



# International eDiscovery

Seamus E. Byrne

Australian Lawyer and Chief Operating Officer, eDiscovery Tools

LL.B, CISSP, CCE, EnCE, MCP, Security+

## **Please Read - Disclaimer**

This presentation is made available by Seamus E. Byrne, an Australian legal practitioner, for educational purposes only. Content is not to be used as legal opinion or as a substitute to qualified matter-specific legal advisory within your jurisdiction. All endeavours have been made to ensure content accuracy as at April 2008.

**For the Computer and Enterprise Investigations Conference (CEIC) 2008 – US English**

# Today



- **Preliminary**
  - Your Presentation
  - Your Presenter
- **Key Drivers**
  - Globalization
  - International Litigation
- **Key Considerations**
  - Choice of Law
  - Corporate Relationships
  - International Evidence Collection
  - Blocking Statutes
  - Foreign Judgment Enforceability
  - Data Protection and Privacy
  - Privilege
  - Commencing Proceedings
  - EDRM Workflow

# Today

## ■ Key Jurisdictions

- European Union (EU)
- United Kingdom (England and Wales)
- Canada
- Singapore
- Hong Kong SAR
- India
- Russia
- Australia

## ■ Current eDiscovery Rules – Comparative Table

## ■ Hypothetical Analysis

# Preliminary Your Presentation

## ■ Coverage

- International (i.e. Beyond the United States)
- Brief Comparative
- Foundation Principles
- Recent marketing campaign of [Baker & McKenzie](#)
  - *“Any lawyer can read the local laws; you have to be local to know them”*

## ■ Primary Audience

- American Litigators and Corporate Counsel
- Computer Forensic Practitioners

# Preliminary

## Your Presenter – Seamus E. Byrne

### ■ Yesterday

- Hometown: Gold Coast, Australia
- Product of the ‘tech boom ...and bust’
- Youngest Lawyer **ever** admitted to practice in Australia (19 years, 6 months)
- Co-drafted forthcoming Federal Court of Australia Practice Note

### ■ Today

- London and Sydney
- Experienced **computer forensic expert** (CISSP, CCE, EnCE)
- eDiscovery advisor and counselor to a number of S&P/ASX 200 companies
- Chief Operating Officer, eDiscovery Tools

# Key Drivers

## Globalization

- **Global economy**
  - Cross-border business
  - Cross-border communications
- **Boom in corporate mergers, acquisitions and collapses**
- **Common for a mid-size company to be a subsidiary piece of a:**
  - Complex;
  - Inter-related; and
  - Multi-jurisdictional **corporate structure puzzle**

# Key Drivers

# Globalization

## ■ Financial Markets

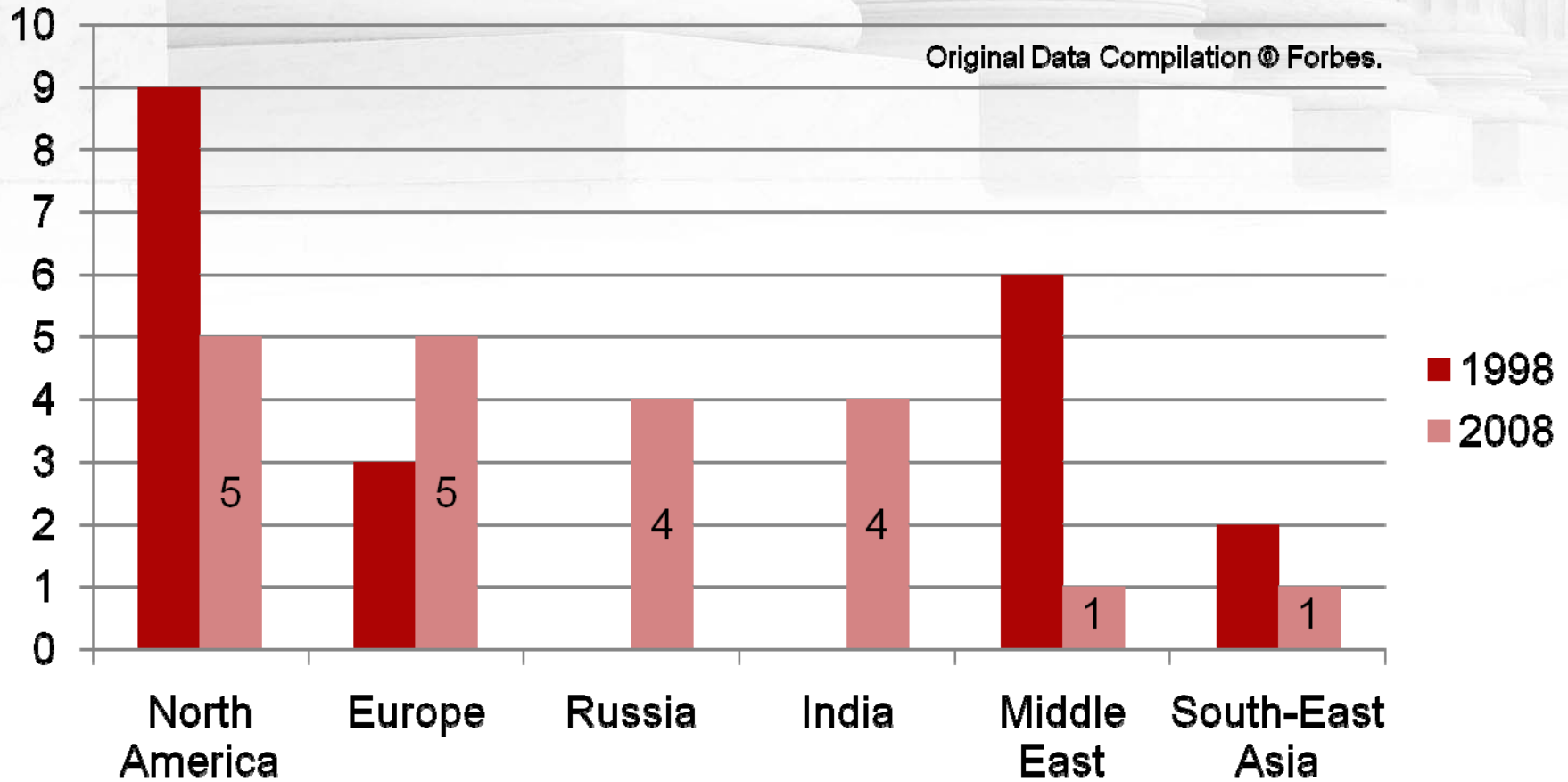
- **Subprime Mortgage Crisis and Global Credit Crunch**
  - *“When Wall St catches a cold...”*
- **Banking**
  - From Switzerland to Singapore

## ■ Trade Markets

- Beyond North America, the United States’ **primary trade partner** is China (11.5%)
- Trade benefits exceeding political and security concerns?

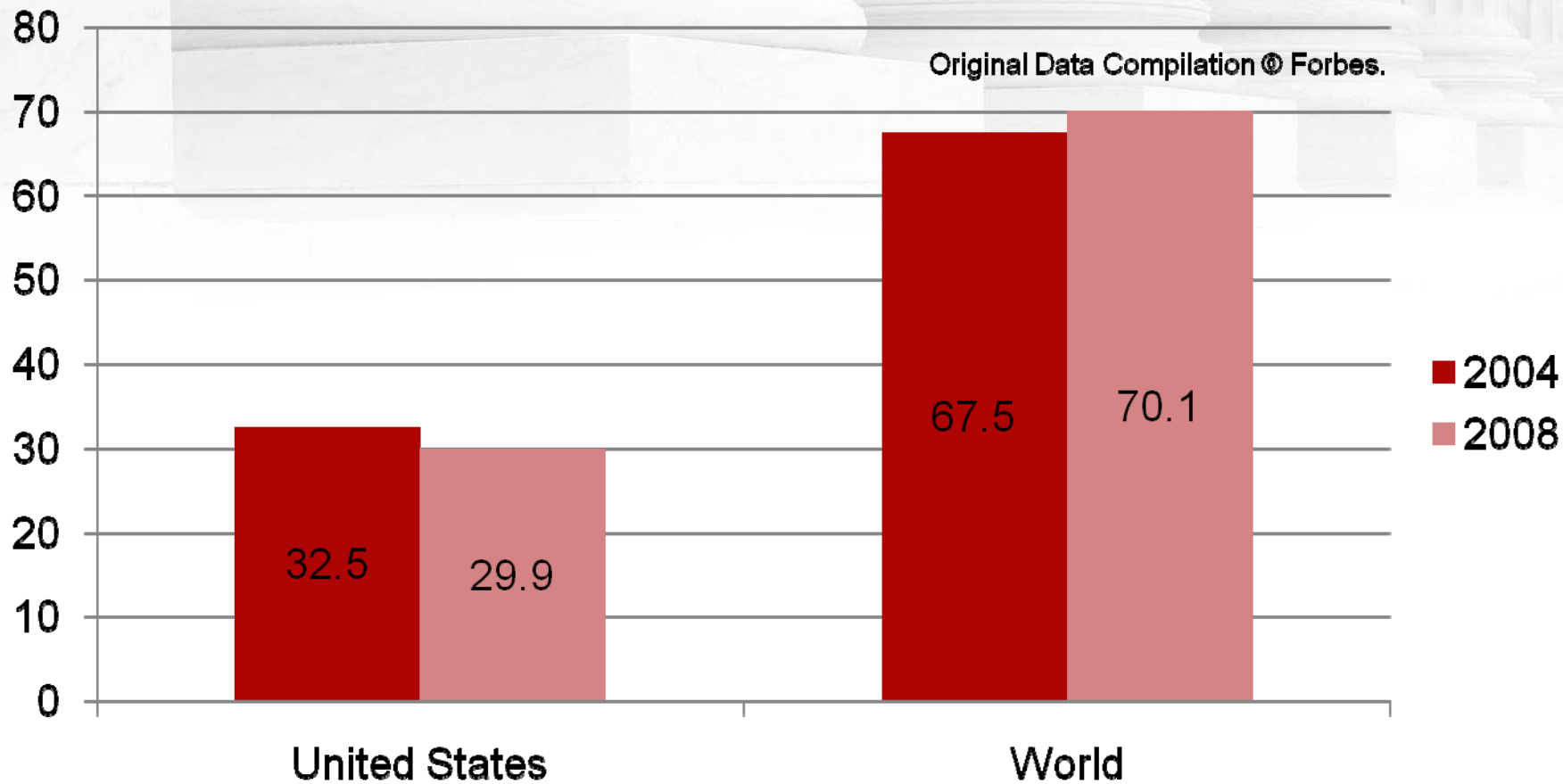
# Globalization

## World's Top 20 Billionaires



# Globalization

## World's 2000 Public Companies



# Key Drivers

## International Litigation

- 75 of the Global 100 law firms are based in the United States
  - However, the ‘**comparative world**’ is **not** as litigious as the United States
- The concept of discovery, including the availability of depositions and interrogatories, is relatively **rare** and at the Court’s discretion in **civil law jurisdictions** (e.g. Europe – in majority, Japan, China)
- Many traditional ‘litigation friendly’ **common law jurisdictions** are also introducing reforms to reduce the ‘**burdens**’ (i.e. scope, time, cost) of discovery

# Key Considerations

## Choice of Law

- **Home Jurisdiction**
  - Common Law
  - Civil Law
- **Alternative Jurisdiction**
  - Ability to 'forum shop'?

# Key Considerations

## Corporate Relationships

- Discovery within ‘possession, custody **and control**’
  - e.g. Rule 34, *FRCP*
- Case law in a number of jurisdictions supports that an order for discovery of a parent company (i.e. non-party affiliate) of a subsidiary (**and vice-versa**), where a **connection** between the ‘**corporate family**’ (i.e. parent and subsidiary) can be established

# Key Considerations

## International Evidence Collection

- **From United States to World (or World to World)**
  - *Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters*
    - Party may request the Court to send a Letter of Request (Letter Rogatory) to the Central Authority within a participating foreign country to compel production of evidence
    - However, not an exclusive and/or mandatory avenue to obtain discovery: *Société Nationale Industrielle Aérospatiale v US District Court*, 482 U.S. 522 (1987) (**Aérospatiale**)
- **From United States to the Americas**
  - *Inter-American Convention on Letters Rogatory*
- **Within European Union**
  - *Council Regulation (EC) No. 1206/2001*
    - Except Denmark (opted-out)
- **Last Resort - Letters Rogatory**
  - Very slow and cumbersome, via Consular or Diplomatic channels

# Key Considerations

## International Evidence Collection

- **Alternative: Use *FRCP* (or Local Equivalent)**
  - **United States:**
    - If the Court has **personal jurisdiction** over a foreign party, **request discovery under local civil procedure rules prior to relying upon Hague Evidence Convention: *Aérospatiale***
  - **United Kingdom:**
    - Order upheld for a foreign party to comply with discovery obligations under local civil procedure rules. Conditionally justified on the basis that the Court has a “***legitimate interest in the conduct of its own judicial proceedings***”: *Morris v. Banque Arabe et Internationale D’Investissement* [2001] ILPr 37 (CA)

# Key Considerations

## International Evidence Collection

### ■ From World to United States

- **Title 28 (Judiciary and Judicial Procedure) USC § 1782(a)**
  - The person from whom discovery is sought must reside (or be found) in the district of the district court to which the application is made;
  - The discovery must be for use in proceedings before a foreign court or tribunal; and
  - The application must be made by a foreign court, tribunal **or any interested person.**
- ***Intel Corp. v Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004)**
  - Complaint filed by AMD against Intel before Directorate-General for Competition of the European Commission
  - AMD recommended that the Commission request discovery of documents previously produced by Intel in a private antitrust law suit in the United States
  - **Court upheld request** and rejected ‘**showing of foreign discoverability**’ argument

# Key Considerations

## Blocking Statutes

- Some countries have ‘blocking statutes’ which effectively make it illegal (with both criminal and/or financial penalties) for an entity within that country to comply with a foreign request for discovery
- **The Criminal Impact of ‘Blocking Statutes’**
  - e.g. *French Penal Law No. 80-538 (1980)*
- **Offensive Use of ‘Blocking Statutes’**
  - **Accepting an Adverse Inference:** *Lyondell-Citgo Refining, LP v. Petroleos de Venezuela, S.A.*, 2005 WL 1026461 (S.D.N.Y. May 2, 2005)
- **Discovery Obligations and ‘Blocking Statutes’**
  - **Does not excuse obligation:** *Enron v. J.P. Morgan Secur. Inc.*, No, 01-16034 (Bankr. S. D. N.Y. July 18, 2007)
  - **Discovery ordered, even after Court acknowledgement of French Blocking Statute violation:** *Aérospatiale*
  - Notwithstanding, **Court must balance** the production of documents from a foreign party with their good faith efforts, e.g.: *Restatement (Third) of Foreign Relations Law § 442(1)(c)*; per *Société Internationale v Rogers*, [357 U.S. 197 \(1958\)](#)

# Key Considerations

## Foreign Judgment Enforceability

- Beyond scope of today, complex area of law
- Consider whether the relevant countries are party to any agreement:
  - **Worldwide**
    - *Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*
  - **European Union**
    - Council Regulation (EC) No. 44/2001
      - Except Denmark (opted-out)

# Key Considerations

## Data Protection and Privacy

- Beyond the scope of today, many comprehensive sources available
- In many civil law jurisdictions, particularly the EU, protection of personal information is perceived as a **fundamental human right**

# Key Considerations

## Privilege

- Beyond scope of today
- Understand what constitutes a privilege claim in relevant jurisdictions
  - Particularly, in some civil law jurisdictions

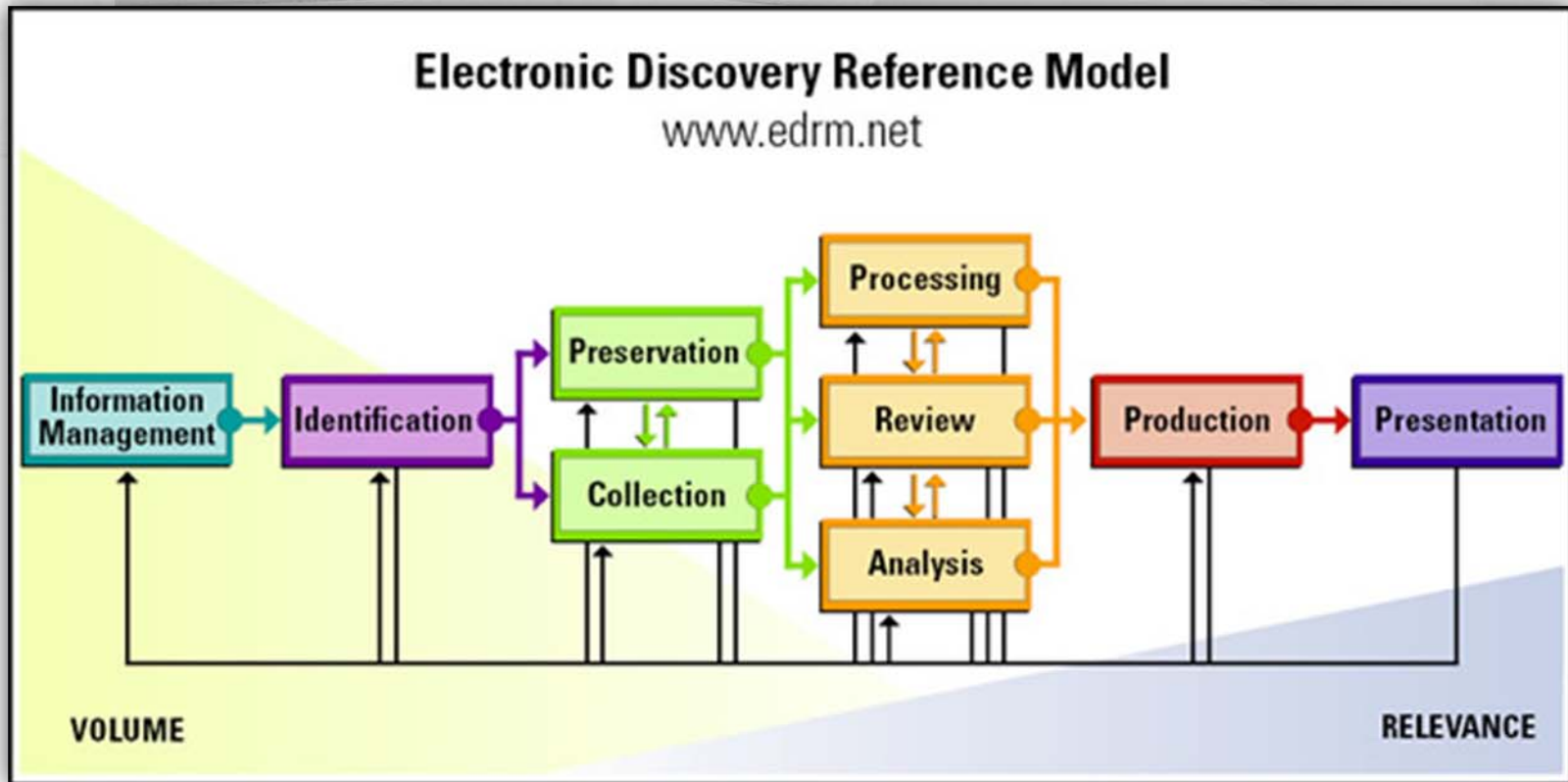
# Key Considerations Commencing Proceedings

- For the plaintiff/claimant
  - Is litigation the 'only viable avenue'?
  - Is discovery essential?
- How '**discovery friendly**' are:
  - **the jurisdiction(s)** in which the
  - **potential defendant(s)** has
  - **known (and appropriate) assets?**

# Key Considerations Commencing Proceedings

- **Resources** to proceed with litigation in that jurisdiction?
  - Time and Cost
  - Qualified and Trusted Legal Representation
  - eDiscovery Assistance
- **Prospects**
  - Success
  - Settlement
- **Judgment enforceability**

# Key Considerations EDRM Workflow



© 2005-2007 Socha Consulting LLC and Gelbmann & Associates. All Rights Reserved.

# Key Considerations

## EDRM Workflow

### ■ Identification

- In which country or countries is the requested or 'potentially relevant' ESI stored?
  - Financial Records in X; HR Records in Y; IT Outsourced to Z

### ■ Collection and Preservation

- Timeframes (including transit)
- Bandwidth?

### ■ Processing and Analysis

- Translation (Machine then Human?)
- Searching (Tools, Unicode, Concept)

### ■ Review

- Simultaneous Review in Multiple Countries (Locations, Languages and Time zones)
- Dealing with 'Local Document Caching' Restrictions

# Key Jurisdictions

## European Union

- Number of civil law jurisdictions which do not readily permit discovery
- EU Data Protection Directive (Directive 95/46)
  - EU Member States have adopted with varied consistency
  - General prohibition of personal data transfer to countries outside the EU
- **Further Information**
  - Pinsent Masons' OUT-LAW.COM – Data Protection
  - Trilantic's Guide to EU Member State Implementation
  - Guidance Software's Impact of Data Protection in the EU (Paper)

# European Union

## Real-World Forensic Collection

- If part of the **'corporate family'** is located within one or more EU Member States, consult local legal advisory to examine whether data may be collected and transferred **under existing agreements and arrangements**
  - Model Contractual Clause
  - Standard Contractual Clauses (Limited Liability)
  - Binding Corporate Rules
- 1. Collect, process, redact and review within the EU Member State; **OR**
- 2. Engage a US organization compliant with the Safe Harbor scheme to perform required collection and discovery tasks (part or whole)
- Also consider the physical forensic implications (e.g. travel) and whether 'live forensics' is a viable alternative

# Key Jurisdictions

## United Kingdom (England and Wales)

### ■ Judicial Structure

#### - Commercial Court (Part 58, CPR)

- Part of HMCS within the Queen's Bench Division of the High Court of Justice
- Manages "*complex cases arising out of business disputes, both national and international*"
- As a court of first instance, may hear any '*commercial claim*'

#### - London Mercantile Court (Part 59, CPR)

- Deals with matters of lesser value and complexity

### ■ Practice and Procedure

- Part 31 of the **Civil Procedure Rules (CPR)** deals with the disclosure and inspection of documents
- Supplemented by Practice Direction 31

# United Kingdom (England and Wales)

## Overview

- **Disclosure is a positive, continuing obligation that is mandatory in every proceeding**, with limited exceptions
  - **Contrast:** United States - 'Discovery Requests' per [Rule 26, FRCP](#)
- Disclosure **means stating** that a document (or class of documents) *"exists or have existed"*
- **'Standard Disclosure'**
  - Partial implementation of [Lord Woolf's recommendations](#) (1996)
  - Documents that your party relies upon **AND** those documents materially adverse to your party's case
  - Restricts the 'train of inquiry' per Brett LJ in *Peruvian Guano* (1882)
- **Subject to privilege and other limited exceptions**, opponent(s) have the right to **inspect and/or take copies** of disclosed documents

# United Kingdom (England and Wales)

## Recent Developments

- **December 2007 - Report and Recommendations of the Commercial Court Long Trials Working Party**
  - Reflected **popular judicial view** that “*the administrative burden and therefore cost of disclosure has grown disproportionately to its benefits*”
  - Recommended **greater judicial control** over the **disclosure process**
    - **Procedure** – No disclosure until specific Case Management Conference (**CMC**)
    - **Document Classes** – Parties prepare a ‘**List of Issues**’
    - **Level of Disclosure** – ‘**Standard Disclosure**’ – More or less?
    - **Time Periods** – Parties agree upon a ‘**Disclosure Schedule**’
- **3 April 2008 - Draft Form N265 – Disclosure Statement**
  - Drafted by the **Litigation Support Technology (LiST) Group**
  - Provides the ability to **document your searches undertaken for ESI**

# United Kingdom (England and Wales) Commercial Court Workflow

## ■ Proceedings Commence

- **Claim Form** (Verified with Particulars) (**Part 7 or 8, CPR**)
- Service of Claim Form
- Acknowledgement of **Service** by Defendant(s) (~ 14 days)
- Defendant's Opportunity to:
  - Dispute Court's Jurisdiction (~ 28 days); OR
  - **File a Defense** (~ 28 days)
- Claimant's Opportunity to Reply (~ 21 days)

# United Kingdom (England and Wales) Commercial Court Workflow

## ■ **Prior to Case Management Conference (CMC)**

- Parties (jointly) prepare a Case Memorandum for Judge conducting CMC
- Claimant prepares '**Case Management Bundle**' with **List of Issues** and any **Disclosure Agreement**
- Parties **should** discuss "*any issues that may arise regarding searches for and the preservation of electronic documents*" (Guide, E3.11(b), PD 31 2A.2)
- "*In most cases metadata is unlikely to be relevant*" (Guide, E3.11(a) only)

## ■ **Mandatory CMC (6 weeks after 'File a Defense')**

- **Common Disclosure Orders**
  - 'Standard Disclosure' – *Rule 31.6*
  - 'Sample Disclosure', 'Stage/Rolling Disclosure', Specific Disclosure – *Rule 31.12*
- **Reasonable Search Considerations** – *Rule 31.7*

# United Kingdom (England and Wales) Commercial Court Workflow

- **Serve ‘List of Documents’ in Disclosure Statement (Form N265)**
  - **Per Draft - (Reasonable) Search Limitations**
    - Physical Documents
    - Electronic Documents
  - **Schedule A** lists all relevant, non-privileged documents in a party’s control;
  - **Schedule B** lists all relevant documents that are alleged to be privileged and are in the party’s control;
  - **Schedule C** lists documents that were once, but are no longer, in the party’s control (with a listing as to where the documents are now)
- **Electronic Exchange per LiST Data Exchange Protocol?**

# United Kingdom (England and Wales)

## Further Reading

- [LiST Group](#)
- [Chris Dale's Lawyer Support Blog](#)

# Key Jurisdictions

## Canada

- All provinces and territories are **common law jurisdictions** (e.g. Ontario, British Columbia)
  - **Positive discovery obligation to produce relevant documents**
  - Similar to UK and Australia, contrast with United States
  - **Except Quebec** (civil law, French origin) where there is no specific requirement to preserve and/or produce beyond what the disclosing party intends to rely upon – *Code of Civil Procedure (CCP)*

# Canada

## Recent Developments

- January 2008 - Sedona Canada (Working Group 7), *Principles Addressing Electronic Discovery*
- 31 January 2008 – Canadian Judicial Council, *National Model Practice Direction and Generic Document Protocol for ‘Use of Technology in Civil Litigation’*
  - Pre-Trial (Court Documents)
  - Discovery
  - Trial (Common Book of Documents)

# Canada

## Further Reading

- [LexUM \(University of Montreal\) e-Discovery Canada Portal](#)
- [Martin Felsky's 'E-Discovery in Canada' Blog](#)

# Key Jurisdictions Singapore

- **Based on English common law**
- **Judicial Structure**
  - Supreme Court of Singapore (Civil Jurisdiction – SGD\$250K = ~USD\$183K)
    - Court of Appeal
    - High Court
- **Practice and Procedure**
  - Order 24 of the Rules of Court (per Supreme Court of Judicature Act) deals with the discovery and inspection of documents

# Key Jurisdictions

## Hong Kong SAR

- As a former British territory, based on English common law
- Hong Kong has been a special administrative region (SAR) of the People's Republic of China (PRC) for the past 10 years
- **Judicial Structure**
  - **High Court** (Unlimited Jurisdiction – HKD\$1M+ = ~USD\$128K)
    - Court of Appeal
    - Court of First Instance (formerly **Supreme Court**)
- **Practice and Procedure**
  - **Order 24** of the **Rules of the High Court** deals with the discovery and inspection of documents

# Hong Kong SAR

## Recent Developments

- **July 2006** - “Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned”
  - Previously Hong Kong judgments were **not enforceable** in mainland China
  - Provides the ability to litigate in Hong Kong (i.e. a common law jurisdiction **where discovery is available**) and enforce the judgment in mainland China
  - Where a **monetary judgment** (not a civil remedy of specific performance, etc.) or in relation to a **commercial contractual dispute**
  - Anticipated to come into effect by end-2008
- **February 2008** – Latest Draft - **Rules of the High Court (Amendment) Rules**
  - Part of Civil Justice Reforms in High and District Courts

# Key Jurisdictions

## India

- **Based, where relevant, on English common law**
- **Judicial Structure**
  - Supreme Court of India
  - State High Courts
- **Practice and Procedure**
  - **Order 27 (XXVII)** of the Supreme Court Rules deals with the discovery and inspection of documents (Handbook)

# India

## Recent Developments

- **Business and Legal Process Outsourcing (BPO, LPO)**
  - Popular location, particularly for US law firms and corporations, due to relatively minimal restrictions on the cross-border transfer of data protection (compared with EU)
- **Data Protection and Privacy Laws**
  - **2004-2007** – Forthcoming [Data Protection Bill](#)
  - **August 2007** – [Data Security Council of India](#) (Self-Regulation Initiative)

# Key Jurisdictions

## Russia

- **Intentionally blank.**

# Key Jurisdictions

## Australia

- **Based on English common law**
- **Judicial Structure**
  - Federal Court of Australia
  - **State Supreme Courts** (e.g. Supreme Court of New South Wales)
- **Practice and Procedure**
  - **Federal Court of Australia**
    - Federal Court Rules (FCR) (per Federal Court of Australia Act 1976 (Cth))
    - Practice Notes 14 (Discovery) and 17 (Use of Information Technology in Litigation)
  - **Supreme Court of New South Wales**
    - *Civil Procedure Act 2005* (NSW)
    - Uniform Civil Procedure Rules (UCPR) and Practice Notes (e.g. Equity Division - Eq 3)

# Australia

## Recent Developments

- **July 1, 2008 - Forthcoming Federal Court Practice Note**
  - Driven by judicial reform following [C7 mega-litigation](#), etc.
  - Mandates eDiscovery for **all cases** with 200+ discoverable documents
    - **Pre-Discovery Conference (PDC)**
      - Similar to UK Case Management Conference and US *FRCP* Rule 26(f)
    - **Electronic exchange** of both paper and electronic documents
      - Native production and/or image formats (e.g. TIFF, PDF)
      - No static images, searchable images only (e.g. Searchable PDF)
    - **Document Management Protocols** per volume of discoverable documents:
      - Basic (200-5000)
      - Advanced (5000+)

# Australia

## Recent Developments

- **Forthcoming Federal Court Practice Note (July 1, 2008)**
  - Parties, with proportionality taken into account as a consideration to their discovery obligations, **are expected to take proactive steps to manage their documents** (i.e. to address preservation)
  - *“The Court requires legal practitioners to be appraised of the basic capabilities of modern technology in so far as it relates to this Practice Note or, where they are not so appraised, to ensure they have access to advisors who have the necessary skills and experience.”*

# Current eDiscovery Court Rules Comparative Table

|   | <b>US FRCP</b>                             | <b>UK CPR</b>  | <b>AU FCR</b>                             |
|---|--|--|---|
| <b>Pre-Trial Conference and Case Scheduling</b>                         | R 26(f) 'Meet and Confer'<br>R 16(b), FRCP | <b>Case Management Conference (CMC)</b>                  | <b>Pre-Discovery Conference (PDC)</b>     |
| <b>General Provisions Governing Discovery; Duty of Disclosure</b>       | R 26, FRCP                                 | Part 31, CPR   | O15, FCR                                  |
| <b>Search and Proportionality</b>                                       | R 26(b)(2)(B)<br><b>*Cost Shifting</b>     | PD 31 (2-2A)   | PN 14                                     |
| <b>Production of Documents and ESI</b>                                  | R 34, FRCP                                 | R 31.4, CPR  | Rule 1.4, FCR<br>Forthcoming PN 17        |
| <b>Failure to Make Disclosures or Cooperate in Discovery; Sanctions</b> | R 37(f), FRCP                              | e.g. R 31.23, CPR (False Disclosure Statement, Contempt) | e.g. O 35A, r 2, FCR (Default, Contempt)  |
| <b>Report of Parties' Planning Meeting</b>                              | Form 35                                    | Forthcoming (by LiST Group Subcommittee)                 | Pre-Discovery Conference Checklist (PDCC) |

# Hypothetical Analysis

A row of white classical columns in a perspective view, receding into the distance. The columns are fluted and have papyrus capitals. The background is a light, hazy sky.

# Closing Remark

- **As legal counsel or advisor**, seriously and strategically consider implications of your current cross-border data flows and if necessary, take steps to more proactively manage ESI
- **As a computer forensic practitioner**, have an active understanding of international eDiscovery issues to facilitate legal and community awareness
- **As a litigator**, can you force the opposing team to play at your home ground – and win?

# Thank You

**If you have any questions or feedback regarding this presentation please contact:**

**Seamus E. Byrne**

**+61 (0)416 214 388 / +44 (0)207 193 8588**

**[sbyrne@ediscovetrytools.com](mailto:sbyrne@ediscovetrytools.com)**

**[seamus@seamusbyrne.com](mailto:seamus@seamusbyrne.com)**