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Conducting Investigations and Discovery in China, Part II: Navigating Judicial and Regulator Expectations in Cross-Border Reviews

BY JOHN DAVIS GARY GAO

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In the first part of this series, we provided an overview of legal and practical challenges in conducting discovery and investigations in China, along with practice pointers toward identifying and collecting data in the country. In this second part, we delve into strategies for effectively reviewing information under restricted conditions for cross-border transfer and use in the U.S., as well as key considerations in managing Court and regulator expectations to ensure a smooth and compliant process.

1. Planning Your In-Country Review Strategy

We often collaborate with trusted local counsel and technology providers to manage and evaluate data collected in China for restricted or sensitive information ***before export***. This in-country review is not only designed to comply with PRC law, but also often reveals data characteristics that guide compliance decision-making. However, the review can be expensive and time-consuming, straining budgets and requesters' patience. Further, the limitations on U.S. counsel's access to data in China can undermine oversight and slow the integration of data insights into case strategy. A successful review strategy can effectively lift the blindfold from counsel's eyes and bridge this oversight gap.

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2. The Role of Technology in Review

The pain of review can be eased by focusing upfront on narrowing scope to exclude documents that do not require export, such as those that are (a) clearly non-responsive, (b) subject to deferred or phased disclosure and so are of only contingent relevance – e.g., documents only relevant to damages/remedies, or (c) obtainable outside of China (although certain Chinese data laws have extraterritorial effect, and so prior export of a document would not necessarily lift the compliance obligation). Counsel can prioritize and categorize the remaining documents based on their importance and risk of containing protected information of the sort that would move the needle with authorities, with more sensitive data (for example, communications with

government officials) receiving closer inspection and more time to address. As we discuss below, working with the requester to adjust production expectations may also minimize and expedite the review.

Use of e-discovery techniques such as search terms, analytics and AI technology can enormously advance this process. We are also closely studying Generative AI to allow counsel to direct more flexible and rigorous inquiries into the dataset and receive a form of output that may more manageably be assessed for export. While this technology has a host of issues that remain unaddressed, it can aid in identifying restricted data and help U.S. counsel remotely oversee the harvesting of case-critical information during formative stages of a matter.

3. Structuring the Review: Case Objectives and Data Risks

With the data universe defined, it is time to settle on the best structure of the overall review. Options include reviewing documents in China solely for compliance with Chinese law, conducting a comprehensive review for all issues within China, or a hybrid approach. This decision requires a detailed analysis, as it can significantly impact risk, cost, and timelines. Among the factors to consider in planning are:

- *Effective Oversight*: For quality as well as ethical and professional reasons, U.S. counsel should exercise adequate oversight over the discovery process and certify disclosures to U.S. courts. The restrictions on cross-border data access, however, can undermine training and oversight of review teams as well as knowledge transfers needed to effectively litigate a case. Where oversight is conducted remotely or indirectly (e.g., via Teams, or through local proxies), a more involved process and heightened collaboration with local counsel may be needed to ensure quality and compliance. The ability to place qualified resources (such as U.S. trained attorneys with Chinese language skills) on site for the investigation and review can help mitigate such risks, albeit with added burden and expense. This option, however, has become less available as foreign law firms have increasingly withdrawn from China. Further, foreign attorneys working in China – in addition to worrying about general country risk (*e.g.,* U.S. State Department China Travel Advisory dated Nov. 27, 2024), must take care to not transgress PRC laws and policies restricting their scope of permissible activities and ability to access information while in China.
- *Qualified Reviewers:* Local law firms are experienced in conducting Chinese law and relevance reviews and often staff Chinese attorneys with U.S. law qualifications. However, finding enough reviewers capable of handling technical issues and complex issues of U.S. law can be challenging. Staffing deficiencies may increase U.S. counsel's oversight burden and require additional training, intervention and QC steps both in China and after export, with budget and timeline implications.
- *Case timelines*: The "comprehensive" review workflow, where all steps are performed in China, can streamline processes by avoiding the need to assemble a separate review operation after export. This may expedite outside counsel's access to "cleared" data for use in the matter and decision-making on the proper handling of restricted information. In addition, where there is uncertainty about changing regulatory directions (as we already have seen with U.S./China relations under strain), clients may wish to prioritize speed of export rather than risking a regulatory window slamming shut. Of course, the expected efficiencies may be illusory if quality is poor and the work needs to be done over, undermining timelines, knowledge acquisition, and patience of the court or requester.
- *Jurisdictional risk*: Some clients may be reluctant to allow any data—in particular, documents not required for production—to be transferred outside of China, where it may come within easier reach of subpoenas or capture in other legal proceedings.
- *Approvals*: Whether and how to seek guidance of Chinese authorities on the proper classification of information or approval for its export significantly impacts the timing and scope of data exports. For example, authorities may require that you submit for

review ***every*** document to be exported—including those that Chinese counsel has determined do not contain restricted information. A large submission may so slow processing of the request as to make this route unusable. In addition, some agencies will only entertain a single submission—ruling out rolling requests for approval. Compounding the uncertainties, Chinese authorities have recently provided inconsistent signals in their approach to data exports. While authorities have issued regulations to promote data cross-border flows and stressed judicial cooperation to create a more business-friendly environment, we have seen few instances of successful requests for approval.

4. Managing the U.S. side: Obligations and Expectations

Despite best intentions, Chinese companies may still face conflicts between Chinese law (enforced by civil, administrative, and criminal penalties) and U.S. disclosure requirements (risking sanctions and loss of credibility and eligibility for cooperation credit).

a. Enforcement Agencies: Expectations and Realities

U.S. enforcement agencies typically react unfavorably to difficulties in obtaining information from China. Time and time again, we have seen disconnects between the assumptions and beliefs of U.S. regulators and Chinese companies as to what is possible under Chinese law. The U.S. Department of Justice (DOJ), for example, expects full disclosure of relevant information no matter where kept, will ask probing questions about failures to produce based on foreign law, and weighs companies' efforts and success in surmounting such barriers in assessing credibility and cooperation credit. *See* DOJ FCPA Corporate Enforcement Policy 9-47.120; 9/15/22 DOJ Memorandum, Dep. AG Lisa Monaco ("Department prosecutors should provide credit to corporations that find ways to navigate such issues of foreign law and produce such records.").

b. U.S. Courts: Navigating Competing Legal Systems

U.S. courts, while skeptical, are generally more nuanced in their approach to foreign law conflicts. The Supreme Court in *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 546, 565 (1987) set the broad framework for this consideration, instructing U.S. courts to "demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations". *First*, courts make a searching inquiry of whether a true conflict of law exists such that compliance with both laws is impossible, demanding "sufficient particularity and specificity" of conflict for the evidence at issue. *Wultz v. Bank of China Ltd.,* 979 F. Supp. 2d 479, 486 (S.D.N.Y. 2013). For example, courts have found that the prohibition on disclosures to foreign judicial authorities or government officials found in China's data security and privacy laws do not apply in civil litigations where disclosures are exchanged between the parties. *In re Valsartan, Losartan, and Irbesartan Products Liability Litig.*, No. 2875 (RBK), 2021 WL 6010575, at *10 (D.N.J. Dec. 20, 2021).

Second, if a true conflict is found to exist, *Aerospatiale* and its progeny dictate a multifactor assessment of comity principles to flesh out and balance the competing interests involved. The *Aerospatiale* test tends to be difficult for the withholding party to pass, in particular it seems when Chinese law is invoked. In the great bulk of reported decisions, courts in assessing the most important factor – the balance of respective national interests – have found the U.S. interest in enforcing its substantive and procedural laws outweigh the Chinese interests underlying its data protection laws, and compelled production. Indeed, some courts show little to zero deference to Chinese law. *See, e.g., id.* at *18 (citation omitted) ("Even though between a 'legal rock and hard place', PRC defendants cannot enter the U.S. market expecting a possible shield from unfavorable discovery by PRC blocking statutes. As one judge's decision has implied, if you don't like the rules, then stop doing business in the U.S."). *Compare to Kashef v. BNP Paribas S.A.*, No. 16-CV-3228 (AKH) (JW), 2022 WL 1617489, at *3 (S.D.N.Y. May 23, 2022) (declining to compel production of information in

conflict with French banking secrecy statute and the GDPR; finding in that case that U.S. interest in compliance with its discovery obligations and in "the pursuit of justice for victims of genocide" was low, and foreign interest in data privacy and banking sovereignty was high). Perhaps mindful of the lopsided scorecard, the Federal Rules Committee is currently considering whether to recommend amending the Rules to explicitly address foreign law issues in discovery.

Still, as we discuss below, litigants can take steps to help themselves, and good advocacy can go a long way toward reducing the risk of sanctions. Some courts have forgiven failures to produce and, while notionally rejecting proffered excuses, acknowledged the difficulties of compliance. Such courts effectively rely on principles of proportionality in granting relief by providing Chinese litigants with additional process and time to work on disclosure, adjusting the scope of disclosure requests to avoid unnecessary conflicts, and declining to issue sanctions based on demonstrations of good faith conduct. For example, before entertaining motions to compel, the Court in *In re Valsartan* permitted the Chinese defendant to (1) conduct an extensive review in China for restricted information, (2) solicit Chinese authorities' interest in the documents and information in dispute, and (3) engage in multiple, iterative meet and confers where the issues were developed and disputes about disclosure narrowed from 1,000s to only 23 documents. *Id.* (details in docketed filings). The Court found the Chinese defendant's efforts to comply were appropriately diligent and only then considered the applicability of Chinese law, finding after a comity analysis that three of the 23 documents were properly withheld as they "likely contained state secrets". *Id.* at *1, *17.

5. Effectively Engaging with Courts and Regulators

To lessen the possibility of sanctions and misunderstandings, Chinese companies should exhibit a cooperative approach to disclosure and establish their credibility in seeking to meet discovery obligations. Here are some essential strategies:

- *Raise the Issue Early and Often*: As soon as reasonable, communicate the challenges posed by Chinese law and set realistic expectations about disclosure timelines and process. This may require providing education and expert testimony about the relevant Chinese laws and examples of the real-world consequences of non-compliance in the investigations and discovery process. *See, e.g.,* "China Punishes U.S. Due-Diligence Firm Mintz Over Statistical Work," *Wall Street Journal* (Aug. 21, 2023) (reporting on enforcement action levying penalties of $1.5 million against Beijing operation of investigations firm for conducting "foreign-related statistical investigations" without official approval); *see also Global Investigations Review, The Practitioner's Guide to Global Investigations Third Edition, China* (Feb. 8, 2024) (discussing police investigation of China Auto Logistics for violation of privacy laws based on its internal investigation into employee personal devices and email). *But see In re DiDi Glob. Inc. Sec. Litig.,* No. 21-CV-5807 (LAK), 2025 WL 267893, at *4 (S.D.N.Y. Jan. 22, 2025) (discounting threats of PRC enforcement actions).
- *Don't Over Promise*: That said, avoid making commitments that are difficult to meet, and provide early warning where timelines slip. The process of bringing data out of China can be involved and unpredictable, with unexpected detours, unwelcome revelations and other frustrations. Better to under promise and over deliver than to be caught short and be seen as obstructive.
- *Work to Avoid and Minimize Conflicts of Law:* Take proactive measures to align your negotiations and review strategy with the data risks you uncover in your investigation. You may look to defer and narrow the scope of cross-border discovery to avoid unnecessary conflicts, and structure review to further reduce withholdings. Negotiating an ESI protocol that addresses the handling of information restricted by foreign law, as well as a protective order to safeguard sensitive information,

may also help to ease tensions and mitigate compliance risk.

· *Demonstrate Good Faith*: Showing consistent transparency and documenting your compliance efforts (such as by providing metrics of documents collected and reviewed compared to how few actually are being withheld) can help to show good faith and avoid the ire of the decisionmaker. When a dispute arises, having a clear paper trail of efforts made to narrow the issues and justify the reasons for particular remaining conflicts may also help avoid the penalty box. In litigations, moreover, it is not common for each side to have foreign law difficulties, so be sure to push for all parties to be held to the same standards.

· *Consider PRC Regulatory Engagement*: Consult with local counsel as to whether your disclosure strategy should involve seeking export authorization form Chinese authorities. While this can avoid conflicts and demonstrate good faith, the process of seeking official guidance or approval is often extended and unsettled, with no guarantee of a favorable outcome. Some requests never receive a response in the time available. Moreover, clients may hesitate to engage with authorities at all, for fear of provoking unwanted scrutiny. Similarly, consider whether to solicit a statement from the Chinese authority that disclosure of particular information is prohibited and would threaten China's national interest. *E.g., Didi, supra* at *3.

· *Document Your Efforts*: Log all withholdings, and comprehensively document all instructions, determinations, export-related regulatory interactions, and steps taken in the collection, review and transfer process. Courts are not receptive to *ipse dixit* assertions of hardship, best efforts and Chinese regulator intervention, and may see them simply as obstruction. *See, e.g., id* at *4.

Conducting investigations and discovery in China increasingly demands specialized expertise and careful planning, as pressures on companies doing business with and in China continues to mount. *See* June 9, 2025 DOJ Guidelines for Investigations and Enforcement of the Foreign Corrupt Practices Act (targeting, *inter alia*, "conduct that directly undermines U.S. interests"). The risks and strategies discussed in this series of articles require close coordination between client, counsel and technology providers, and proactive engagement with Chinese and U.S. stakeholders. Although rarely a linear process, by prioritizing transparency, realistic commitments, and meticulous planning and documentation, counsel can effectively manage risks and lower the temperature in these often highly contentious proceedings.

John Davis *is a member of Crowell & Moring's Litigation and Investigations Groups in New York, where he Co-Chairs its E-Discovery and Information Management Practice Group. He can be reached at jdavis@crowell.com. John has extensive experience as in-house and outside counsel conducting cross-border investigations, leading responses to governmental inquiries, representing companies in complex litigations, advising companies on data risk, and managing discovery projects and groups. John is an award-winning author and frequent lecturer on investigations, AI and information law issues.* ***Gary GAO (Jun GAO)*** *is a Partner at the Zhong Lun Law Firm in Shanghai, where he Co-Chairs the Compliance & Regulatory Department. He can be reached a gaojun@zhonglun.com. Gary is a skilled litigator with near 30 years experience in disputes, arbitration, mediation and negotiation, including domestic and cross border matters. In addition, Gary has served as an arbitrator in leading arbitration institutions, e.g., ICC, SIAC, HKIAC and etc. Gary further has rich work experience in compliance & regulatory including investigation, criminal issue, comprehensive compliance system, cyber security and data compliance, crisis issues and firewall program design and implementation.*