

An EPIQ primer on eDiscovery and its challenges in Asia

The global explosion in data variety, velocity, and volume has transformed legal practices requiring regular large-scale document disclosures. Electronic discovery (“eDiscovery”) solutions are developed to help practitioners handle disclosures in arbitrations, litigation, and investigations in the era of Big Data. Technologies for the law must be critically reliable. Today, eDiscovery is integral to case management, as it can impact budgets significantly.

An eDiscovery project begins with data collection and preservation. This stage must be conducted with forensically-sound practices to avoid spoliation claims. The data (in volumes of 10s to 1000s of gigabytes) must then be processed and unitized in a database. Duplicates and system-created files are filtered out. Data files might also need decryption and repair. The data is hosted on a software platform, where keyword searches are applied to further reduce document sets for human review for case relevancy and privileged communications. The data set could also be limited by time range and custodian, and pre-sorted by email threads and document version (if more than one version was created). Users could also employ analytical technologies to automate review functions and gain further insights.

The execution of eDiscovery projects require legally defensible practices and trained specialists (vendors or in-house consultants) to address numerous case-specific requirements. Upstream errors arising from the collection and processing stages could compound and impair review and other downstream stages.

Internal and regulatory investigations drive the demand for Asian eDiscovery services. Such investigations often require cross-border data transfers, and many are connected with China. Demand is also driven by U.S. Foreign Corrupt Practices Act investigations, patent prosecution, and shareholder litigation.

Conducting cross-border eDiscovery adds several dimensions of complexity, and might require eDiscovery services in remote locations, different time zones, and multiple languages. For example, if data containing mixed English and CJK (Chinese, Japanese, and Korean) text is processed without accounting for their differences in encoding, the text would appear unsearchable and scrambled. Regularly, eDiscovery in Asia requires scanning of paper records, but optical character recognition may not be effective in all cases. Separate review workflows are needed for searchable and unsearchable records. Given the nuances involved, counsel should consult eDiscovery specialists who can apply global best practices while being sensitive to local requirements. This means having local presence and language skills.

Over 90% of Asian jurisdictions neither have common law systems, nor would recognize the concepts of discovery and legal privilege. Many Asian clients are often surprised by disclosure

costs and the need for extensive evidence preservation. Hong Kong and Singaporean courts have eDiscovery rules that help litigants manage eDiscovery processes and costs. It is expected that these jurisdictions will develop eDiscovery practices rapidly following the U.S. and U.K., which have established comprehensive eDiscovery jurisprudence.

Data privacy and cybersecurity laws and compliance are hot topics in eDiscovery. There were Hong Kong and U.S. cases where parties invoked Chinese state secrecy and accountancy laws to block disclosure requests to varying degrees of success. eDiscovery might be conducted onsite at client offices to assuage various confidentiality concerns. Tailored workflows must therefore be implemented to handle sensitive data and work with corporate policies.

eDiscovery technology solutions impact widely on legal practice today, especially when complex disclosure projects are the “new normal”. Given the moving parts and aggressive timeframes of eDiscovery projects, it is cost-effective for lawyers, even those with eDiscovery experiences and capabilities, to consult eDiscovery specialists early on and to delegate technical duties. To conduct eDiscovery efficiently, its processes and technology must be managed and integrated carefully together with business, legal, compliance, and IT teams.

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