

A nighttime photograph of a city skyline, likely in Asia, with illuminated buildings and a street with light trails from cars. The image is overlaid with a semi-transparent blue triangle on the right side.

LEGAL TRENDS AND CHALLENGES IN ASIA

BY MONICA BAY

For many legal practitioners, Asia remains a legal challenge, “whether it’s the different data sources, the lack of familiarity with case law or an understanding of the legal landscape in different countries, from Hong Kong to China to South Korea and elsewhere,” said Zach Warren, editor-in-chief of ALM’s *Legaltech News*, as he opened the ALM webcast “Legal Trends and Challenges in Asia,” sponsored by Epiq. The \$10 billion+ global e-discovery market is growing by roughly 10 percent every year, and by 2019, 7 percent of the global market will be in Asia, said Warren, citing a 2016 report from the International Data Corporation (IDC).

Sebastian Ko, regional director, document review services, Asia Pacific region for Epiq, and Boston-based Shannon Capone Kirk, e-discovery counsel at Ropes & Gray addressed these issues in the webcast. Ko oversees managed review services and staffing in Epiq’s Hong Kong, Shanghai, and Tokyo offices, and has been involved in both multi-jurisdictional and onsite projects in the Asia Pacific region. He is admitted to the New York and Hong Kong bars. Boston-based Kirk has led e-discovery strategy in many cases involving coordinated cross-border strategies for China’s State Secrets Law and non-U.S. data privacy laws. She is licensed in Massachusetts and Illinois.

The two speakers provided a detailed overview of many key issues in Asian e-discovery. Here are some of the takeaways,

ranging from data translation, interpretation and vendor issues to cultural considerations and China state secrets.

AN INCREDIBLE UPTICK IN ASIAN ACTIVITY

Kirk started off the discussion by noting the “incredible uptick in activity in all of Asia,” with globalized investigations, Foreign Corrupt Practices Act 1977 (FCPA) work, and “regular litigation” that requires cross-border discovery, investigations, and collections. She also said she sees much growth in U.S. work that involves coordinating with three to five Asian countries.

Ko also acknowledged the Asian-American expansion, and said that Epiq has responded by building full staff

capabilities in greater China and Japan, allowing the company to provide collection, processing and local review capabilities and other services. He has also seen many Asian cases with cross-border elements, which are likely to come under FCPA and U.S. Securities and Exchange Commission requirements, and he predicted spikes in intellectual property cases.

The growth of litigation can create obstacles, said Ko, due to the fact that collections are quite commonly in remote places, which can involve lengthy travel and location-specific difficulties (e.g., logistics and networks). Rural areas can also have limited internet bandwidth, with dramatically varying speeds, which poses a challenge at every stage, from collection to review, he said. Leaders will need a thorough, well-planned approach when collecting in remote areas.

THE NEED FOR MULTIPLE LANGUAGE CAPABILITIES

It's also important to know that electronically stored information (ESI) used for e-discovery projects may be in Chinese, Japanese, Korean, or any other Asian language.

"If you don't have the right processing tools or review systems to display these characters properly, then it is really a waste of time when you are doing the searches [for data]," said Ko.

TOP TIPS FOR MANAGING CROSS-BORDER E-DISCOVERY

Among the advice offered during the webcast, Kirk gave three tips for managing e-discovery in Asia:

- 1) "Know exactly who will be working on the ground" in both Asia and the U.S.
- 2) Be aware of subcontracted tasks, which can trigger contract liability provisions.
- 3) Have a contact in Asia with whom firms can quickly discuss changes to avoid costly delays.

PEOPLE'S REPUBLIC OF CHINA STATE SECRETS LAWS

Firms dealing with People's Republic of China (PRC) and its State Secrets Laws often hire local PRC counsel, which can delay data collection and transfer.

"Whenever we're in mainland China, [State Secrets Laws] is a topic that we have to build into our thinking, and often into our workflow," said Kirk.

Broadly, the PRC defines "state secrets" as matters with a vital bearing on state security and national interest. These matters are specified by legal procedure, and access is given to a limited number of people or for a limited period of time.

"That's pretty vague and pretty broad," she said, which can lead to questions about what firms will have access to, when, and for how long.

Kirk then summarized the seven main categories of PRC state secrets:

- 1) Secrets concerning major policy decisions on state affairs.
- 2) Secrets in the building of national defense and activities of the armed forces.
- 3) Secrets in diplomatic activities and activities related to foreign countries as well as secrets maintained as commitments to foreign countries.
- 4) Secrets in national, economic, and social development.
- 5) Secrets concerning science and technology.
- 6) Secrets concerning activities for safeguarding state security and the investigation of criminal offenses.
- 7) Matters classified as state secrets by the state secret guarding department.

In addition, there are three levels of classification: Top secret, highly secret and secret.

Penalties for improper access vary based on the seriousness of the violation and classification, Kirk said, from fewer than five years, imprisonment to death.

Accounting and archiving laws can also easily block or delay regular e-discovery processes, Kirk said. U.S. litigators may have difficulty ascertaining which data contain state secrets due to the uncertainty of all these moving parts, she explained.

Kirk ended her presentation with the following words of advice for U.S. practitioners: "Firms should not make any assumptions about the level of understanding at the companies they're representing or the vendors they're hiring in Asian countries. Ask all the questions you would of a U.S. practitioner, with an eye for the potential differences and issues to be aware of."

The panelists also discussed practices in Taiwan, Singapore, and Hong Kong. For the full discussion, listen to the webcast [here](#).

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