Where Discovery and Privacy Collide


Litigation teams face new challenges when an ediscovery project crosses borders – from multilingual data and unique cultural norms to unfamiliar laws, regulations and data privacy practices.

In addition, the international data protection landscape is changing, and U.S. businesses with global operations need to be prepared. Companies need to think carefully about the risks of transferring data across borders.

Litigation, compliance demands and investigations are part of the regular course of business for U.S. lawyers. With global considerations and cross-border implications, law firms and companies now rely on mobile ediscovery technologies, in-country data centers and local expertise to empower the processing and transferring of data in a compliant and cost-effective manner.

This guide includes practical insights into how organizations all over the world are managing a wide range of business challenges using ediscovery technology.

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KrolLDiscovery is here to help you and your business thrive and adapt in a changing ediscovery world.
FCPA Investigation

Investigative work becomes increasingly complex when data in multiple locations and languages collides with data sensitivity and protection. Whether looking into corruption allegations or deciphering communications between parties, successful cross-border cases start with sound forensic collection and result in case facts being uncovered.

A Swiss pharmaceutical company involved in an FCPA investigation needed to collect data strewn throughout several locations in Indonesia and conduct in-region review of Bahasa-language documents by native speakers.

Challenge
- Multi-location data collection including encrypted laptops, mobile devices and email
- Mixed-language review set
- Need to review Bahasa-language documents with native speakers

Goal
- Uncover facts surrounding the alleged corruption
- Respond to government inquiries in a timely manner

Approach
- Deploy collection engineers to the various locations
- Determine who key players were talking to and when communications occurred
- Determine scope of non-English documents
- Separate non-relevant data from key documents
- Leverage in-region resources, for native review
Netherlands
Legal System
Civil Law
Applicable Rules
Dutch Personal Data Protection Act (Wet bescherming personengegevens) [1995]
Dutch Telecommunications Act (Telecommunicatiewet, implementing Directive 2002/58/EC)
EU Data Protection Law
Ediscovery Practices
Ediscovery demand is growing due to increased regulatory scrutiny and EU companies taking more proactive approaches to compliance.

Nordics
Legal System
Civil law
Applicable Rules
Sapin II
EU Data Protection Laws
Ediscovery Practices
Notable data protection laws and regulations exist in the Nordics, and ediscovery is performed in compliance with these. The intricate privacy laws in the region are based on multilateral data protection principles.

Hong Kong
Legal System
Common Law
Applicable Rules
Personal Data Protection Ordinance (Cap. 486 of the Laws of Hong Kong)
Practice Direction PDSL 1.2
Ediscovery Practices
Hong Kong is a global center of finance, with many banks, brokerages, private equity funds and other financial institutions based here. As such, demand for ediscovery in Hong Kong is heavily driven by regulatory investigations. Hong Kong provides a unique set of ediscovery tools and techniques which allow for frictionless ediscovery that aligns perfectly with its market reality, proportionality and cost efficiency.

China
Legal System
Based primarily on the civil law model
Applicable Rules
Chinese Civil Code
Chinese Cybersecurity Law
Ediscovery Practices
China does not have formal discovery practices in civil litigation. Further, the Chinese government has several regulations that impose restrictions on gathering data in China or an investigation or litigation. The most important regulation in the State Secrets Law. Other ediscovery barriers in China revolve around language and culture, with the work culture in China being very familiar and controlled by personalized networks of influence and reciprocity.

Canada
Legal System
Civil law
Applicable Rules
Federal Rules of Civil Procedure
Ontario Rule 25.1 (Ediscovery)
Ediscovery Practices
The Canadian ediscovery community is closely watching the increasing number of practitioners embracing new ediscovery tools and techniques.

United States
Legal System
Civil law
Applicable Rules
Federal Rules of Civil Procedure
California Rule 37
Ediscovery Practices
The common law discovery rules and regulations set the stage for ediscovery practice in the United States.

United Kingdom
Legal System
Common law
Applicable Rules
Civil Procedure Rules (Part 31 and 32 and Practice Direction 31A)
Ediscovery Practices
Ediscovery is well practiced and judicial oversight on requests, proportionality and cost practices have had a tremendous effect over the past decade.

Spain
Legal System
Civil law
Applicable Rules
EU Data Protection Law
Ediscovery Practices
While Spain is a civil law jurisdiction, there is no formal discovery requirement in Spain. As such, data protection laws in Spain are very similar to those in other common law jurisdictions.

Italy
Legal System
Civil law
Applicable Rules
Legislative Decree No. 196/2003, which contains the Italian Data Protection Act (Codice Civile); [1996]
EU Data Protection Law
Ediscovery Practices
Ediscovery practices are well-defined and regulatory requirements are strict. Italy is developing in Switchen.

Germany
Legal System
Civil law
Applicable Rules
Federal Data Protection and Information Commissioner (BfDI)
EU Data Protection Law
Ediscovery Practices
No formal discovery requirement in Germany. Companies and regulatory authorities are increasingly engaging in international collaborations. Data protection laws in Germany require the need to produce a massive amount of data in a short amount of time.

Belgium
Legal System
Civil law
Applicable Rules
General Data Protection Regulation (GDPR) which implements EU Data Protection Law
EU Data Protection Law
Ediscovery Practices
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Switzerland
Legal System
Civil law
Ediscovery Practices
Switzerland is the first country in the APAC region to have a legal ediscovery framework.

Japan
Legal System
Civil law
Applicable Rules
Japanese Act on the Protection of Personal Information (JAPPI)
Ediscovery Practices
Japan is the most developed ediscovery market in the APAC region and continues to implement the GDPR-based 
Practices (CBPR) system in order to foster internationalization and personal information transfers across borders.

Australia
Legal System
Common law
Applicable Rules
Federal Privacy Act
Applicable Rules
New South Wales Privacy Note 5.17 and Victoria Practice Note 5.17
Ediscovery Practices
Australia has been slow to embrace ediscovery technology. Further, Australia has the most recent and sophisticated ediscovery technology.

Singapore
Legal System
Civil law
Applicable Rules
Personal Data Protection Act (PDPA)
Ediscovery Practices
Singapore is the first country in the APAC region to have opted out ediscovery technology within its legislation. Although the guide was introduced in 2008, companies and law firms have been slow to adopt ediscovery technology. Further, Singapore has the most recent and strict data protection laws, and it is lest if personal data does not leave Singapore.

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United States

In December 2015, the Federal Rules of Civil Procedure were amended with the aim of putting a stronger lid on growing discovery. For example, the new version of the Rule 26(b)(1) contains a new emphasis on the need for proportionality in discovery and has been a movement by the courts to use the rule to restrain unnecessary discovery. Given these new rules, U.S. legal practitioners are smart to make use of the latest ediscovery technologies, such as predictive coding and information governance platforms, to meet court deadlines and reduce expenses.

Canada

Ediscovery practices in Canada are quite similar to the processes, principles and goals of the United States and the United Kingdom. But, there is a general sense that Canada leads the global ediscovery community in terms of cooperation and proportionality. While there is too little to say about ediscovery in Canada, it is designed to narrow the scope of documentary discovery and provide increased judicial access to information. Given these new rules, U.S. legal practitioners are smart to make use of the latest ediscovery technologies, such as predictive coding and information governance platforms, to meet court deadlines and reduce expenses.

Brazil

Brazil is one of the newest and fastest growing ediscovery markets. While ediscovery is not as prevalent as in the United States or United Kingdom, Brazil is widely regarded as one of the world’s Latin American economies with strong relationships between corporations, law firms and ediscovery providers. In Brazil, ediscovery tools and techniques mainly are used for internal investigations and fact-finding purposes. That means that most of the time, ediscovery is for internal use only and documents are not called to be disclosed to any other party.

United Kingdom

Unlike many of the Americas and EMEA nations, ediscovery has been part of the United Kingdom’s Civil Procedure Rules for over a decade. During that time, practical know-how regarding ediscovery technology has spread globally. To this end, U.K. lawyers are comfortable with the advantages a full analysis of electronic evidence can bring to their cases. However, with uncertainty brought about by Brexit, the new EU-U.S. Privacy Shield and the impending EU General Data Protection Regulation, there will be more scrutiny than ever on the handling of personal data and tougher penalties for non-maintaining personal data in the future.

France

French litigators are not consistently familiar with ediscovery, since discovery is not a formal discovery requirement in French law, which happens from time to time when a French company is asked to produce evidence before a U.S. court. Ediscovery tools and techniques mainly are used for internal investigations and fact-finding purposes. That means that most of the time, ediscovery is for internal use only and documents are not called to be disclosed to any other party.

Belgium

As the de facto capital of Europe and the formal center of the European Union, Belgium is at the center of European ediscovery, particularly investigation matters, even though it has no formal discovery requirement itself. Despite this, the laws based in Brussels work globally, whether in a competition or litigation matter. Belgium has put into place ediscovery technologies to not only help manage the significant volumes of electronic data, but also the many different languages that feature in each case.

What Makes Ediscovery Unique?

Around the World:

Americas

EMEA

APAC

United States

United Kingdom

Germany

Canada

Brazil

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What Makes Ediscovery Unique?
Major Milestones: EU Data Privacy & Protection

There is a significant amount of uncertainty and upheaval with regards to the data privacy and protection landscape in the EU. How should U.S. in-house counsel and their law firms manage through this change?

All of this change leaves many legal professionals asking, “Data protection—new horizons or business as usual?” Until the implications of these new data protection regimes and the impact of Brexit are fully known, companies and counsel need to think carefully about the risks of transferring data across borders.

In the late 1990s, the European Data Protection Directive was designed to protect personal data in a world that was becoming increasingly digital. As technology developed over the next decade, the need for a new law in the EU was realized, and thus a successor to the European Data Protection Directive, the EU General Protection Regulation (GDPR), was created.

In order to allow data transfers with United States, the EU entered into the “Safe Harbor Agreement” with the United States which allowed U.S. organizations to self-certify that they will provide privacy protections that meet the Directive’s standards when transferring personal data outside of the EU. However, in 2015, the Safe Harbor Agreement was deemed invalid. The replacement legislation, the EU-U.S. Privacy Shield, was finalized in July 2016, following protracted discussions and a rejected draft agreement.