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IT LAW TODAY article on the December 1, 2006 amendments to the American Federal Rules of Civil Procedure

On the 1 December new rules come in to force covering "electronic disclosure" in US federal courts. The new rules cover how to treat the electronic documents that constitute the vast bulk of information involved in corporate litigation. One of the things this will affect is the preservation of electronic data, which has confused many Corporates as to what they actually need to do and what they need to preserve. Lawyers will also have to engage earlier in the process and discuss e-discovery. There are also a number of issues around privilege that need to be considered.

The article could discuss what these changes are and what they will mean for businesses. Explaining what effects this might have on this side of the Atlantic, what happens if your parent company is in the US, or you have subsidiary over there, do you also need to comply. In October last year in the UK new rules came in to force regarding e-disclosure. However we are likely to see harsher punishment and fines in the US for those that don't comply.

Article – FINAL DRAFT

On 1 December 2006, the American Federal Rules of Civil Procedure (FRCP) were amended to take into account some of the challenges associated with the disclosure of Electronically Stored Information (ESI), otherwise known as electronic disclosure or e-disclosure. The purpose of this article is to examine the changes and assess the impact they might have on UK businesses, particularly those with connections to the US. In particular the issues surrounding a company's obligation to preserve and produce ESI will be examined in an attempt to bring clarity to an at times confusing situation. What is certain is that lawyers will need to become far more au fait with computer information technology and understand the make up of their client's "data retention architecture". Without input from suitably qualified third parties, this might be a significant challenge to some practitioners.

Most people's definition of ESI will refer to electronic data, such emails, Word, Excel, PowerPoint or MS Project files. Collecting this information from a variety of locations, such as laptops, central servers and back-up systems, is complex enough, but ESI can also include the data stored on mobile phones, personal digital assistants (PDAs) and pagers. It can also include hidden data, such as "metadata", system information and deleted files. Finally, instant messaging (IM) is also within the remit of ESI and may need to be disclosed. Small wonder then that techno-savvy lawyers will be at a distinct advantage in the so-called "meet and confer" phase and may be able to obtain distinct advantages over their less technically literate opponents.

Two of the FRCP amendments are similar in nature to the changes made in October 2005 to the English Civil Procedure Rules (CPR), in that it is now mandatory for the parties to have early discussions on e-disclosure issues and parties must now declare those data sources they are not going to review for relevant material. Companies might want to amend their litigation strategy to take account of these changes and should certainly incorporate an "early look" at the e-disclosure process into their case preparation efforts. The evidence from this last year would suggest that in England these changes to the CPR have yet to have a significant impact. In contrast, the US system – with its more advanced case law and in particular the recent trend of the courts imposing heavy sanctions and penalties on defaulting parties – could prove to be a less tolerant environment for those companies who are slow to embrace the new way of working.

The main thrust of the remaining amendments is to attempt to apply some proportionality to the preservation and production processes. For example the new rules provide "limited protection" against sanctions for a party's inability to provide relevant ESI lost as a result of the good-faith "routine modification, overwriting and deletion of information that attends normal use". This concept was called "Safe Harbor" during the drafting of the rules, but this label has gone from the

final version, possibly as an acknowledgement that the rule actually offers very little protection from sanctions. As this concept has yet to be explored and tested by the US courts, for now the recommended approach would be to place a “litigation hold” on all such business practices as soon as it can be reasonably identified that there is the possibility of litigation. The mind-set of juries appears to be that companies always have a nefarious reason for deleting data and the punishments flow accordingly.

The other main attempt to reduce the burden of e-disclosure is to enable clients to exclude “not reasonably accessible” data sources from the scope of the production process. Again, this approach has yet to tested by the US courts, and until the case law emerges, lawyers will need to have a wealth of technical information at their fingertips to argue as to the accessibility or otherwise of ESI. Remember these arguments might well be conducted in front of Judge who is also coming to terms with a new, complex and rapidly changing environment. The early indications in this area, seem to be that Judges will tend towards a “sampling” approach, in effect forcing companies to at least have an initial stab at revealing all the identified data sources.

That said, the rule changes are in effect trying to encourage a “two-tier” methodology for data production, with the “readily accessible” data being provided first and the more difficult (and costly) information only being produced if it can be proved that it is required. In advancing and countering the arguments for a two tier approach, lawyers will need to demonstrate their grasp of the technologies involved and the relative ease (or otherwise) that information can be retrieved, and the associated costs. The principle of cost sharing is associated with these debates, as lawyers will try to convince a skeptical judge that the production burden is onerous and should be bourn (at least in part) by the requesting party.

As part of the new approach to the “meet and confer” process, the opposing parties must also agree the format they will use to exchange data. This seemingly innocuous requirement also has the potential for complex technical discussions. The party requesting production has the right to specify the manner in which the data is produced and if they choose not to exercise that right they will have to accept the default selected by the producing party. The producing party can challenge the proposed format if they consider it would be unduly burdensome. However, they are expressed forbidden from effectively degrading the information by making it less searchable than it was to start with.

A final part of the attempt to obtain a more consensual approach revolves around legally privileged documents. The rules recognise that a perennial problem with the large scale volumes associated with e-disclosure is the inadvertent production of privileged documents. To this end they encourage lawyers to consider entering into agreements over procedures for reviewing and producing documents without waiving privilege or work product protection. The rules provide two examples, called “quick peek” and “clawback”, but in practice their effectiveness may be limited.

In summary, companies and lawyers engaged in – or that might become involved in – litigation in the US should plan early and extensively for the disclosure process. This may require detailed technical assistance so they can carry the argument for their approach quickly and understand the implications of the production process. They should be wary of loosing any control over privileged documents and above all embrace the thrust of the new approach before they (inadvertently or by default) fall foul of the US courts and/or before a more techno-savvy opposition gains an obvious advantage

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