JUDICIARY'S INFORMATION TECHNOLOGY STRATEGY PLAN: PROPOSED LEGISLATION AND PRACTICE DIRECTIONS

COMMENTS BY THE LAW SOCIETY

1. The Law Society has reviewed the proposed legislation and Practice Directions ("PDs") by the Judiciary for the first phase implementation of the Information Technology Strategy Plan. The papers in this consultation, as enclosed in the letter from the Judiciary dated 14 February 2019, are the following:

   (a) the Court Proceedings (Electronic Technology) Bill ("e-Bill") at Appendix I;

   (b) the Court Proceedings (Electronic Technology) (Specification of e-Courts and Tribunals) Rules ("Specification Rules") at Appendix II to specify e-Courts;

   (c) the Court Proceedings (Electronic Technology in District Court Civil Proceedings) Rules ("Civil e-Rules") at Appendix III on rules for civil proceedings at the DC;

   (d) the proposed consequential amendments to the Rules of the District Court (Cap. 336H) at Appendix IV;

   (e) the PD for civil proceedings at DC ("Civil e-PD") at Appendix V;

   (f) the Court Proceedings (Electronic Technology in District Court Criminal Proceedings) Rules ("Criminal e-Rules") at Appendix VI on rules for criminal proceedings at the DC;

(g) the PD for criminal proceedings at DC ("Criminal e-PD") at Appendix VII;

(h) the Court Proceedings (Electronic Technology in Magistrates' Court) Rules for the Summons Courts ("Summons e-Rules") at Appendix VIII; and

(i) the PD for the Summons Courts ("Summons e-PD") at Appendix IX.

(Where appropriate, the above is collectively called "e-legislation" in this paper.)

Attached to the Consultation Paper is a summary of the signature arrangements proposed in the e-legislation (Appendix X).

2. This paper sets out our comments on the above.

A. General Comments

3. We wish to make our general comments at the outset.

4. Other than references to the two-phase approach and that the ITSP would be implemented by an "*incremental approach"*, the Judiciary is silent on when the ITSP is expected to be rolled out and how long each phase is expected to take. As the Judiciary is aware[1], a number of other jurisdictions have already implemented electronic filing systems (e.g. Singapore, Australia New South Wales, the United Kingdom), and Singapore has begun the introduction of their electronic filing system as early as in 1997[2]. To remain competitive and subject to matters set out below, Hong Kong should aim to roll out its ITSP as soon as possible.

5. The planned two phases are further subdivided with Phase 1 divided into 2 stages, Stage I seeing the introduction of the planned iCMS in the District Court (both civil and criminal divisions) and the Summons Courts of the Magistrates Courts. While the division into stages is

[1]Para. 8, Judiciary's Information Technology Strategy Plan: Proposed Legislation and Practice Directions dated February 2019.

[2]http://unpan1.un.org/intradoc/groups/public/documents/UNPAN/UNPAN031797.pdf

clearly sensible, commencing in the District Court and the Summons Courts of the Magistrates' Courts, with their considerably higher proportion of litigants in person and even where solicitors are instructed, typically they will be firms with lesser resources and technical capacity, will impose a heavy burden on the Judiciary in terms of support.

6. To ensure sufficient take up of the opportunity to aid development and learning, it also is hoped that substantial users or interested parties such as the Department of Justice, the Legal Aid Department and other government agencies along with frequent litigants such as insurers will be encouraged and incentivised to make use of the e-system.

7. The existing space constraints at all Court buildings will also likely present significant obstacles to creating easily accessible public facilities for use by litigants in person and thus may inhibit promotion of their use. The Judiciary may wish to consider whether the e-system public facilities need to be located / re-located alongside the equivalent physical paper Counter facilities where space is already lacking or could be located elsewhere.

8. We reckon that the intended e-legislation would have major implications to relevant stakeholders. It is imperative that views from the relevant stakeholders should be obtained.

9. On the legislation per se, we note that it is largely speaking technology-related. As such, the legislation should build in language that caters for the rapid advancement of technologies. Consider for example biometric signatures which use factors relating to biological characteristics of the signer for identification purpose. Technology-neutral language can be and has already been used in other Practice Directions (e.g. PD SL 1.2). In our views it would be equally (if not more) helpful if such could be deployed at the legislative level for the proposed e-legislation.

10. Additionally, we would also suggest the Judiciary to draw reference from other countries (e.g. in the UK[3]). For example, insofar as electronic signatures are concerned, the relevant court rules in the UK seem to have no specific language about advancement of

[3] See also an article published at the World Economic Forum on 1 April 2019, titled "5 factors driving the Chinese lawtech boom".

technology and they aim to be technologically neutral. They apply the equivalence of our Electronic Transactions Ordinance Cap 553 (which defines electronic and digital signatures).

B. Criminal Litigation Perspective

11. We are going to set out below our comments from criminal litigation perspective, to be followed by those relating to civil litigation. In the comments from the criminal litigation perspective, we would make reference primarily on the rules and PD relating to the District Court (i.e. App VI and VII). The comments apply *mutatis mutandis* to the similar set of rules and PD for the "Summons Courts" (as defined in the consultation paper).

Time

12. We note that *"when a time limit is imposed on manual users for submission of certain documents to the court, a similar time limit should also be imposed on electronic users"* (§12, Consultation Paper).

13. The e-Bill sets out rules on electronic filing – e.g. an electronic submission received by the court after the registry is closed (e.g. after 5:30pm on a working day) would generally be deemed to have been received when the registry is next open for operation (normally at 8:45am on the next working day) (§30, Consultation Paper).

    See "Receiving Time" for electronic submission in cl. 6, Criminal e-Rules (App VI).

    See also §§88-90 of Criminal e-PD. NB. the receiving time is the official filing time of a document (§89, Criminal e-PD, App VII)

14. In criminal proceedings, submissions or admitted facts are very often available after the prescribed deadline by the Court. In the experience of our members with criminal practice, criminal courts would not reject late filing of the above documents; the question ultimately is a matter of fairness.

15. In our views, the rules on time limits and the proposed arrangement of electronic filing should not usurp the function of the criminal courts in receiving and admitting the above documents. In other words, the flexibility and the discretion now the criminal courts have in receiving and admitting late filing should not be disturbed by the e-legislation. Such should be preserved.

16. There is also the question of confirmation of acceptance of filing of documents. At present, with manual filing, a filing party needs to queue at the Registry to file a document. Upon handing over the documents at the counter, the party would readily know whether the document could prima facie be accepted for filing. If the document is not proper for filing, the Registry would reject the filing right away at the counter. With electronic filing, the party filing the document might not know whether the document has been accepted for filing, until he receives a confirmation notice (§88, Criminal e-PD, App VII).

17. In any event, *"[it] remains the responsibility of the Sending Party to ensure that his or her submission of documents by the electronic mode is received by the Court within any applicable time limit, taking into account the possibility of technical failure, and/or pre-announced maintenance of electronic communication systems and information systems and that the e-system may be busy at certain time of a day."* (§102, Criminal e-PD, App VII). Absent any service pledge by the Judiciary to issue confirmation notices within a reasonable time, an onerous responsibility is apparently placed upon the legal profession.

Conversion of Documents by Court

18. The proposed rules provide for the conversion of documents to electronic form by the Court, if a document is sent by or to the Court in paper form, and vice versa (cl.7, Criminal e-Rules, App VI). Irrespective of the conversion one way or the other, the above conversion in our views should not affect the criminal proceedings themselves.

19. According to the e-PD, *"the Court may in its discretion direct a party to use the conventional mode in conducting the case or proceedings instead of using the electronic mode if so doing is in the interest of justice or to save costs.*" (see §153, Criminal e-PD, App VII). If the

Court in the course of the criminal proceedings is to make such direction, for the reason of any failure on the abovementioned conversion, or for other reasons, the Defence would have to immediately switch to and produce hard copy bundles. That could be unnerving and chaotic to small or medium firms whose manpower are thin. We consider that the e-legislation should address and/or accommodate any difficulties in the switching to the conventional made in the conducting of the case or proceedings.

Exceptions to electronic filing

20. We note and have no views on those criminal proceedings now proposed where documents should not be sent in electronic mode i.e.

    (a) Sivan proceedings;

    (b) applications for search warrants under the Organized and Serious Crimes Ordinance (Cap. 455); and

    (c) applications for production orders under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525).

    (See Rule 81, Criminal e-PD, App VII)

21. We add that there are currently no rules that mandate the disclosure / filing of the documents by the Defence in most criminal proceedings. The proposed legislation rightly does not disturb the above.

E-Authentication

22. Authentication is provided for *inter alia* under rule 21 of the Criminal e-Rules (App VI)

> **"21. Authentication of other documents sent to Court**
>
> (1) Subrule (2) applies if—
>
> (a) the document is not a document specified in rule 20(1); and
>
> (b) the signer of the document—
>
> (i) is a registered user or an Organization User account holder; and
>
> (ii) is the person who sends the document to the Court by means of an e-system.

(2) The document must be authenticated in one of the following ways—

(a) by inputting the signer's name at a place where the signature of the signer would otherwise appear on the document;

(b) by the signature of the signer in the form of an electronic signature that—

(i) complies with the conditions specified in rule 23(1); or

(ii) complies with the conditions specified in rule 23(2);

(c) by the signature of the signer in the form of a digital signature that satisfies the requirements specified in rule 24;

(d) in any other way prescribed by e-practice directions.

(3) Subrule (4) applies if—

(a) the document is not a document specified in rule 20(1); and

(b) the signer of the document—

(i) is not a registered user or an Organization User account holder; or

(ii) is not the person who sends the document to the Court by means of an e-system.

(4) The document must be authenticated in one of the following ways—

(a) by the signature of the signer in the form of an electronic signature that—

(i) complies with the conditions specified in rule 23(1); or

(ii) complies with the conditions specified in rule 23(2);

(b) by the signature of the signer in the form of a digital signature that satisfies the requirements specified in rule 24;

(c) in any other way prescribed by e-practice directions."

23. Despite that there are references to Rule 23(1) and 23(2) in Rule 22(4)(a)(i) and 22(4)(a)(ii), there are no corresponding references to such rules in Rule 23(1) and 23(2), see below.

"23. Conditions for using electronic signature

(1) The conditions specified for the purposes of rules 18(2)(a)(i), 20(2)(a), 21(2)(b)(i), 21(4)(a)(i) and 22(2)(a)(i) are that ….

(2) The conditions specified for the purposes of rules 18(2)(a)(ii), 21(2)(b)(ii), 21(4)(a)(ii) and 22(2)(a)(ii) are that ….

24. It is not readily clear to us whether a barrister who signs off his written submission could himself file the submission electronically with the Court, with his manuscript signature under the above rule 21

(which is the normal and the current practice of endorsement upon a submission).

25. It is also not readily clear to us whether a law firm (i.e. an Organization User) would be able to file submission on behalf of barrister who signs off his written submission. It seems that the barrister would need to provide his electronic signature or digital signature onto the submission as manuscript signature of a barrister is not acceptable under rule 21(4). Prima facie, however, this contradicts with what is being provided for in App X of the Consultation. A clarification on the above is required.

26. For the use of digital signatures, a "recognized certificate" (as defined in the legislation) is needed (see Rule 24, Criminal e-Rules (App VI)). If and when e-filing is used, we have reservation as to whether our general membership could readily be prepared and possess the requisite technical know-how on the generating or the use of the "recognized certificates". This could be a concern; we repeat that a majority of law firms in Hong Kong handling criminal litigations are or tend to be small to medium-sized firms.

    Additionally, there is also a costs issue.

Inter Parties e-service

27. Before a party could serve documents electronically, that party needs to have prior consent from the opponent to use electronic service and that the relevant electronic contacts (normally email addresses) have been designated. Furthermore, consent could be withdrawn at any stage (see §§33 – 35, Consultation Paper; see also §120, Criminal e-PD, App VII)).

28. It seems to us that it is easier to give consent to e-service than to withdraw such consent. See rule 12 and 13 of the Criminal e-Rules (App VI). The *withdrawal* must be in the form specified in e-PD, but that is not the case with the *giving* of the consent. Different hurdles seem to have been imposed in the above and that could cause confusion to the users. There should be a policy justification.

29. We acknowledge that the current proposal focuses primarily on electronic filing with the Court. We consider that there should also be a detailed discussion on the regime or mechanism for inter partes

electronic service between the Prosecution and the Defence. A discussion which is more than what has been mentioned in the consultation (e.g. Part G of the Criminal e-PD (App VII)) would be useful, as inter parte electronic service could have implications on disclosure by the Prosecution. If electronic service is agreed upon, we envisage that the Defence should be in a better position to argue for and to receive earlier disclosure by the Prosecution on documents that would otherwise be supplied only close to on the date of the hearing. Such could include criminal records, antecedent records.

Inspection and Payment

30. The Criminal e-PD (App VII) provides as follows:

> "144. The right to inspect shall include the right to a copy of the record, where appropriate, upon payment of any prescribed fee.
>
> 145. If a document cannot be inspected through the e-system, a person should physically approach the Registry for assistance."

31. A clarification on how an inspection could be arranged is helpful. On the other hand, we consider that it is desirable to have a detailed explanation or (more helpfully) a demonstration on electronic payment of fees and the actual operation of any payment system (see rule 25 of Part 7, Criminal e-Rules (App VI)).

Court as a party?

32. Rule 5 of the Criminal e-Rules (App VI) provide that [emphasis supplied]:

> **"5. Who may send documents to Court by means of e-System**
>
> (1) Only a registered user or an Organization User account holder may send a document to the Court by means of an e-system.
>
> (2) However, neither a registered user nor an Organization User account holder may serve a document in relation to a proceeding by means of an e-system on the Court <u>if the Court is acting in the capacity of a party to the proceeding</u>."

33. It is not readily apparent as to what is being envisaged in the above provision. Furthermore, on a plain reading of the above, if the Court becomes a party to a set of proceeding, seemingly no electronic filing would be allowed. This tends to be suggestive of favouritism towards the court. It is relevant to have an explanation on the policy intent that underlines the above.

Design of the PDs

34. Appendices VI, VII, VIII and IX relate exclusively to criminal law practices – these cover a set of rules and e-PDs for District Court criminal proceedings, and another set for Summons Courts. These two sets are almost identical. In our views, these two sets could be combined into one set for criminal proceedings.

35. Both sets of the e-PDs, as currently drafted, are unusually styled, in that it contains "objectives" and are therefore, arguably, dogmatic. This style is not customarily known to practitioners. A Practice Direction should be a supplemental protocol to rules of civil and criminal procedure in the courts, and is a device to regulate minor procedural matters. They are issued "for the conduct of the proceedings" [4]. However, those statements now appearing are policy-oriented. They are objectives that the Judiciary Administration itself desires to achieve (e.g. "*Litigants are encouraged to make full use of electronic technology…"* (see para 8, Criminal e-PD on App VII). In our views, the e-PD as drafted has become a handbook of practice rules confusingly mixed with policy intents.

36. The above is <u>not</u> seen in similar practice directions in other jurisdictions - not only those countries with modern criminal justice systems, but also those vying for dispute resolution work, e.g. Singapore (see SICC Practice Directions [5] for the Singapore International Commercial Court. See also Practice Direction 14[6] in the UK).

37. A disturbing consequence of including policy statements in a subject which is technology-sensitive is that it would render the e-PD unwieldy. For example, para 10 of the Criminal e-PD on App VII contains a mission statement to the effect that *"… the use of*

[4] See the webpage of the Hong Kong Judiciary
[5] https://www.sicc.gov.sg/legislation-rules-pd/practice-directions
[6] https://www.supremecourt.uk/procedures/practice-direction-14.html

electronic mode is optional." The e-PD therefore envisages that parties are free to choose between the conventional paper-based mode of operation and the paperless electronic mode. When this option is not available e.g. in situations when the computer system breaks down[7], this paragraph 10 would become meaningless.

38. We are not aware of any Practice Directions whose validity or enforceability is subject to circumstances, or could become meaningless under specified circumstances.

39. On the other hand, we have not been advised of any legal consequence for non-compliance of the e-PD. That is not satisfactory.

40. In our views, policy objectives, being helpful in explaining to readers the mission of the Judiciary Administration, could be re-housed and re-styled to become some Guidance Notes to be placed onto the Judiciary website, along with other administrative notices e.g. the "*Guidance Notes For Jurors in Criminal Trials*".

41. The re-housing and re-styling of these policy objectives into a set of stand-alone guidance notes has an added advantage to litigants in persons. If guidance notes are publicly made accessible under a separate webpage, with title such as *Guidance Notes on Electronic Filing* (or description to that effect), those litigants in person would be able to find these notes more easily - compared to the current draft, where (1) the guidance is set out in a Practice Direction which is bundled with other practice directions of all subject matters, and (2) even assuming the litigants in person could locate the correct Practice Direction, it is not readily apparent to him where (within the 159 paragraphs in the e-PD) he could find the guidance he is looking for, noting that other procedural and technical rules are listed alongside the guidance notes. Difficulties for parties (in particular those litigants in persons) to navigate in a practice direction would not be helpful to the implementation of e-filing and, more generally, the use of technology for Courts.

42. In the above regard, we note that in Singapore, policy statements and objectives on electronic filing are separated from their Practice Direction and they are put onto a stand-alone webpage. Unlike other

[7] as what happened last month (March 2019) in the UK Court whose IT system repeatedly broke down See the UK Gazette of 9 March 2019 reporting on "Courts IT headache drags on into Friday"

practice directions whose readership is aimed for the legal profession, the explanatory note in Singapore apparently uses more laymen languages which in our views help promote the use of electronic filing.

43. In addition, we note repeated cross-referencing in the Bill to e-PD. This mode of referencing is not commonly seen in other local legislation. The effect of this appears to us that the e-PD is conferring legislative powers through the back door. An example is on section 22 of the Bill (with emphasis supplied):

"22. Electronic production of documents

(1) This section applies in relation to a provision of written law or a direction of a court that—

(a) requires a document to be conveyed by producing it as a paper document; or

(b) permits a document to be conveyed by producing it as a paper document;

(2) In relation to a proceeding in an e-Court—

(a) for subsection (1)(a)—the requirement is met if—

(i) a copy of the document is sent in electronic form by means of an e-system in accordance with any applicable e-rules and e-practice directions; and

(ii) it was reasonable to expect that the information in the copy in electronic form would be accessible so as to be usable for subsequent reference; and

(b) for subsection (1)(b)—a copy of the document may be sent in electronic form—

(i) if it sent by means of an electronic form in accordance with any applicable e-rules and e-practice directions; and

(ii) it was reasonable to expect that the information in the copy in electronic form would be accessible so as to be usable for subsequent reference."

Another example: Rule 14 of Criminal e-Rules (App VI):

"14. Change of designated system for receiving documents

(2) The notice must be in the form specified in e-practice directions"

See also Rule 20 of Criminal e-Rules (App VI):

"20. Authentication of affidavits, etc. sent to Court

(2) The document must be authenticated in one of the following ways—

(c) in any other way prescribed by e-practice directions."

If the e-PDs are amended (and the amendment exercise should be relatively straightforward), the amended e-PD would immediately be given legislative effect by the operation of the above rules. We surmise that this arrangement may be intentional as the Judiciary desires that if there are technological advancements, which could be rapid, the practice should be updated as soon as practicable. We however have not been confirmed as that is the intention underling the arrangement. As the matter now stands, it gives a fleeting feeling that the procedures could too easily be subject to changes.

Drafting

44. With our greatest respect to the draftsmen, we note that the drafting of the legislation on some occasions are clumsy and it is not easy to follow. Example – rule 18 Criminal e-Rules (App VI)

"18. Authentication of documents sent by Court

(1) Subrule (2) applies to a document that—

(a) is required or permitted to be signed or certified by a person specified in subrule (3) under a provision of written law or a direction of the Court; and

(b) is in electronic form.

(2) The document must be authenticated by the signature of the person in the form of—

(a) an electronic signature that—

(i) complies with the conditions specified in rule 23(1); or

(ii) complies with the conditions specified in rule 23(2); or

(b) a digital signature that satisfies the requirements specified in rule 24.

(3) The person is—

(a) a judge;

(b) a judicial officer; or

(c) any other officer appointed or attached to the District Court under section 14(1) of the District Court Ordinance (Cap. 336).

(4) Subrule (5) applies to a document that—

(a) is required or permitted to be sealed by the Court under a provision of written law or a direction of the Court; and

(b) is in electronic form.

(5) The document must be sealed in a way prescribed by e-practice directions."

The above drafting of sub-rule (4) and (5) are loaded with internal or self-referencing and are convoluted. They are not in the conventional way that practitioners are familiar with, or could easily be understood. They could be daunting to unqualified people and litigants in person.

45. The rather clumsy and convoluted drafting permeates to the definition e.g. for "electronic form" – see section 2 of the Bill (with emphasis supplied).

"electronic form ([Click and Type]) means in the form of an <u>electronic record</u>;

<u>*electronic record*</u> [Click and Type] means a record that—

(a) is generated in a digital form by an information system;

(b) can be transmitted—

(i) within an information system; or

(ii) from one information system to another; and

(c) can be stored in an <u>information system</u> or other medium;

e-rules ([Click and Type]) means rules made under section 27 or 28;

<u>*information system*</u> ([Click and Type]) has the meaning given by section 2 of the Electronic Transactions Ordinance (Cap. 553)"

46. A quick internet search for comparable legislation in other jurisdictions identifies a similar section in the Singaporean Criminal Procedure Code (Electronic Filing and Service for Supreme Court) Regulations. This is appended (**Annex 1**) – for record we are not comparing the contents of the Singaporean legislation with ours; any comparison for contents is irrelevant. However, the way that the legislative ideas is presented in the Singaporean legislation is in our views simpler, clearer and much easier to be understood by the profession and the laymen.

47. We note a typo in para 117 of the Criminal e-PD on App VII.

"117. For example, after the prosecuting department submits information to the Court for issuance of a witness summons, the prosecution would receive from the Court the summons in electronic form. The prosecution may then use a printout (or its copies) of the summons for service on the witness, so long as the requirements in paragraph ~~117~~ <u>116</u> above are met."

Other Comments

48. We recap the following issues which have previously been raised by our Criminal Law and Procedure Committee with the Judiciary Administration. These issues should be addressed in the e-legislation. Alternatively, where relevant, those could be put into the Guidance Notes that we have suggested in the above.

(a) Is it possible for court attendance forms to be filed electronically, instead of filling in the form manually each time before and at the time of court attendance?

(b) The current consultation appears to be silent on the logistics upon change of accounts users (i.e. upon change of firms) for the purpose of e-filing. What could or should a successor firm do in order for the firm to receive files and documents from the predecessor *in time and without interruption,* upon re-assignment or change of solicitors? Are there any logistics issues to be addressed?

(c) We have concerns if the volumes of documents to be filed electronically are huge. Would there be traffic jam in the course of electronic filing? Would there be any size limitation in the documents electronically filed? A traffic jam on e-filing could have serious consequences to the time of delivery, and the delivery itself (in particular when the sending party could not know at once whether the document so filed has been accepted).

49. Lastly, we feel obliged to point out the importance of maintaining confidentiality of documents electronically filed with the court. It goes on without saying that IT security should always be treated as of top importance to avoid risks such as hacking, spoofing and fraud. Should the e-legislation (in particular the e-PDs) provide guidance on confidentiality of the documents filed electronically with the Court and the scenario on loss / breaches of confidentiality?

C. Civil Litigation Perspective

50. We now set out our comments from the civil litigation perspective.

Court Proceedings (Electronic Technology) Bill ("e-Bill")(App I)

51. The e-Bill is the enabling legislation by which the Judiciary's ITSP will be implemented. It provides the legislative framework for the electronic mode of handling court-related documents; quite rightly, it should be designed with flexibility in mind so that court practices and procedures adopted by the Judiciary can be adjusted / updated to take account of practical experience and advances in technology.

52. The e-Bill has become necessary as court proceedings are exempted from the operation of the Electronic Transactions Ordinance Cap 553 ("ETO"); however, some of the drafting of the e-Bill has not surprisingly been inspired by drafting in the ETO.

53. Without prejudice to our comments on the drafting expressed in the preceding paragraphs, our specific and further comments on the e-Bill are as follows:-

(a) The e-Bill is accompanied by an Explanatory Memorandum. To a large extent, this is a case of something not really doing what it says on the tin. It is a rather brief document which does little more than summarise and/or re-state each clause of the e-Bill. Additional explanation of many of the clauses would be helpful.

(a) Definitions are set out in section 2 of the e-Bill. "e-signature" is not defined in the e-Bill itself. We suggest that consideration be given to adopting a generic definition which is technology neutral and future-proofed (so that it can for example encompass biometric signatures; see our comments in paragraph 9 above). The definition adopted in the ETO is an obvious starting point.

(c) Section 7 includes a definition of "send" so as to embrace the different ways this verb is used in court practice; we suggest similar consideration be given to the various ways in which a court can "receive" a document.

(d) The e-Bill adopts a concept inspired by section 5 ETO as regards a requirement that electronic documents are "accessible so as to be usable for subsequent reference". The intention seemingly is to ensure that documents can be read not only at the time of filing/service etc, but also subsequently, so use of passwords etc in documents should be restricted. The wording actually used is rather awkward; we suggest consideration be given to adopting something which is more user friendly and written in plain English.

(e) In section 17(3), we consider the wording in square brackets to be superfluous.

(f) There are numerous typographical errors scattered throughout the draft e-Bill; we can provide details of these under separate cover if that is helpful.

Court Proceedings (Electronic Technology) (Specification of e-Courts and Tribunals) Rules ("Specification Rules")(App II)

54. The Specification Rules concern (a) specifying District Court and Magistrates' Court as the first two courts for running of the project; and (b) inclusion of the Competition Tribunal, Lands Tribunal, Labour Tribunal and Small Claims Tribunal and Obscene Articles Tribunal in the reference to a "court" in the e-Bill. These are the only two functions of these rules.

55. Regarding (a), we are happy to have the District Court and the Magistrates' Court as the starting points for the rolling out of the project. The expectation is the project will be extended to the High Court after review. However, we note there is no time table of or estimated time for such review and extension. We suggest there should be a target date for the rolling out of the project at the High Court.

56. Regarding (b), the Government should consider inclusion of other administrative tribunals in the reference to court for the purposes of application of the project in due course. Administrative tribunals such as Securities and Futures Appeals Tribunal, Appeal Tribunal (Building Ordinance), Town Planning Appeal Board, Copyright Tribunal etc. involve quasi-judicial proceedings very often legally

represented, document-heavy and heavily fought. They should be assisted by electronic technology.

Court Proceedings (Electronic Technology in District Court Civil Proceedings) Rules ("Civil e-Rules")(App III)

57. As has already been noted in our above comments from the Criminal Litigation Perspective, while proceedings to which the Court itself is a party are a rarity, it is somewhat ironic that there is felt to be the need for an express provision that the Court itself may not be served by means of an e-system (Rule 8(2)). Would it not be sufficient rely on the provision of general application that such service requires consent (Rule 19)?

58. Rules 5 and 6 make provision for the effect of non-compliance with the Rules and the consequences of the resulting irregularity, including an application to set aside. However, unusually for a court procedural rule the time period for an application to set aside is no more defined than “within a reasonable time”, this being subject to the proviso that party must have taken no fresh step in the proceedings since becoming aware of the irregularity. Such a non-prescriptive time limit appears inconsistent with the strict case management. There appears no reason why a specific time limit should not be specified, whether 14 or 21 days. Rule 6(2) further requires that a summons to set aside an irregularity must state “the grounds” rather than state the rule said not to have been complied with and provide for an affirmation/affidavit in support. The proposed wording may lead to lengthy prolix summonses when establishing that there was indeed an irregularity is very likely to require evidence in any event.

59. The receiving time of the documents sent to Court by the e-system can easily be defined and the time of receipt identified. However, while the cut-off time for documents sent by the e-system may match the stated closing time of the Counter by which paper documents are received, in practice there is some latitude given to the receipt of paper documents provided a court clerk arrived at the counter before closing time. It is understood that there is to be no immediate change in practice regarding paper documents received at the Counter but in time the effective cut-off time for 2 different filing process may need to be harmonized.

60. As has already been noted in another context, the format and process for consenting to the acceptance of service by electronic transmission and designating the system for receiving documents is different from that for withdrawing consent or changing the designated system for receiving documents (Rules 19, 20 and 21) (see our above comments from Criminal Litigation Perspective). The latter requires use of a form specified in the e-practice directions. Other than a desire to encourage service by electronic transmission by making it harder for consent to be withdrawn or to change the designated system there appears no immediate justification for the difference.

61. Rule 24(3) requires that an affidavit proving due service of a document by electronic transmission exhibit the record "evidencing the sending of the document" without identifying the form and content of the record. This leaves open the question of what evidence will be accepted. The serving and receiving systems may be of very different types or configured differently. Receiving systems can be configured to reject requests for delivery or read receipts and may have unpublished limits on file size which do not result in a failure or reject message. The information readily accessible by a desktop every day user is also substantially less than that available to the network operator who manages the serving or receiving email server gateway. In the vast majority of cases, the evidence available to the serving party may be limited to a copy of the message as sent with date and time stamp and the absence of a failure or reject message. Will this be accepted as sufficient record evidencing "sending"?

62. The inter-action between the procedure and operation of the e-system as regards documents and the process and procedure for making the payments required payments required, while it may be an administrative matter, raises the question of what the position will be where a payment is not made, perhaps for a technical or a financial reason, and either at the time or subsequently. Provision for the use of credit cards to make payments may largely prevent this. An alternative, in the manner of the Companies Registry, might be the operation of an account with a credit balance.

Draft Rules of the District Court (Amendment) Rules 2019 ("Amendment Rules") (App IV)

Clause 4(2) - Appendix A amended (forms)

63. It is unclear what the precise meaning of the words "*to ascertain the issuance of the Writ of Summons*" are, in the context stated in the proposed amendment. It seems likely that the intended effect of this proposed amendment is to enable a defendant (or the defendant's solicitor) to make enquiries with the Registry of the District Court as to whether the Writ of Summons, which has been only been received by him or her in electronic form, has in fact been issued and filed with the Registry. Whether that is the case or some other meaning is intended, we suggest that this wording be expressly clarified.

Practice Direction for civil proceedings at District Court ("Civil e-PD")(App V)

General comments on Civil e-PD

64. The Civil e-PD is unnecessarily lengthy, repetitive and dense (as compared to other Practice Directions). It generally reads less like a procedural practice note and more like an academic commentary on the ITSP, legislation and rules. For example, Sections B1 and B2 are reiterating the key provisions in the Ordinance and the Rules, query whether these sections are necessary or whether they can be shortened. As the introductory paragraph of the Civil e-PD states, the practice direction is issued to prescribe the "*detailed practice and procedure*", the PD should aim to set out pragmatic procedures/practices, as opposed to summarising the legislation

    In this regard, we repeat our above comments similarly expressed from the Criminal Litigation Perspective.

Specific comments on Civil e-PD

Time

65. In civil litigation, the time of filing on some occasions is of critical importance. In some cases, an out-of-time filing would not be accepted and that by itself collapse the whole case, as for example in the case of an unless order.

66. The draft Civil e-PD uses a number of different terms to describe the submission time of a document, including "*submission time*", "*acceptance for submission*", "*receiving time*", and "*official filing time*"(e.g. para. 108). Do they mean the same, and if not what are the differences? It is suggested that a brief explanation of these terms and their significance/meaning be provided.

67. According to the Civil e-PD, documents submitted through the e-system will be subject to a "*basic check*", which will "*take a short while to complete*". (para. 102) If for example a document is successfully submitted at 5:30 PM, but the system only completes the check at 5:31 PM, is the official filing time 5:30 PM or 8:45 AM the next day (due to the reckoning of time provision in para. 100)? This scenario is not addressed in the section which currently deals with submission at a time when the Registry is not open (paras. 107-108, or 134-135).

68. **Deeming Provision for electronic service of documents on parties -** Para. 173 of the Civil e-PD states that for documents (other than originating process) that are served by electronic means, the date of service shall be deemed to have been served on the business day following the day of service by electronic means. This means that if a document (e.g. a Defence) is served on the Plaintiff electronically on Monday (<u>any time</u>, even if it is served in the morning), it is deemed to have been served on Tuesday (assuming it is a business day). The policy intent of this deeming provision is unclear to us. It is also unclear as to how this provision would interact with the current O. 65 r. 7 of the RDC (Cap. 336H) which states that where a document (other than a writ or other originating process) is served <u>after 4PM</u> on a day (which is not a specified day), it is deemed to be served on the next day for the purpose of computing time period after service.

69. **Deeming Provision for electronic filing of documents –** Para. 100 of the Civil e-PD states that if the time at which a document is given initial receipt is a closure time of the Registry, the document is taken to have been received by the Court at the time when the Registry is next normally open. This deeming provision seems artificial and also runs contrary to the objective of the ITSP which is to "*streamline and improve the litigation process*". If a document filed electronically after the Registry's office hours is only deemed to have been received by the Court the next day, there would be no

real incentive for parties to submit documents electronically after 5:30 PM of any given day. The key advantage of introducing convenience to the parties by allowing them to submit documents to the Court by electronic means round-the-clock so that the conduct of litigation would not be constrained by the opening hours of the court registry is defeated.

70. Furthermore, in civil proceedings, it is common for parties to consent to the exact time for filing and service of court documents. For example, a consent order may state that the Plaintiff is ordered to "*file and serve the Statement of Claim by 4 PM on 7 January 2019",* and the Defendant is ordered to "*file and serve the Defence by 4 PM on 7 February 2019"*. With the introduction of the e-system, parties could in theory enjoy greater flexibility in the time of filing and serving a court document (e.g. they can now agree to file and serve a document by 6PM on a certain date). However, the deeming provision in the draft legislation and Civil e-PD, which artificially imposes a different filing date, seems to defeat this.

A registered user "must not" serve a document electronically on the Court as a party to a proceeding?

71. Paragraphs 47 of the Civil e-PD currently states that "*only a registered user… may send a document to the Court by means of an e*-system". However, paragraph 48 states that "*a registered user … must not serve a document by means of an e-system on the Court as a party to a proceeding"*.

72. The rationale and policy intent for the prohibition of serving documents electronically when the Court is a party to a proceeding is unclear and could be better expressed. We repeat our comments in paragraphs 32 and 33 above.

Searches of court files by non-party

73. Under para. 196-198 of the Civil e-PD, upon introduction of the e-system, a party to the proceedings who is a registered user may conduct a search of documents via the e-system. However a non-party would have to attend the Centre or the Registry in person during office hours to search/inspect the documents which they are entitled to under O. 63 r. 4(1) (i.e. the writ, originating process, judgment, order). The ability to search the court files is an important tool of research not only for lawyers and their clients, but also for the

press and other members of the public. Is there any plan to enable public (who are not a party to proceedings) to search the court files electronically via the e-system/internet (without the need to attend the Centre/the Registry) in due course?

D. Concluding remarks

74. This Submission includes a significant amount of detail, commenting on a number of important issues, drafting approach and rule amendments etc. We would welcome any opportunity to further discuss, in a meeting or otherwise, the issues that we identified with the Judiciary for addressing these issues.

The Law Society of Hong Kong
23 April 2019

ANNEX 1

Criminal Procedure Code (Electronic Filing and Service for Supreme Court) Regulations 2012 - extract

Signing of electronic documents

10.—(1) Where a document is filed, served, delivered or otherwise conveyed using the electronic filing service, any requirement under the Code relating to the signing by or the signature of an authorised user or a registered user, shall be deemed to be complied with if the identification code of the authorised user or registered user has been applied to or associated with, directly or indirectly, the document or the transmission containing the document.

(2) For the purposes of paragraph (1) —

(*a*) where the identification code of a registered user is applied to or associated with, directly or indirectly, a document or a transmission containing a document in compliance with the security procedures of the electronic filing service —

(i) the document shall be deemed to be signed by the registered user; and

(ii) the contents of the document shall be deemed to be endorsed by the registered user;

(*b*) where the identification code of an authorised user (other than an employee of a service bureau) is applied to or associated with, directly or indirectly, a document or a transmission containing a document in compliance with the security procedures of the electronic filing service —

(i) the document shall be deemed to be signed by the authorised user on behalf and with the authority of the registered user to whom the authorised user belongs; and

(ii) the contents of the document shall be deemed to be

endorsed by that registered user; or

(*c*) where the identification code of an authorised user, who is an employee of a service bureau, is applied to or associated with, directly or indirectly, a document or a transmission containing a document in compliance with the security procedures of the electronic filing service —

(i) the document shall be deemed to be signed by the authorised user on behalf and with the authority of the person tendering the document to the service bureau and the contents of the document shall be deemed to be endorsed by that person; or

(ii) where the person tendering the document to the service bureau is acting as agent for his principal, the document shall be deemed to be signed on behalf and with the authority of his principal and the contents of the document shall be deemed to be endorsed by his principal.

(3) For the avoidance of doubt, it is declared that the application to or association of the identification code of an authorised user or a registered user, directly or indirectly, with a document or a transmission containing a document in compliance with the security procedures of the electronic filing service is a secure electronic signature within the meaning of the Electronic Transactions Act (Cap. 88).