Ediscovery in China
Traditions, Rules and Customs You Need to Know
Speaker

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• New York lawyer educated in New York City with practice starting out on Wall Street
• Extensive experience at Kroll Ontrack in eDiscovery Consulting, Client Relationship, and Case Management – most of which has been spent in Asia assisting US Multi-Nationals and Asia based companies doing business in the US
• Advisory role for Asia based clients defending Antitrust investigations and actions
Agenda

- U.S. Litigation Involving China: Overview
- Challenges of Doing Business in China
  - Regulations
  - Language
  - Work Culture
  - Guanxi
  - Developing Economy
- Sources of Information Collection
- Balancing Act
Increasing Litigation Between U.S. and China

Since 2012, China has been the most frequent country to be involved in FCPA investigations.

About 8% of securities class action suit filings in 2015 were filed against Chinese companies.

Securities class action lawsuits against Chinese companies represent about 44% of all such suits filed in 2015 against non-U.S. companies.

Trademark litigation is booming in China with civil IP cases up by 14.51% in 2015.


*Kevin LaCroix, Securities Litigation Filing Trends: Suits Against Foreign Companies Continue to Accrue. [Link](http://www.dandodiary.com/2015/12/articles/securities-litigation/securities-litigation-filing-trends-suits-against-foreign-companies-continue-to-accrue/).

*http://www.worldtrademarkreview.com/blog/detail.aspx?g=cf71edeb-49b8-484a-8ca5-0224fa0da31f*
The Challenges of Doing Business in China
Chinese Regulation: State Secrets

What is it?

State Secrets is a broad/vague term loosely defined as:

“matters that have a vital bearing on state security and national interests and, as specified by legal procedure, are entrusted to a limited number of people for a given period of time”

Chinese Regulation: Anti-Terrorism Laws
New Rules for Tech Companies

The law prohibits:

“all kinds of terrorism, bans terrorist organizations according to law, and pursues legal responsibilities of anyone who organizes, plots, prepares to carry out, or carry out terrorist activities; or who advocates terrorism, incites to commit terrorist activities, organizes, leads, joins terrorist organizations, or aids terrorist activities.”

Requirements:

Telecommunications operators and internet service providers shall:

- provide technical interfaces, decryption and other technical support assistance to public security organs and state security organs conducting prevention and investigation of terrorist activities in accordance with law
- put into practice network security systems and information content monitoring systems, technical prevention and safety measures, to avoid the dissemination of information with terrorist or extremist content

Counter-Terrorism Law of the People’s Republic of China.
http://chinalawtranslate.com/%E5%8F%8D%E6%81%8B%E6%80%96%E4%B8%BB%E4%B9%89%E6%B3%95-%EF%BC%882015%EF%BC%89/?lang=en
Other Chinese Government Regulations

**Privacy Laws**
- China has not enacted a single piece of legislation that specifically addresses the collection, storage, transmission and operation of personal information.
- There are a few privacy provisions in specific PRC laws and regulations (e.g., The Civil Code and Tort Liability Law provide legal recourse for infringement of rights to privacy).

**Regulation and Punishment of the disclosure of state secrets**
- **Criminal Law of the People’s Republic of China**
  - Set out the guidelines for punishment one can receive for violation of the various provisions of the State Secret Laws.
  - Punishment can include both fines and incarceration.
- **National Security Act of the People’s Republic of China**
  - Any organization or individual that has committed any act endangering the State security shall be prosecuted according to law.
  - Whoever intentionally or negligently divulges State secrets concerning State security shall be given a detention of not more than 15 days by the State security organ.
  - A State security organ may search the body, articles, residence and other related places of anyone who unlawfully holds documents, materials or other articles classified as State secrets.
  - Anyone, who unlawfully holds documents, materials or other articles classified as State secrets, if the case constitutes the crime of divulging State secrets, shall be investigated for criminal responsibility according to law.

*http://us.practicallaw.com/4-519-9017
*http://www.china.org.cn/english/China/218754.htm
The FCPA prohibits U.S. companies and their “issuers” to participate in bribery with foreign officials.

- The DOJ has both Criminal and Civil enforcement under the FCPA
- The SEC only has Civil enforcement under the FCPA

How is the DOJ and SEC notified about FCPA violation?

- tips from informants or whistleblowers
- information developed in other investigations
- self-reports or public disclosures by companies
- referrals from other offices or agencies
- public sources, such as media reports and trade publications
- proactive investigative techniques

In Re Parametric Technology, Feb. 16, 2016

What Happened?

- DOJ and SEC joint case against two subsidiaries of Massachusetts software company PTC Inc. for FCPA violation

- According to admissions made in the resolution documents, Parametric Technology (Shanghai) Software Company Ltd. and Parametric Technology (Hong Kong) Ltd. (collectively, PTC China), through local business partners, arranged and paid for employees of various Chinese state-owned enterprises to travel to the United State, the primary reason being recreational travel to areas such as New York, Los Angeles, Las Vegas and Hawaii

- PTC China paid a total of more than $1 million through its business partners to fund these trips

- PTC China admitted that the cost of these recreational trips was routinely hidden within the price of PTC China’s software sales to the Chinese state-owned entities whose employees went on the trips

- Company employees typically accompanied the Chinese officials on these trips

- During this same period PTC China entered into more than $13 million in contracts with the Chinese state-owned entities

- The company signed a non-prosecution agreement and agreed to pay a $14.54 million penalty to the DOJ and a $13.622 million disgorgement including interest to the SEC in order to resolve the government’s investigation against them
### Implications of Chinese and U.S. Regulations on Data

<table>
<thead>
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<th>U.S.</th>
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**U.S.**

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**Language**

**Ediscovery in China: Things to Keep in Mind**

- English is NOT the first language
- Communication will be difficult
- Need a discovery tool that can run searches and process data in multiple languages
  - Chinese language has multiple dialects
  - Understand the difference between *traditional* and *simplified* Chinese characters
- Important to have a Chinese consultant validate your search results- search engine tokenization using Chinese characters is not always accurate
Work Culture

Familism Guides Chinese Business Practices

What is Familism?
The social convention that prioritizes the entire family above the needs of individual members

Why is it Important?
- Circle of trust is difficult to break
- Many of China’s companies are family-based
  - Managers tend to hire relatives
- In China, people will go out of their way to protect their boss
- Makes it challenging to enforce corporate governance
**Guanxi**

**A Central Foundation to Chinese Society?**

*Guanxi* refers to personalized networks of influence and reciprocity that individuals and businesses possess.

Such *informal* relationships govern almost every aspect of social and business interactions.

**Implications**

- Strengthens the circle of trust which is already difficult to penetrate
- Relationships built through *guanxi* must be continuously maintained
- Ethical concerns - the relationship between *guanxi* and fraud is complex and often blurred
Developing Economy

Understanding Ediscovery Nuisances is Critical in China

- China does not have formal ediscovery obligations
- Multinational companies follow U.S./home country ediscovery laws
- Chinese employees don’t understand this U.S. requirement of gathering and giving information for litigation
- The Chinese still use a lot of paper documents
- In China, employees often mix things between their personal and business computers
- Chinese custodians are not very forthcoming with information
- Manufacturing and production plants are located in remote locations rather than in big cities which means parties only have one chance to get the information
Sources of Information Collection
Preservation and Collection

Common Sources of ESI in China

- Paper Documents
- Email
- Electronic Documents
- Websites
- Phone Records
- WeChat

- Audio Recordings
- Video Recordings
- Images
- Social Media
- Other forms of Electronically Stored Information
Ediscovery in China: A Balancing Act
Helpful Guidelines

Tips for Ediscovery Success in China

1. Balance data production and protection
2. Review responsive documents and protect privileged data
3. Use local resources
4. Have the right team in place
5. Consider diverse data sources
6. Don’t limit your investigation to just one custodian
7. Don’t be afraid to ask for updates
8. Use a mobile solution
Mobile Ediscovery Solutions

Why is it important in China

- **Mobility**
  - data remains on location
  - capture, process and filter data anywhere
  - opportunities to work more efficiently - rapid deployment
  - can be leveraged as an Early Case Assessment tool – with the ability to perform quick searches and extensive on-the-fly reporting
  - No need to implement or deploy application behind client’s firewall

- **Control**
  - analyze and examine content across multiple devices on location
  - self-contained network of technologies

- **Compliance**
Mobile Ediscovery Solutions

Why is it important in China

- **Compliance**
- **Confidentiality**
  - sensitive data can be identified and left behind
  - Segregation of private and/or privileged documents
  - only preserve or send “potentially relevant” documents
- **Cost**
  - without the cost of a full-blown eDiscovery exercise
Questions?

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