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Alert

Energy & Natural Resources

Dispute resolution for the energy and natural resources sector – the new English court disclosure regime – wholesale cultural change?

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Many contracts in the energy and natural resources industry provide for disputes to be resolved before the English courts. Industry participants select this forum for a variety of reasons including its reputation as an efficient and robust system, the quality of (specialist) judges, the value precedent case law provides and in some instances because of its neutrality in an international market. However, one feature of litigation in the English courts that has, increasingly, attracted criticism is the process of disclosure. This client alert summarises the key changes contained within the new disclosure pilot scheme and identifies areas where industry participants may need to consider changes to their day-to-day business processes in contemplation of litigation.

Disclosure as a concept varies greatly from jurisdiction to jurisdiction. In fact, many systems of law do not have mandatory disclosure regimes. For some foreign companies litigating before the English courts, it will be an anathema to be required to provide documents that are harmful to that party's own case.

Further, many believe that disclosure is now more labour intensive and requires an ever increasing amount of time and costs. The volume of data to be processed in disclosure has steadily increased, with individuals now frequently sending or receiving hundreds of emails, texts or chats per day. Cases can involve disclosure of hundreds of thousands of documents. A system of rules that does not embrace or deal efficiently with the numerous, rapid digital and electronic forms of communication used in the commodities sector, for example, will likely be inadequate and unpopular with users. Inefficiencies in the disclosure process are also believed to result from too little communication between parties early in proceedings and from excessive searches being conducted due to insufficient focus on the specific issues in dispute.

At a time when there are various alternative means to resolve disputes, most notably international arbitration, that typically involve more limited disclosure obligations, the default standard disclosure option often adopted in English court proceedings has by comparison become onerous and costly.

To address these criticisms, in July 2018 the Disclosure Working Group presented a new set of disclosure rules (the "**New Rules**") with the expectation that, if deemed a success, the New Rules will revise the current system (the "**Existing Rules**"). A pilot scheme for testing the New Rules commenced on 1 January 2019 in the Business and Property Courts of England and Wales. This includes the Commercial Court, in which many energy and commodities cases are heard. The scheme will run for two years, and will apply to all claims (with a small number of exceptions[1]) in these courts that exist or come into existence during that time.

The New Rules present an important and significant development for all parties litigating in these courts and reflect, amongst other issues, the following underlying themes:

- First, although standard disclosure goes beyond what is required in many cases, there is insufficient engagement with the flexibility already offered by the Existing Rules;
- Second, oversupplying insufficiently relevant documents can be just as counterproductive as failing to disclose relevant information; and
- Third, front loading for disclosure by thinking and communicating earlier in the matter, including engaging with the greater oversight and case management powers of the judiciary under the New Rules, should result in greater time and costs savings later in the execution of disclosure.

This alert summarises the key changes under the New Rules as compared to the Existing Rules, highlights the consequences of these changes, and identifies areas where industry participants may need to consider changes to their day-to-day business processes or the process adopted in anticipation of litigation when using the English courts to resolve disputes.

	New Rules	Reference	Existing Rules
Underlying principles	The New Rules set out a number of underlying principles, indicating what they are seeking to achieve. These can be summarised as: • Close cooperation between the parties and the court will enable greater efficiency; • Disclosure will be less burdensome and more valuable if tailored to specific issues in dispute; • Disclosure should comprise no more than is reasonable and proportionate to achieve a fair outcome; • Data forms of all variety should be handled efficiently. Document expressly includes information stored on servers or back-up systems, 'deleted' information, metadata, text messages, social media, voicemail, audio or visual recordings. **Comment** • The underlying principles reflect the challenges that have been experienced by industry and users of the English courts and that have driven reform. Value and efficiency seem to be the touchstones of the New Rules, which are aimed at ensuring a disclosure process suitable and fit for the particular dispute. If embraced, this will be welcomed by industry participants who want to ensure costs are spent both efficiently and effectively.	PD51U, paras. 2.3, 2.4, 2.5 and 2.6	Endorses the overriding objective of dealing with cases justly at proportionate cost.
Document preservation	The duty to preserve documents has been extended: • All relevant current and former employees must be asked to preserve relevant documents, and be given an explanation of what are relevant documents; and • Reasonable steps must be taken to ensure that agents or third parties preserve documents held on a party's behalf. The parties must confirm in writing that steps have been taken to preserve relevant documents when serving particulars of claim or defence. Likewise, legal representatives must notify their client of its duty to preserve documents, and obtain written confirmation from their client that it has complied with this duty. **Comment** • The duty to contact former employees raises practical questions, especially where such employees may no longer be under continuing duties, including confidentiality. • Companies should consider whether employment contracts and exit arrangements require adjustment to ensure collation of documents and/or ongoing duties of confidentiality and cooperation. • The use of agents or intermediaries in countries all over the world is commonplace in the energy and natural resources sector. Such jurisdictions may have very different concepts of document retention and disclosure. Ensuring the compliance of agents or third parties may require additional contractual obligations to be expressly included in such arrangements, as well as time and effort to explain what is required should litigation arise.	PD51U, paras. 3.1(1), 3.1(2), 4.2, 4.3, 4.4, 4.5	The duty to preserve relevant documents arises from the moment litigation is contemplated, but does not extend as far as the New Rules in respect of former employees or third parties.
Initial disclosure	The New Rules require (subject to certain qualifications – see below) any statement of case[2] to be accompanied by an Initial Disclosure List of Documents and copies of the key documents: • On which a party relies; or • That are necessary to enable the other side to understand the claim or defence they have to meet; or • That are referred to in the statement of case. However, this Initial Disclosure is not required: • Where it would exceed either 200 documents or 1,000 pages. For complex cases this appears to be a relatively low threshold. However, documents already provided (e.g., by pre-action disclosure or with a letter before action) or that are in (or have been in) the other party's possession are excluded.[3] • Where the parties agree to opt out of or defer Initial Disclosure. • Where a party applies to the court to dispense with Initial Disclosure on the grounds of disproportionate cost or undue complexity. • Where the court, on its own initiative, dispenses with Initial Disclosure.	PD51U, para. 5	The only requirement to disclose documents with a statement of case applies where a claim is based on a written agreement, that written agreement must be disclosed.

	New Rules	Reference	Existing Rules
Initial disclosure *continued*	Note that when serving outside the jurisdiction, no Initial Disclosure is required until the defendant files an acknowledgment of service. This is important for those within the energy and natural resources industry where many cases have an international aspect. In giving Initial Disclosure, each party is required to: Describe how the documents making up the Initial Disclosure were identified, e.g., what searches were undertaken. Although there is no need to run any searches, any relevant results of searches already completed must be included; and Provide all documents in electronic form unless otherwise ordered or agreed. **Comment** • Initial Disclosure is one of the elements aimed at encouraging earlier consideration of the key documentation for the dispute. In many cases parties will be well prepared for the proceedings and the collation and presentation of key documents will cause little extra work. However, in an urgent situation, such as to protect a time bar, the requirement to front load disclosure is likely to be an unwelcome additional requirement and not an issue on which the parties are likely to reach agreement. • Opting out of Initial Disclosure will certainly appeal to a number of parties, whether as a matter of strategy or to reduce the early documentary burden. However, it should be noted that the court may, at the case management conference ("CMC"), require justification and can set the agreement aside. • The New Rules necessitate detailed records of exactly what steps have been taken to prepare disclosure and comply with the New Rules, as soon as a dispute is likely to arise. Audit trails are advisable to record all elements including preservation, document retention, the searches undertaken and contact with former employees or agents.	PD51U, para. 5	Although in practice work on disclosure might be commenced earlier, there is no requirement for the parties to address disclosure until 14 days before the first CMC, when filing a disclosure report. Communication between the parties is only required thereafter.
Known adverse documents	The ongoing duty to disclose adverse documents now extends only to known adverse documents, which must be disclosed unless they are privileged. Where such documents are known to exist but cannot be located, this fact must also be disclosed. • Known means an actual awareness. For companies, it is the awareness of any person with accountability or responsibility for the circumstances that are the subject of the case (whether currently employed or not). Enquiries must be made to ascertain the knowledge of former employees; and • Adverse means that the document or any information within it contradicts or materially damages the disclosing party's contention or version of events, or supports such contention or version of events of any opposing party. Known adverse documents must be disclosed either at the same time as Extended Disclosure is given (see below) or, where no Extended Disclosure is ordered, at the latest 60 days after the first CMC. Any adverse documents discovered after such time must be disclosed without delay. **Comment** • Ascertaining the knowledge of former employees may cause practical difficulties. The obligation is to make enquiries of any former employee "with accountability or responsibility" for the subject of the case. In a sector where relationships between commercial entities can last years, but staff turnover is not unusual, it will be a question of ascertaining carefully whose confirmation is required for the specific issues in dispute. This may be problematic if departures have not been on good terms or former employees now work for competitors. Again, scrutiny and, potentially, adjustment of employment contracts and exit arrangements may be required.	PD51U, paras 2.7-2.9, 3.1(2), 3.4, 9.1, 9.3, and 12.5.	Under the Existing Rules, no distinction is made between known and unknown adverse documents. All adverse documents must be searched for and disclosed (unless privileged or where disclosure would damage the public interest).
Issues for disclosure	Under the New Rules, where Extended Disclosure is sought the parties must supply the court with a List of Issues for Disclosure. This must include every issue on which the court needs to see contemporaneous documents to give a fair judgment. The list must specify what model of disclosure is considered appropriate for each specific issue. The parties are obliged to attempt to reach agreement on this list in advance of the first CMC. Where such agreement cannot be reached, the list must record the matters in dispute for determination at the CMC. **Comment** • The List of Issues for Disclosure is another front-loading element of the New Rules. It requires a far more forensic examination of the pleadings earlier to identify precisely and expressly which issues will require disclosure. • It also forms the basis of the parties' discussion and any court order as to the scope (or model) of disclosure required for that issue. In this way, the New Rules seek to ensure documents produced are tailored far more specifically to the issues in the case. If properly embraced and policed, the List of Issues for Disclosure may serve to significantly reduce the time and costs of the disclosure process.	PD51U, para. 7. The Disclosure Review Document ("**DRD**") sets out the form to be used. See PD 51U, Appendix 2	Although the court has power to order disclosure on an issue-by-issue basis, the requirement to provide an issue-by-issue breakdown is new.

	New Rules	Reference	Existing Rules
Extended Disclosure	The New Rules introduce the concept of Extended Disclosure. In essence, any disclosure beyond Initial Disclosure and the ongoing duty to provide known adverse documents **must be requested**, using the DRD and specifying the Disclosure Model sought for each Issue for Disclosure. There is no presumption of any entitlement to Extended Disclosure. The merits of each Extended Disclosure request will be assessed against the overriding objective of dealing with cases justly at proportionate cost and with regard to: • The nature and complexity of issues in dispute; • The importance of the case, including any non-monetary relief sought; • The likelihood of existence of relevant documents; • The ease and expense of any particular search; • The financial position of each party; and • The need to deal with the case expeditiously, fairly and at a proportionate cost. The party seeking disclosure must persuade the court that these criteria are met. One of five models of Extended Disclosure may be ordered for any individual Issue for Disclosure. In principle, each party could be ordered to provide disclosure by reference to different models and the disclosure order may provide that only one party is to give disclosure on any particular issue. The five models can be summarised as: **Model A: No order for disclosure**: No further disclosure, save for known adverse documents. **Model B: Limited disclosure**: Key documents relied on expressly or impliedly, plus key documents required for any other party to understand the case they have to meet. Relevant results of previous searches must be disclosed, but there is no need to run any additional searches. It appears that this model is very similar to the test for Initial Disclosure and may not require any additional documents, except to the extent that documents not available at the time of Initial Disclosure, have come to light. **Model C: Request-led search-based disclosure**: This comprises relevant documents that correspond to specific requests made by a party and that are either agreed or ordered. Requests should be focused and concise (i.e., not for "any or all documents relating to…"). To comply, a disclosing party must conduct a search, the scope of which may be described in a disclosure order. **Model D: Narrow search-based disclosure, with or without narrative documents**: This is akin to standard disclosure under the Existing Rules, except that the search must be referenced to a specific Disclosure Issue. Any document that is likely to support or adversely affect any party's claim or defence must be searched for and disclosed. The disclosure order should specify the limits of any searches (which must be reasonable and proportionate). Narrative Documents (explained below) will be excluded unless expressly requested. **Model E: Wide search-based disclosure**: This only applies in exceptional cases, for example for allegations of dishonesty. It is similar to Model D but extends further to documents that, although not likely to support or adversely affect any party's case, may lead to new lines of enquiry that may result in further requests for disclosure. Narrative Documents (explained below) must be searched for and included unless otherwise ordered. Narrative Documents are a new concept covering documents that are not pivotal to any specific Disclosure Issue, but are of value in explaining the background and context of material facts or events. **Comment** • It is suggested that Model C is likely to be the favoured option for many parties under the New Rules, where parties are reluctant to forego Extended Disclosure for fear of missing something within the other parties' documents which might assist their position. Model C is also as likely to be a popular option due to its similarity with the disclosure regime under the International Bar Association Rules on the Taking of Evidence in International Arbitration (the IBA Rules), frequently adopted in international arbitrations around the world. • No doubt as part of the drive to reduce time and costs in substantial disclosure exercises, the onus will be on any party requesting Model D or E to explain why Model C would not be sufficient.	PD 51U, paras. 6 and 8	The courts are empowered to be flexible in making disclosure orders[4], including by specifically tailoring the disclosure for individual issues or giving directions as to specific searches. However, in practice this flexibility is rarely used, with parties or the court typically defaulting to standard disclosure. No specific consideration is given to Narrative Documents.

	New Rules	Reference	Existing Rules
Additional duties of clients and legal representatives	The New Rules impose additional express duties on both the parties and their legal representatives including to: • Act honestly in disclosing and reviewing any other party's disclosure; • Conduct any searches in a conscientious, responsible manner; and • Use reasonable efforts to avoid the disclosure of irrelevant documents. Legal representatives must confirm that they have advised their clients in relation to these duties when serving particulars of claim or a defence. **Comment** • The commodities sector uses many different forms of communication, from the most obvious emails and telephone calls to complex trading platforms. Modern day disputes can potentially involve a large variety of data forms. Although the New Rules do capture all possible data formats, the focus of disclosure on relevant information only, and the express obligation to avoid disclosure of irrelevant documents, might remove some of the extensive time and costs often associated with standard disclosure and disclosure of a vast number of documents that are only of passing relevance to a dispute. • As explained above, maintaining a comprehensive audit trail of all steps and action taken in respect of disclosure will be vital for those individuals required to expressly confirm compliance with the New Rules.	PD51U, paras 3.1(4), 3.1(5), 3.1(6), 3.2(4), 10.9 and Appendix 3	*Duty to act honestly* The Existing Rules put the obligation as a negative i.e. not to act dishonestly. *Irrelevant documents* Parties are to disclose relevant documents, but there is no express duty to prevent irrelevant documents being disclosed.
Additional duties for legal representatives	The New Rules introduce obligations on legal representatives in addition to those mentioned above, including to: • Take reasonable steps to advise their client on its disclosure duties and assist in complying with the same; • Liaise with any other party's representatives to achieve reliable, efficient and cost-effective disclosure, using technology; this can include agreeing, or at least attempting to agree, the use of technology assisted review, search limits, the identification and handling of narrative documents and the approach and format for production; and • Satisfy themselves that any claim to privilege by their client is properly made and is sufficiently explained. **Comment** • Although many legal representatives will already have been implementing a number of these provisions, as a matter of practice it will now be important for legal representatives and clients alike to be aware of and to document carefully compliance with the New Rules.	PD51U, paras. 3.2(2) and 3.2(3) PD 51U, para. 9.6; DRD section 3, appended to PD 51U as Appendix 2. PD51U, para. 3.2(5)	The Existing Rules require the parties to consider many of the points on which agreement is now required. However, there is a change of emphasis, from voicing disagreement to requiring consensus. There is no express duty on legal representatives to satisfy themselves that a client's claim to privilege is correct under the Existing Rules.
Guidance hearings	If the parties have reached an impasse in agreeing disclosure (before or after the CMC), they can apply to the court for a short (maximum 30 minutes) guidance hearing. The court may make orders at such a hearing. The parties must show that they have already made a real effort to find agreement prior to applying for the guidance hearing. The hearing must be attended by a legal representative in charge of disclosure. **Comment** • Satellite disputes about disclosure are common in litigation and can lead to extended and costly correspondence. If deployed sensibly, guidance hearings may provide an effective means to resolve such issues.	PD15U, para 11	No equivalent to this concept currently exists.

	New Rules	Reference	Existing Rules
Use of technology	The New Rules cover matters such as disclosure in native formats, deduplication and OCR searchable data formats. The court is entitled to make orders addressing the use of specified software or analytical tools and the format of documents for disclosure. It can hold parties to account by requiring reasons for their preferred approach. As an example, parties will have to explain any decision not to use technology-assisted review in cases involving more than 50,000 documents. **Comment** • The New Rules require that parties must engage IT forensic expertise as is needed. Where a court orders the use of technical assistance that is not already at a party's disposal, the cost may be significant. • Parties should consider whether their document retention and management policies need adjustment or updating in light of the focus within the New Rules on the use of technology to promote efficient disclosure.	PD 51U, para. 13 and section 3 of the DRD; PD 51U, paras. 9.6(3) and 9.7; DRD, section 3	The Existing Rules regulate the handling of electronic documents, but the New Rules go further in requiring consideration of, and agreement on, the use of technology. The Existing Rules address only the need to achieve time and cost savings by the disclosing party, not the receiving party.
Privilege and confidentiality	The New Rules include an express right to redact a document for privilege and/or if it is irrelevant to the issues in the proceedings and confidential. However, the disclosing party must: • Explain why the redactions were made; and • Confirm that the redactions were reviewed by a legal representative with control over the disclosure process. A disclosing party is also permitted to withhold documents on the basis of any right (other than public interest immunity) or duty to do so, but must: • Describe the documents, part of document or class of documents withheld; and • Explain why it is being withheld. Many commodities disputes involve confidential information, such as pricing data. The court now has the express power to order the disclosure of confidential information to a "limited class of persons". Any party can apply for such order, or for a variation or setting aside of the same. **Comment** • As a matter of practice, the redaction of material based on privilege or irrelevance and confidentiality is common. The question is whether the now express right will encourage parties to seek to redact more widely, and whether this will give rise to problems in understanding the meaning of disclosed documents.	PD51U, paras 14, 15 and 16	Under the Existing Rules inspection may be witheld where privilege applies or where any other right or duty entitles a party to withhold inspection. There is no express rule empowering the court to make an order for disclosure to a limited class of persons.

Conclusion

Only time will tell whether the changes introduced under the New Rules will be successful. However, what is clear is that the changes can only bear fruit if the parties, their legal representatives and the courts are willing to make the "wholesale cultural change" sought by the Disclosure Working Group. The New Rules encourage parties to be more robust in setting justifiable limits to their disclosure, and the parties and their legal representatives should not be afraid to follow this lead. If a more proactive, focused, specific approach to disclosure is embraced and leveraged by technology[5], the new system may realise at least some of its aims including lowering the overall cost and effort involved in disclosure in the English courts.

Endnotes

[1] Including proceedings within the Admiralty Court, a competition claim as defined in Practice Direction 31C, proceedings within the Shorter and Flexible Trials Schemes and others.
[2] Except Part 8 claim forms or claim forms served without particulars of claim.
[3] Such documents must, however, be included in the Initial Disclosure List of Documents.
[4] CPR 31.5(7) and (8).
[5] Reed Smith's Global Solutions and Client Technology teams can offer specialist resources and market leading technology to assist throughout the disclosure phase of the dispute.