under PD 31B.11. The EDQ requires a party to give very detailed information about the extent of the search carried out and why that is reasonable, specifically in relation to ESI, as well as that party's proposals for its opponent's/opponents' edisclosure. In particular, the EDQ covers information relating to the custodians of documents; the date range[s] searched; the forms of ESI; the types of searches/automated searches; the types of edisclosure software used or intended to be used; potential accessibility issues; document retention policies that might be relevant; inspection arrangements; and the use of OCR. If the statement on the EDQ is signed without the honest belief in its truth, again, contempt of court proceedings may be brought.

PD 31B.16 requires the person signing the EDQ to attend the first CCMC and any subsequent hearing at which disclosure may be considered, as that person will be responsible and accountable for that aspect of the case. Whilst it is legally possible for the legal representative to sign the EDQ, it might be more appropriate for the party itself – perhaps a senior member of the party's IT team with a full appreciation and understanding of all of the ESI in question and the practical implications of dealing with it – to give that statement of truth and take on that responsibility.

CPR 31.23 provides that the List of Documents must be signed with a disclosure statement, which is akin to a statement of truth as it can also result in contempt proceedings if the statement is signed without an honest belief in its truth. The disclosure statement requires a party to state that it has carried out a reasonable search in accordance with the disclosure order; to explain the extent of that search and how it has been limited (for example, in relation to date range[s], location, categories of documents, edisclosure arrangements, keywords used, and the like); and to confirm the facts that were considered when deciding that the search was reasonable. The disclosure statement also requires the person signing to certify that his/her disclosure duties have been complied with, and to confirm his/her understanding of those duties.

CPR 31.10 (6) provides that the disclosure statement should be given by the party itself, but the rules go on to envisage that it may be appropriate for a legal representative to sign in some circumstances (although examples are not given). Section E3.8 of the Admiralty and Commercial Courts Guide suggests that the person signing should be *"a person who is in a position of responsibility and authority to search for the documents required to be disclosed by that party and to make the statements contained in the disclosure statement."* In a case involving significant ESI, that person will generally be the party itself, and again perhaps a senior member of the party's IT team with a full appreciation and understanding of the ESI, or a director if a corporate party.

12. Form of Production of ESI

PD 31B contains specific rules to be followed in relation to edisclosure, and applies to multi-track cases started on or after 1 October 2010. It applies in respect of ESI specifically, over and above the fundamental general disclosure rules contained in CPR 31 and PD 31A, which are also applicable. PD 51U applies to cases proceeding under the new disclosure pilot scheme.

Most of the key provisions of CPR 31, PD 31A and 31B have already been explained above, and (as mentioned previously) the timing within which production of ESI must be completed will be set out in the disclosure order that is made by the court in each individual case. There are, however, some additional points that arise from PD 31B, relating specifically to ESI, that should be mentioned.

PD 31B.6 identifies a number of principles that should be borne in mind by parties and legal representatives considering edisclosure, as follows:

- edocuments should be managed efficiently to minimise costs;
- technology should be used to assist effective and efficient document management;
- edisclosure should be given in a manner that is consistent with the overriding objective;
- consideration should be given to the appropriate format in which edocuments should be made available for inspection; and
- parties should avoid disclosure of irrelevant documents.

As mentioned earlier, completion by the parties of the EDQ should assist with the practical application of these principles.

PD 31B.31 sets out criteria that should be met when one party is providing ESI to another, unless the court orders otherwise. The rule provides that disclosure data should be set out in a single, continuous table or spreadsheet, with each separate column containing exclusively one of the following types of data:

- a sequential disclosure list number;
- date;
- document type;
- author/sender;
- recipient; and
- disclosure list number of any parent or covering document.

In addition, other than for disclosure list numbers, blank entries are permissible and preferred if there is no relevant disclosure data; dates should be set out in the alphanumeric form '01 Jan 2010' (which is something to watch out for if any of the ESI in question adopts the form [month] [day] [year], which is in particularly common usage in the United States and increasingly so in other jurisdictions); and disclosure data should be set out in a consistent manner (which, ideally, will have been agreed between the parties).

PD 31B.32, 31B.14, 31B.6 (4) and 31B.9 together mean that, at a very early stage in the litigation, the parties are required to consider and co-operate regarding the appropriate format in which to provide edisclosure. PD 31B.33 states that the default position, unless agreed or ordered otherwise, is that edocuments will be provided in their native format (that is, the original form in which they were created), in a manner that preserves metadata relating to the date of creation of each document (see below).

Documents disclosed in their native format contain metadata, which, effectively, is embedded data about the document which is not visible when the document is printed and which is not necessarily visible on screen unless a reviewer specifically tries to access it. Metadata can include a document's properties (such as its date of creation, author and the dates/authors of any amendments made to it) and sometimes tracking data such as amendments made and/or comments made about its content. Parties and practitioners alike must be careful to consider metadata during the edisclosure process because the default position means that all such metadata would routinely be disclosed to the other side. That may or may not be appropriate, depending on the particular case. In particular, some metadata may be privileged from inspection (for more information on privilege and the risks associated with metadata, please see **14 Production or Withholding Production of Privileged ESI**, below).

The main alternative to the provision of edocuments in their native format is provision in 'image format', such as TIFF or PDF files. Image format documents will still contain some metadata, but usually much less.

In many cases, the disclosure of metadata may not be relevant and it may not affect a case either way. In some cases, however, metadata can be crucial (for example, fraud cases or any other matter where the authenticity and/or history/provenance of a document is at issue). In such cases, a party may request that the disclosing party goes beyond the default position and discloses additional metadata or forensic image copies of disclosed documents. PD 31B.28 requires that the requesting party must demonstrate that the relevance and materiality of such metadata justifies the cost and burden of producing it.

Regardless of whether or not metadata/additional metadata is ultimately disclosed, a party's duty to preserve documents includes a duty to preserve metadata. It is therefore always important that original forms of documents are retained intact from the moment that litigation is in prospect.

If and when any edocuments are disclosed that do not contain [all] metadata or that are redacted or altered in any other way, PD 31B.35 (1) obliges the disclosing party to notify its opponent that altered copies are being supplied. The only exception to this rule on redaction (and one which exists for clear practical purposes) is where an alteration to metadata has arisen simply as a result of merely copying or accessing the document itself.

13. Advance Analytical Tools

The CPR provide, right from the outset at CPR 1.4 (2), that active case management to further the overriding objective includes making use of technology. Whilst that is not a specific reference to the use of TAR in the disclosure process, it is nevertheless applicable and authoritative in that context.

A review of recent case law demonstrates that the courts are increasingly willing to endorse the use of specialist technologies to assist in the ediscloure process – especially where this contributes to efficiency and compliance with the overriding objective. We have already seen that the court approved the use of predictive coding in Pyrrho, noting that it can improve consistency within the disclosure/review exercise and can be at least as accurate as a manual review. In Brown v BCA, the court ordered the use of predictive coding despite a party's objection. PD 31B.36 goes so far as to specify that if edocuments are best accessed using technology not readily available to the inspecting party, the disclosing party must co-operate to make reasonable inspection facilities available.

In Amey LG Ltd v Cumbria County Council [2016] EWHC 2856 (TCC), there were nearly 700 boxes of potentially relevant hard copy documents, amounting to approximately 1.4 million pages. Amey's proposal was to scan and electronically disclose documents that it considered relevant, and to offer the Council up to three days of supervised access to the hard copies in a storage facility to review and determine the extent of disclosure it required. The High Court confirmed that it could not criticise Amey's proposed approach, which would clearly limit the time and cost Amey would spend scanning and disclosing electronically. The case is a good example of a practical compromise, using a combined hard copy and technology-assisted approach in the very common scenario where relevant documents comprise both hard copy and edocuments.

Going on to look at some of the more specific rules relating to the use of technology in the search for, culling, processing, review or production of ESI, the general principles at PD 31B.6 provide that technology should be used in order to ensure that document management activities are undertaken efficiently and effectively, and PD 31B.8 requires the parties to discuss the use of technology in the ediscloure context before the first CCMC. PD 31B.9 (3) goes on to specify that one of the matters to be discussed before the first CCMC is the tools and techniques (if any) that should be considered to reduce the burden and cost of ediscloure. In addition to limiting disclosure of documents or certain categories of documents to particular date ranges, to particular custodians of documents, or to particular types of documents, and the use of agreed keyword searches, this includes:

- the use of agreed software tools;
- the methods to be used to identify duplicate documents;
- the use of data sampling (ie, the process of checking data by identifying and checking representative individual documents);
- the methods to be used to identify privileged documents and other non-disclosable documents, to redact documents (where redaction is appropriate), and for dealing with privileged or other documents that have been inadvertently disclosed; and
- the use of a staged approach to ediscloure.

Another matter for discussion is whether it would be appropriate to use the services of a neutral electronic repository for storage of edocuments.

De-duplication is an area in which technology can assist greatly, because de-duplication is another effective method of filtering, so as to encourage efficiency and proportionality within the disclosure process and avoid unnecessary disclosure. It is important to note, however, that many de-duplication technologies do not work on scanned hard copy documents, nor on different versions of the same document that are not absolutely identical. Care should also be taken when it comes to email chains, as there are a number of risks and limitations to email de-duplication technologies (including the risk of losing/overlooking attachments). This is an area in which parties will have to confer, and it may be advisable to take specialist advice from an ediscloure consultant on a case-by-case basis. We have already mentioned the case of West African Gas Pipeline Co Ltd v Willbros Global Holdings Inc. [2012], in which the court imposed costs penalties for ediscloure failures, including inadequate de-duplication of documents.

The part of the EDQ dealing with the disclosing party's method of search includes a section on keyword searches. It also asks the party whether it considers that automated searches or automated techniques other than keyword searches (for example, concept searches or clustering) should be used as part of the process of determining which edocuments the party should disclose and, if so: the process(es) used or to be used (by reference, if applicable, to individual custodians, creators, repositories, file types and/or date ranges); the extent to which the processes have been or will be supplemented by a review of individual documents; and how the methodology of automated searches will be made available for consideration by other parties. It also asks whether attachments to emails, compressed files, embedded files and imaged text will respond to the keyword searches or other automated search, and whether the party is using or intends to use computer software for other purposes in relation to disclosure (and the details of such software, processes and methods). The EDQ also asks for the party's proposals about the keyword or other automated searches that should be applied by the other parties to their own document sets.

There are no provisions or regulations prescribing the analytical tools to be used. It is understood that a key reason for this is that those drafting PD 31B could not (and did not want to try to) anticipate and sensibly provide for every possible future technological development. The appropriateness or otherwise of using TAR at all and/or any particular tool will depend on the circumstances of the case in question.

The approach to disclosure under the new disclosure pilot scheme in the Business and Property Courts is designed to reflect developments in technology. Unsurprisingly, one of the relevant provisions in PD 51U is that the parties are required to discuss and seek to agree on the use of software or analytical tools, including TAR, with a view to reducing the burden and costs of the disclosure exercise.

14. Production or Withholding Production of Privileged ESI

Privilege is a hugely valuable legal right that entitles a client to withhold documents from another party or from the court without any adverse inferences being drawn. The law of England and Wales recognises various different forms of privilege, each of which can arise in different circumstances. For example, legal advice privilege arises where a confidential document has passed between a qualified lawyer and his or her client, and has been created for the purposes of giving or receiving legal advice in a relevant legal context (ie, not where a legal adviser is involved/engaged in a purely commercial or administrative capacity). Litigation privilege arises where a document or communication has been created for the dominant purpose of litigation which is pending, reasonably contemplated or existing. Without prejudice privilege can arise where parties are engaged in genuine attempts to resolve a dispute, to ensure that communications concerning those negotiations are protected from disclosure to the court so that neither party's open position in the dispute is prejudiced. Common interest privilege can arise where a privileged document is disclosed to a third party who has a common interest in the subject matter. In all cases, it is vital that privilege must not be waived, even inadvertently, or this important protection can be lost altogether.

The protection of privilege is outside the scope of this document, but for these purposes the issue of privilege is relevant to completion of the List of Documents (or the Disclosure Certificate in cases which fall within the new disclosure pilot scheme), because privilege is one of the reasons a disclosing party may give in that document to explain his or her objection to the inspection/production of certain documents or categories of documents in accordance with CPR 31.19/the relevant provisions of PD 51U.

In relation to ESI in particular, some metadata (such as tracked changes and/or comments made by in-house counsel) may, in some circumstances, be privileged. There is a risk that disclosure of privileged metadata, even if inadvertent, could waive a party's privilege overall, which could be devastating to a case. To counter this risk, PD 31B.9 (3) (f) and the TCC edisclosure protocol and TCC Guide envisage that the parties may wish to enter into a 'non-waiver agreement', so that disclosure of such data does not amount to a blanket waiver of privilege where the receiving party knows, ought reasonably to have known or has been notified that the disclosure was inadvertent. At the time of writing, however, the use of such agreements in the edisclosure context is untested in the civil courts of England and Wales. PD 51U contains provisions on restricting the use of a privileged document which has been inadvertently produced.

15. Privacy Statutes & Rules or Regulations

Whenever any document or source containing an individual's personal data (this could include emails, document stores, weblogs or social media tweets/posts) is accessed in any way for the purposes of disclosure/edisclosure, consideration will need to be given to all potentially relevant privacy laws. In England and Wales that is likely to include the following (a non-exhaustive list):

- the Data Protection Act 2018 and the General Data Protection Regulation ((EU) 2016/679) (GDPR), which came into force on 25 May 2018;
- the Privacy and Electronic Communications (EC Directive) Regulations 2003;
- the European Convention on Human Rights and the Human Rights Act 1998;
- the Freedom of Information Act 2000;
- the Regulation of Investigatory Powers Act 2000;
- the Investigatory Powers Act 2016;
- potentially the Official Secrets Act 1989; and
- all related case law and guidance.

In addition, disclosing parties may need to take into account individuals' employment contracts or other relevant contractual arrangements, and relevant HR and/or IT policies, and so on.

Whilst it may sometimes be possible to ensure compliance with all relevant laws by obtaining consent to accessing, searching and potentially disclosing data from the individual(s) concerned, in practice it is likely that parties embarking upon a disclosure/edisclosure process will need to take specialist legal advice on all potential privacy issues.

Under CPR 31.19 (1) a person may apply, without notice, for an order permitting him to withhold disclosure of a document on the grounds that disclosure would damage the public interest. This includes the protection of the privacy rights of others. In Durham County Council v Dunn [2012] EWCA Civ 1654, the Court of Appeal referred to a balancing exercise in this regard between the competing rights contained in Articles 6 and 8 of the European Convention on Human Rights (the right to a fair trial and the right to respect for private and family life, home and correspondence).

16. Transfer of ESI Outside Jurisdictional Boundaries

Chapter V of the GDPR sets out the rules for transfers of personal data from the European Economic Area (EEA) to countries outside of the (EEA). One of the ways in which personal data can be transferred outside the EEA is if it is being transferred to a country or territory whose legal framework provides 'adequate' protection for individuals' rights and freedoms for their personal data. 'Adequate' has been interpreted by the Court of Justice of the European Union (CJEU) as meaning 'essentially equivalent'. The European Commission (EC) may find that a third country (which is a country outside of the EEA) ensures such an adequate level of protection by reason of its domestic law or the international commitments or transfer agreements it has entered into in order to protect the rights of individuals.

To date, the EC has recognised Andorra, Argentina, Canada (in respect of commercial organisations), the Faroe Islands, Guernsey, Israel, the Isle of Man, Jersey, New Zealand, Switzerland, Uruguay and the United States of America (limited to the Privacy Shield framework – see below) as providing adequate protection, which means that personal data can be transferred between the UK and these countries and territories without any further safeguards being necessary (decisions to recognise countries and territories in this way are sometimes referred to as 'whitelisting' decisions). An adequacy decision for Japan is expected soon.

The EC has also issued adequacy decisions in respect of two sets of standard contractual clauses for transfers from data controllers to other data controllers established outside the EEA, and one set of standard contractual clauses for transfers from data controllers to data processors established outside the EEA (often referred to as 'the standard contractual clauses' or 'model contract clauses').

The EC also issued Decision 2000/520/EC in respect of transfers to the US that took place within what is known as the Safe Harbor framework. However, on 6 October 2015, this adequacy decision was held to be invalid by the CJEU in Schrems v Data Protection Commissioner, Case C-362/14, [2015] All ER (D) 34 (Oct), and it has now been replaced by the EU-US Privacy Shield pursuant to an adequacy decision adopted by the EC on 12 July 2016. The second annual review of the Privacy Shield was held in October 2018 to see whether it is working. Following the first annual review in September 2017 the EC said that, on the whole, the framework continued to ensure an adequate level of data protection, but there was room for improvement. In the run-up to the second annual review, Members of the European Parliament called on the EC to suspend the Privacy Shield pending full compliance of the US with EU data protection rules. One cause for concern is a new US law known as the CLOUD Act (Clarifying Lawful Overseas Use of Data), which grants the US and foreign police access to personal data across borders. In its report published in December 2018, the EC confirmed that the US continues to ensure an adequate level of protection. The EC does, however, expect the US authorities to nominate a permanent Ombudsperson by 28 February 2019 to replace the one that is currently acting. Earlier in 2018, the Irish High Court referred questions over the validity of the EC's adequacy decisions on model contract clauses to the CJEU in Schrems round 2. A number of those questions refer directly to the Privacy Shield. Facebook was granted unprecedented leave to appeal to the Irish Supreme Court in Schrems round 2. At the time of writing, the appeal is due to be heard in January 2019.

There is also considerable concern over what will happen to personal data flows between the EEA and the UK post-Brexit (and between the UK and the rest of the world). The UK Government has said that it is keen to ensure that data flows continue unhindered. In its white paper on the future UK-EU relationship, published on 12 July 2018, the Government said that the EU's adequacy framework provides the right starting point, but reiterated its desire for an *"extensive agreement on the exchange of personal data that builds on the existing adequacy framework."*

Under the Protection of Trading Interests Act 1980, the Secretary of State can effectively block disclosure of commercial documents/information to overseas courts or authorities where the requirement to disclose infringes upon UK sovereignty or would be prejudicial to the UK's security or to the UK Government's relations with other Governments.

In terms of civil litigation and edisclosure specifically, one concern is where data hosted on any electronic system (including what is known as a 'cloud') is actually stored – that is, where the servers are located. Most of the big server companies have EU or UK server farms because of the restrictions on transfers outside the EEA. However, organisations need to be careful of the small print – server companies' terms and conditions often provide for 24/7 technical support, which will be provided on a 'follow the sun' policy. That means that if you ring for technical support at 2am in England (for example, to help with accessing edocuments), the person you speak to will be based somewhere overseas where it is still working hours, such as the US, the Philippines, India, and so on. If that person accesses personal data on the server so that they can see it on their screen, that personal data has been transferred to whichever jurisdiction they are in and the issue will be whether there are appropriate transfer mechanisms in place.

The transfer of ESI outside jurisdictional boundaries is a highly specialised area, and one in which the legal landscape is developing rapidly to keep up with an increasingly globalised commercial world and rapid growth in online technologies. Any person involved in an edisclosure exercise

that potentially involves the international transfer of ESI, including but not limited to the transfer of ESI to a foreign jurisdiction for use in civil litigation, should seek specific expert legal advice.

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