



WHITE PAPER

# E-Discovery in Asia: Legal, Technical and Cultural Issues

In late 2013 and early 2014, Asian Legal Business Magazine and FTI Consulting partnered to interview legal professionals in Asia on the e-discovery transformations underway in the region. Sixty-five individuals from corporations and law firms completed an extensive online survey, while five e-discovery experts participated in phone interviews.

The survey showed a number of strong but changing currents, both originating within Asia and from outside the region. These affect both the conducting of e-discovery and the general management of electronic documents in legal matters. This paper outlines the key survey findings, highlights areas of practical concern for multinational corporations and law firms, and shares expert perspectives on the evolving legal, technical and cultural landscape impacting e-discovery in the Asian region.

## Most matters originate locally, but it may not matter much

E-discovery in Asian courts is nascent and hard to characterize in broad strokes. Hong Kong and Singapore are the only two Common Law jurisdictions<sup>1</sup> within the region, and the only two with typical Common Law e-discovery requirements. However, a number of the Civil Law jurisdictions<sup>2</sup> within Asia can require the same level of e-discovery collection and legal review as Common Law jurisdictions. Also, the number of matters crossing multiple jurisdictions across Asia is increasing. In the global economy disputes are not so neatly limited along national borders, and offshore litigation, particularly US litigation, has impacted companies operating in the region for many years. This is particularly notable for Japan and China, even though those countries themselves lack a domestic discovery process as Civil Law jurisdictions.

<sup>1</sup> In Common Law countries, such as the United States, e-discovery obligations can be far-reaching.

<sup>2</sup> E-discovery in Civil Law jurisdictions is traditionally more limited than in Common Law jurisdictions.

According to Steve Lewis, a partner in the Bingham McCutchen LLC Tokyo office: "Although Asia has only two common law jurisdictions, the majority of international transactions between Japan and other Asian countries are documented in English and have a neutral governing law of either "England and Wales" or "New York." Both are common law jurisdictions. Consequently, when a dispute arises the parties are forced into a common law procedure. This will apply whether the dispute is before the courts or is the subject of an arbitration."

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At the same time, more and more e-discovery projects are the result of regulatory investigations and other compliance-related issues. (While discovery per se is part of the litigation process, for purposes of the survey projects requiring data collection, review and/or production for other purposes, such as investigations or arbitrations, are included.) "Given the huge increase in email correspondence, it is not unusual for each of the parties to be required to apply data storage and key word searches to more than 200,000 separate pieces of correspondence," said Steve Lewis. "Indeed, a recent Bingham Tokyo case had over 500,000 separate pieces

of correspondence. Compliance with the common law disclosure process can now only be achieved by utilizing e-discovery systems. The courts and arbitrators will take a very negative view of litigants who fail to use e-discovery systems to comply with their common law disclosure obligations.”

According to survey respondents, more than 75% of matters originate within the region and for almost a quarter of respondents more than 90% of their matters originate in the Asia region.

But it may not matter much where matters originate. “The most interesting thing about this question is that while the concerns originate maybe in the US initially, they can very quickly start evolving into a cross-border concern,” says Michael W. Vella, a partner at Jones Day based in Shanghai. “So we see a broad range of international collections exposure and requirements, with China, Hong Kong, Japan and the US being highest.”

Respondents have collected data from 15 different Asian countries (plus the United States, Europe, Latin America and Africa). It may be worth noting that this list is not topped by one of the two Common Law countries (Hong Kong and Singapore), but China, with 60% of respondents having collected there.

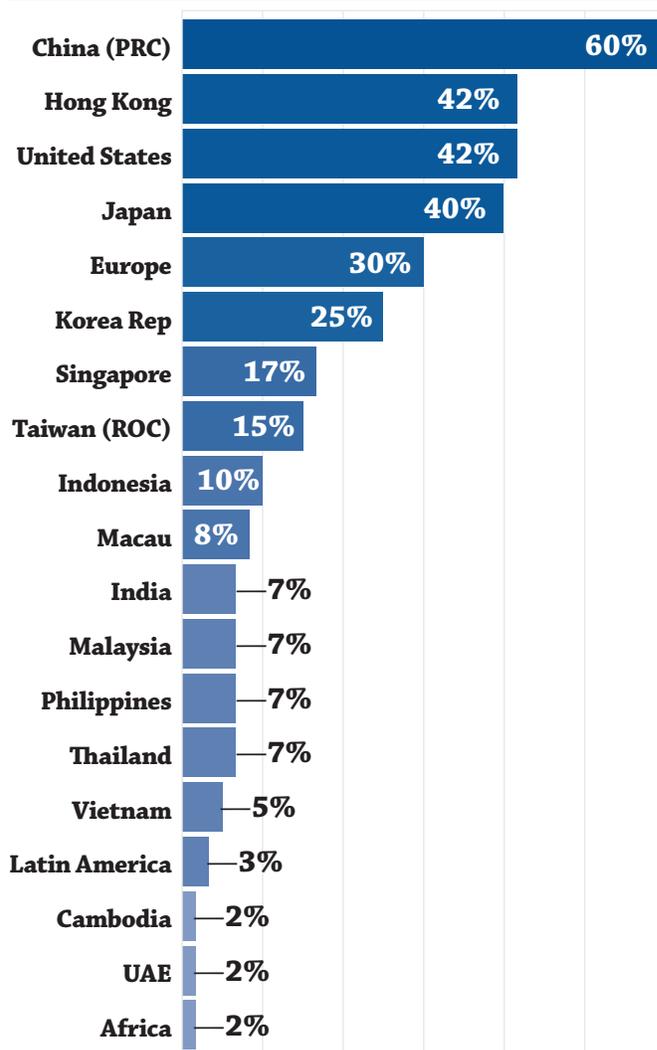
## Most discovery work is due to regulatory investigations, and more is expected

With so few Common Law jurisdictions in Asia, it is perhaps no surprise that so much discovery work is emanating from regulatory investigations. In fact, when asked the open-ended question “What type of matter are you currently seeing most need for e-discovery?” 67% of those who responded cited regulatory and/or internal investigations.

“Western-headquartered multi-national companies are much more compliance orientated recently; the FCPA had always been there, but the U.K. Bribery Act also caused a lot of self-examination,” says James E. Hough, a partner at Morrison Foerster in Tokyo. “We have also seen a huge increase in regulatory investigations in

the last few years, exclusively from regulators outside Japan, often not from the regulatory agency itself, but from the company deciding to do an internal compliance review. Often the regulators don’t know about the issue under investigation, and may not learn of it unless the company decides to self-report.”

**Figure 1:** From which jurisdictions have you needed to collect data for an investigation, arbitration or litigation matter? Please select all that apply.

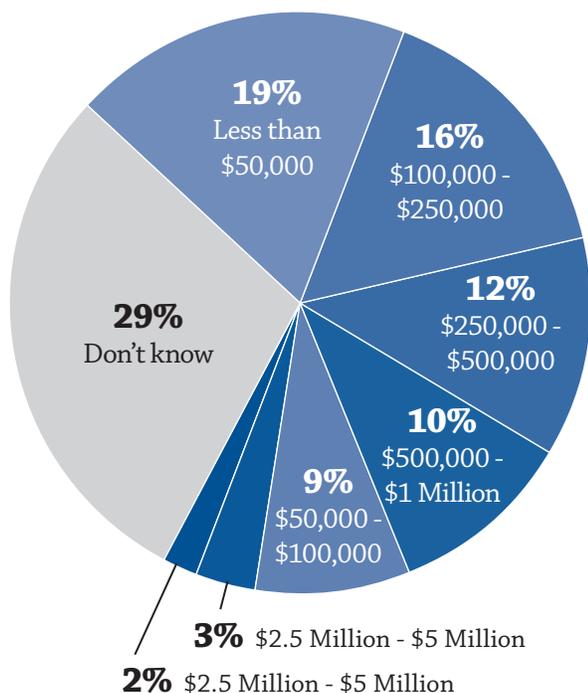


One development that will likely have a giant impact is the trend toward cooperation among regulators from different countries. “There has been increased cooperation between EU and US regulators; the Siemens case is one example—they needed to settle with both regulators,” says Vella. One thing collaboration among

regulators is guaranteed to cause is more investigations—and more e-discovery—in more countries.

There are also new, more delicate risks. Menachem M. Hasofer, a partner at Mayer Brown JSM in Hong Kong, explains, cooperation could also cause difficulties in terms of complying with various countries’ privacy and other laws: “As illustrated in the recent decision of *The Securities and Futures Commission v. Ernst & Young*<sup>3</sup> there is no blanket prohibition on a regulator issuing statutory notices in Hong Kong requesting production of financial information created or held by an agent or affiliate in Mainland China. “ Disclosure of these documents may be prohibited under the State Secrets Law, Archives Law, or under more specific laws such as the CPA Law, or “Regulation 29” (jointly promulgated by the China Securities Regulatory Commission, the National Administration for Protection of State Secrets and the State Archives Bureau). “Unless it can bring

**Figure 2:** Can you quantify the typical spend on electronic document collection and review for these multinational matters? If so, how much (in US Dollars)?



<sup>3</sup> *The Securities and Futures Commission v. Ernst & Young* (23/05/2014, HCMP1818/2012)

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itself within a relevant exclusion to production under the statutory notice, a party disclosing information in compliance with such a statutory notice may find itself in breach of Mainland Chinese law and subject to potential sanctions.”

### The biggest challenge is privacy and confidentiality

In fact, managing data privacy laws and confidentiality concerns is the single biggest challenge faced by our respondents. When asked to rank challenges in running a review project, the top response was “Technology supporting the necessary review flow to meet data privacy or state secrecy.” And in response to the open-ended question, “What new Asian regional laws do you think will impact the management of electronic data in legal review?” 79% cited a specific risk of either privacy or data protection.

“No matter what the trigger, you have to pay attention to privacy concerns,” says Morrison Foerster’s Hough.

The need for data protection and client confidentiality was also cited as the main reason so many respondents would consider using a mobile data processing and document review environment.<sup>4</sup> Almost 85% of respondents said they would utilize such an environment, and

a majority cited both data protection concerns and client confidentiality as the top two reasons.

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“FTI Consulting and indeed other firms are increasing their onshore hosting capabilities in Asian jurisdictions, however even that is sometimes not enough,” said Richard Kershaw, a managing director with FTI Consulting based in Hong Kong. “A mobile processing and review environment enables lawyers to go to the data source – whether in-country or even within a company’s headquarters. Lawyers can conduct an end-to-end investigation on-site, or process the data for export in compliance with country-specific data privacy or state secrets regulations.”

## The second biggest challenge is cost

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As in the U.S., e-discovery cost is a big concern: the respondents ranked it (behind privacy/security) as the second biggest challenge. Unlike in the U.S., however, there is not a great understanding of these costs: almost 30% of respondents stated they do not even know how much they typically spend on document collection and review. “When you are representing clients in the region who are not used to US style discovery spend, it is important to spend time discussing this in advance,” says Jones Day’s Vella. “It is more important than ever for lawyers to make sure they have communicated the discovery costs, which are not limited to their own fees, and not assume that discovery costs are understood as they might be in the U.S.”

However, as in more mature markets, firms and companies in Asia are taking steps to reduce costs.

According to Hough, “Japanese companies who have been through this in the last few years know about e-discovery costs, but still don’t accept it willingly; it is still seen as an undue burden to bear. Companies are also becoming more mature about identifying potential scope,” he adds. “They are moving away from pure keyword search toward technology assisted review and there is a dialogue about how to control costs.”

## China poses unique challenges

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Sixty percent of respondents claimed that they have had to collect data from the People’s Republic of China for an investigation, arbitration or litigation matter and almost 40% say that new laws in China will impact the management of electronic data in legal review. One of the most impactful pieces of legislation will be the Law of the People’s Republic of China on Guarding State Secrets, which is broad and vague and requires documents to be reviewed and cleared of secrecy concerns before leaving China. The State Secrets Law is often in direct conflict with the requirements of U.S. regulators and judges. This is especially true for handling shareholder actions originating in the United States, because US courts are likely to demand financial information which cannot leave China. “To comply with both [State Secrets] and the U.S. Federal Rules of Civil Procedure would be very expensive. Most of these cases settle before they get to discovery,” says Brian

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- 4 Mobile data processing and document review offerings typically entail processing and review software loaded onto a laptop and deployed on-site to ensure adherence to local data privacy laws.

G. Burke, counsel at Shearman & Sterling based in Hong Kong and Beijing.

This may change, explains Aaron G. Murphy, a partner at Akin Gump who focuses on investigations in Asia. "China cannot wall itself off from the rest of the world and continue to do business. As the economic growth slows down in the coming decade, it will need to revisit these approaches or risk choking their own economy."

Another issue, says Burke, is the tightening regulatory environment in China; "U.S. and E.U. regulators are becoming more active and the Chinese government itself is initiating investigations," he states. A company may now find itself dealing with the Chinese authorities, but as a result be investigated in its home jurisdiction, other jurisdictions and face additional consequences such as downstream litigation. "In the last two-and-a-half years, more than 60 listed Chinese companies have been caught up in U.S. shareholder lawsuits, more than any other jurisdiction."

## Increasing regulatory oversight

Beyond the complexity outlined above, the region has seen a recent increase in data protection regimes and concerns about how the Chinese authorities may interpret the country's state secrecy laws. Singapore issued an e-discovery practice direction in 2009 (and updated it in 2012); Hong Kong has a draft practice direction currently under consultation, which is expected to be issued in June 2014.

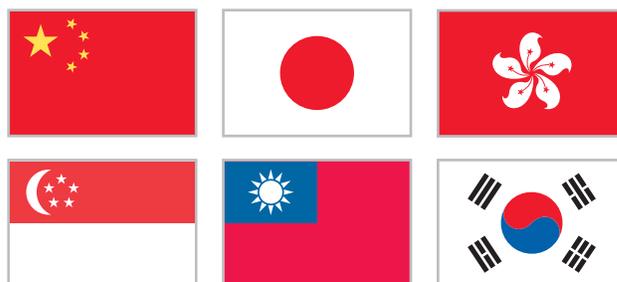
According to the study results, the increase in regulatory attention is having a strong effect regionally. When asked "What new Asian regional laws do you think will impact the management of electronic data

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in legal review?" instead of just one or two countries dominating the responses, the respondents listed six different countries - China, Japan, Hong Kong, Singapore, South Korea and Taiwan. Perhaps not surprisingly, China leads the way with almost 40% of respondents naming it as an area of concern.



**Figure 3:** China, Japan, Hong Kong, Singapore, South Korea and Taiwan were cited by respondents as countries having new laws impacting the management of electronic data in legal review.

Additionally, the unique nature of e-discovery issues being faced in Asia cannot be overstated. Respondents listed a total of more than 20 different "factors encountered in dispute resolution in Asia that you do not see in U.S."

## What this means for those handling Electronically Stored Information (ESI) in Asia

As Asian economies grow, and regulators pay more attention, the problems identified in the survey are likely to get worse before they get better. As then Department of Justice FCPA Unit Chief Charles Duross said at the ABA's National Institute on the Foreign Corrupt Practices Act in September 2013, "what happens in China, doesn't stay in China."

Furthermore, judges and regulators are not terribly sympathetic to the differences between Asian, European and American laws and customs related to ESI, for example difficulties posed by the Chinese State Secrets

Law. “The DOJ often takes the view that where documents have been taken out of China already, there is no argument to be made the data cannot be moved to the U.S.,” says Akin Gump’s Murphy. “If you’re in trouble with China, that’s your problem.”

In many instances, this means collecting either locally or remotely. When asked “how have you handled the in-country data privacy requirements related to document review” more than 83% of respondents claimed they partnered either with a local counsel; a local IT provider or law department; or a global service provider for local collection.

Another growing trend, as discussed above, is use of a mobile data processing and review platform that allows remote collection and review without any data leaving the country. A quarter of respondents have already used this type of technology for document review and almost 17% have done so for collection.

“The wrong time to consider your export requirements and limitations is after you’ve already taken data out of a jurisdiction,” said FTI’s Kershaw. “While there is a widely understood need to preserve in order to avoid sanction, initial project planning should now also include consideration of processing and review onshore, and what technologies are available to support those objectives.”

No matter the jurisdiction where the ESI work will actually be done, in most instances, it makes sense to have a partner or local resource with in-country experience and knowledge. Whether related to a particular regulatory requirement, a State Secret in China or Common Law issue in Singapore, having access to a strong understanding of cultural and legal issues as well as language is crucial to ensure a thorough and defensible process.

“Working with a domestic partner is a prudent approach,” says Jones Day’s Vella. “It all comes down to the workflow you are using and what point you are involving them in that process.”

## About FTI Technology

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FTI Technology helps clients manage the risk and complexity of e-discovery. We collaborate with clients to develop and implement defensible e-discovery strategies with keen focus on the productivity of document review. Our complete range of offerings, from forensic data collection to managed document review services, provides unprecedented flexibility to address and discovery challenge with confidence. Clients rely on our software, services and expertise to address matters ranging from internal investigations to large-scale litigation with global e-discovery requirements. For more information, please visit: [www.ftitechnology.com](http://www.ftitechnology.com).