Our experience over a number of years has been that there is a need for ediscovery services in China and that there is a need to process this data in-country, due to local laws. Without this capability ediscovery projects are lost. We carried out a market study to assess whether there is in fact a need for data to be processed at local data centres in China and to quantify the extent to which companies in China need support from third party providers. We also wanted to explore the types of cases ediscovery is being used on in China and to learn more about how companies and their law firms carry out ediscovery in China.

It is clear from the study that there is a need to carry out ediscovery in China and to process data locally mainly to comply with State Secrecy Laws and data protection laws. If an ediscovery provider cannot process data locally they risk not being selected. This is seen as critical or important by the majority of law firms and companies interviewed.

General Observations

- Our market study reveals that the companies we interviewed in China use ediscovery technologies and services on a wide range of cases even though there are no local rules requiring ediscovery to be carried out.
- The law firms we spoke with see vendors as the party primarily responsible for collecting, processing and producing data in review tools for use by legal teams. Companies see themselves as playing a greater role in these tasks.
- 62.5% of law firms interviewed said that there is a need to process data in China for legal proceedings. Nearly 26% of companies agreed and 68% said this may be required. This is primarily due to State Secrecy laws in China which restricts data that is considered a state secret from leaving China.
- For the law firms that participated in the study, ediscovery is something their clients have needed to carry out between 4 and dozens of times a year in the past 2 years and they see this trend continuing for the next year. Companies that participated reported fewer incidents ranging from 0 to 2 incidents each year in the next 12 months.

Executive Summary

The need for ediscovery services and data processing in China: 62.5% of the law firms we interviewed said there was a need to process data in China for legal proceedings and 37.5% said maybe there was such a need. 29.4% of companies that participated said there was a need, 64.7% said maybe there was a need and only 5% said there was no need. Even though there is no legal requirement for discovery in China and companies are not obliged to process data or provide documents to opponents, it was noted that companies may process their own data to prepare for their own cases, in the ordinary course of business. Electronic evidence may be introduced into evidence in legal proceedings such as litigation and arbitration so can be preserved and processed.

A number of participants stated clearly that data must be processed for ediscovery in China due to State Secrecy laws. As one law firm respondent noted, “Chinese law generally restricts data that is considered a state secret from leaving China. So if the information is considered a state secret it cannot leave China. Unfortunately, there is enough ambiguity in the law for the state to interpret this in a way to protect something which they may feel is of vital interest to them. So care needs to be taken with this and often must take a more conservative approach.”

We asked how important it is when selecting an ediscovery provider, for the provider to have the ability to process data in China. 75% of law firms that took part in the study said this is critical and if the provider cannot process the data in China they do not select them. 62% said this capability was important, but there are other criteria that are also considered. Only 12.5% said this was not an important criterion.

One lawyer noted that “It depends on the case - if state secrets or data privacy are key considerations, then it would be critical and if not it would be important but other criteria would be considered too.” Another said, “As for state secrets consideration, it is safer to process the data in China. Also, the client may want the data processed locally so they can better monitor the process”. Lastly, we had this comment: “This is mainly due to the State Secrets Laws and also because there are vendors who can do this so I have no reason to go to others who can’t.”

Companies that participated in the market study said the ability to process data in China was important (68%) but only 5% said it was critical. Processing in China because of State Secrets laws was flagged up as important but other criteria include cost as well as the ability to process and run searches in Chinese which means local providers are sought. One company said its data was stored in the US so there was only a need to process laptop and mobile phone data in China.
When asked if data needed to be processed at clients' premises, 75% of law firms said maybe and 12.5% said yes. 52% of companies said yes, 26% said maybe and 15% were unsure. This indicates that from a corporate standpoint there may be a need for processing data at their own premises and therefore a role for mobile ediscovery solutions as well as local ediscovery data centres in China.

**What types of cases is ediscovery used for in China?** Ediscovery services are used in many different types of cases that increasingly involve data being processed in some way. According to law firms and companies these scenarios include internal investigations, regulatory investigations by Peoples Republic of China ("PRC") authorities and by foreign authorities, litigation/arbitration arising outside of China, M&A activity and domestic litigation/arbitration. The majority of law firms and companies interviewed agree that the main drivers for ediscovery are internal investigations and regulatory investigations by PRC authorities. For law firms, foreign investigations also rank highly. When proceedings are instituted by foreign authorities these are usually based in the US but the UK and Europe are mentioned too. When litigation and arbitration arise outside of China this usually originates in the US but Hong Kong and Canada are also mentioned.

**Who is responsible for carrying out ediscovery in China?** According to most of the law firms interviewed, data in China is usually hosted and processed for legal proceeding at the premises of a third party provider (87.5%), at the law firm's premises (75%) and at the company's premises (57%). Companies reported a different situation stating that data in China is usually hosted and processed for legal proceeding at the companies premises in China (88%), the companies premises outside of China (33%), the law firm's premises (22%) and a third party provider's premises (11%). One lawyer commented as follows: "Most law firms in China do not have the capacity to do this. Besides it is way too expensive to use a law firm because you need a special team and they just have lawyers which are more expensive". One of the companies we spoke to said that "It depends. In the early stages, we deal with it by ourselves. If we figure out that we are unable to solve the problem, we will outsource to law firms".

We were surprised to see companies stating that they process data themselves as this does not match up to our experience even in mature ediscovery markets. Our experience in other countries where ediscovery has been entrenched in the legal system for some time is that companies still do not fully appreciate what "processing data" for ediscovery means. They may well run searches across their data but very few (even those who litigate routinely) have sophisticated ediscovery systems in-house for processing data and typically outsource this. We therefore followed up with a few companies to see if we could find out anything more and uncovered the following overall picture:

- **Collection of data** – Law firms think that third party providers mainly collect the data, that companies also become involved and that law firms do too, to a lesser extent. As one respondent noted: "For small and straightforward investigation projects, the company usually prefers to collect and review the data by itself. For large and complex projects, the company may want to engage outside counsel and data vendors to collaborate in data collection and document review." Companies reported that they mostly collect data and rank their law firms next as having this responsibility and lastly third party vendors.

- **Processing of data** – The pattern is similar to that found with data collection. One law firm noted: "I have seen all of these scenarios with client matters so it depends on the situation and tends to be case specific. Having said that, if the matter is "hot and heavy" then a vendor is always brought in to make sure everything is done properly (i.e. as a quality assurance measure)." Again, we were told by a company we spoke with that this is determined on a case-by-case basis which makes it hard to determine a pattern.

- **Provider of review tool** – From the law firm point of view the pattern is similar to that found for collection and processing. Companies, however, still see themselves as being involved most often but law firms and third party providers do become involved and rank more highly here as the responsible party than they did with the collection and processing of data. A comment by one company was that whilst law firms probably do this "I am not sure if they have something this sophisticated."

- **Review of the data** – Law firms stated that they have primary responsibility for review and then companies and third party vendors rank equally after that. One law firm said that "All three become involved". Companies did claim to have a lot of responsibility in some cases but their law firms take more responsibility in others and third party vendors also become involved.

**Ediscovery barriers in China:** It is clear from the responses given by law firms and companies that participated in the study that China’s State Secret Laws and local data protection laws can act as barriers to the processing of data. One law firm noted that, "Under China's State Secrets Law, the documents containing "state secrets" are prohibited from disclosure and transfer across borders. The vendor needs to process the data locally and keep such data in China." Another said: "With data privacy laws this usually pertains to data for private individuals. Similar laws in the EU are enforced more and are clearer, but the penalties tend to be greater in China." These laws prevent data being transferred across borders. Another lawyer observed that "The PRC regulators and governments have recently indicated a trend of personal data protection in addition to the state secrets protection. Therefore, although there has been no specific requirement for data processing, written consent from relevant employees may be required when the data to be collected may contain personal information."

One company we spoke to highlighted the importance of complying with local data protection authorities and the importance of defensible handling of data to ensure it is admissible: "For example, the internal investigation and international litigation policies are different in Singapore, China and the US. The Force of Law in electronic evidence also varies. Especially in court, we need solid technical support to prove: this email is sent by this particular person, no modification has been made by other people etc." Another company pointed out that another barrier to overcome for ediscovery providers is the need to establish the demand for their services in a country where discovery is not as onerous or voluminous as in the US or Europe.

**Ediscovery obstacles:** In terms of obstacles that need to be overcome for ediscovery providers to process data in China the following were raised: processing Chinese characters which not all providers can do and encryption.
Methodsology for the Market Study

This market study was conducted by Jeffrey Forbes, Publishing Director of TalklawGlobal and Executive Director of the Forbes Institute, and Jeffrey Teh, Founder & Managing Director of InnoXcell. Kroll Ontrack provided input on the questions to ask.

In the first phase (March to April 2015) a questionnaire with identical questions was filled in by 19 companies and 8 law firms. Where possible an interview was also conducted with each participant.

The questionnaire for the companies was completed by in-house counsel involved with operations in China. Most participants were based in China but a few were based in the US. The companies were large multinationals, most with headquarters in the US, and covered a broad spectrum of industries including: Pharma/Chemicals (25%), Food/Beverage (20%), Manufacturing (20%), Technology (15%), Business Services (10%), Infrastructure (5%) and Retail (5%).

The questionnaire for the law firms was completed by lawyers dealing with investigations and working in international law firms with an office in China. The lawyers were either based in China (65%) in the region (25%) or in Europe (10%).

In the second phase (May to June 2015) a set of revised follow up questions was completed by 5 participants in companies who completed the first questionnaire. The revised set of questions sought to add greater detail and insights regarding the drivers and technology used by those companies in China when preparing such matters.

Quantifying the need for ediscovery in China: We asked law firms and companies to estimate how many ediscovery-type incidents involving data in China their firm / company had encountered in the last two years. Law firms’ responses ranged from 3 or 4 to 25+ and dozens. Companies initially indicated that they had not encountered incidents. We dealt with this in the additional follow up we did with companies focussing on future need for ediscovery services.

Regarding the volume of ediscovery incidents expected to be encountered in the next 12 months, law firms’ responses again ranged from 3 or 4 to 25+ and dozens or more. Companies initially said none but on following up noted between 0, 1, and 2 on a range of matters.

One lawyer said “I see an increasing trend for this, but it is very hard to put a number on it” and another said “The general trend seems to be gradually moving upward and this seems to be what many vendors are betting on as more of them are investing in this market.”

Companies commented that they don’t have many incidents and don’t budget for ediscovery but one respondent stated the following: “I cannot predict, but we are looking for solutions for daily operations, because it will be too late if we start to find solutions when something happens. When we are talking about ESI, particularly in internal investigations, we speak mainly of company emails and documents. If I am the person to be investigated, I look for a tool to help me to defend myself and avoid risk. Also, there are two companies; they have signed a long term agreement for cooperation. At the beginning, they may not pay attention to the legal terms very much. But during their executing processes, there is a dispute. Their legal team will be very cautious about the terms and looking for ESI solutions for document review”.

The Big Four accounting firm’s names came up often. Others operating in China include Alix Partners, Grant Thornton, FTI, Epiq, Alvarez & Marsal, Stroz, Absolute Discovery, H5 and Transperfect.

Regarding why the Big Four seem to get mentioned often, one lawyer was asked if this is because they are naturally on the ground serving their audit clients. He said: “No. It is because they spent more on servers and resources located in China, and were therefore able to react much faster than others when the state secrecy laws were being amended. But it seems most of the other vendors have caught up already.”

Kroll / Kroll Ontrack was mentioned three times (out of 8 law firm respondents) – once in the sense that we operate “to some extent” and the other by someone who only uses us.

Companies we spoke with painted a similar picture with Kroll Ontrack’s name being mentioned more frequently. Additional competitors’ names mentioned were Consilio, BDO, Nuix from Australia, IBM and EasyRecovery.

Conclusion

As far as ediscovery services in China are concerned it is clear that there is a need to process data in China to ensure compliance with State Secrecy Laws and data protection laws. Legal compliance appears to be a very important factor when operating in China. Ediscovery services are used on a wide range of investigation and litigation cases but also in M&A transactions and for compliance and in situations where there is no legal obligation to do so. This indicates that companies and law firms are recognising the value of electronic evidence and tools and their use is taking root organically. The need for ediscovery services is quantifiable and significant when extrapolated over the number of firms and companies in China. There are signs of an upward trend going forward. The market appears to be competitive already and some providers have local processing capabilities. Those who cannot process data locally will be excluded by some clients and may already have lost their competitive advantage. Apart from needing a local data centre a significant number of companies think they may need solutions (such as mobile solutions) at their own premises. Law firms, companies and ediscovery providers are all involved in collecting, processing and reviewing data and there appears to be no set pattern when it comes to who leads but rather this is dealt with on a case by case basis. Law firms are familiar with ediscovery whilst companies understandably experience it less. There is clearly a need for more education on the topic.