

Mitigating Risk In Asia-Based Investigations

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Internal investigations in Asia are rife with risk for the unprepared. For starters, Asia comprises a dozen or so very different legal jurisdictions, each with its own important nuances. As a result, pitfalls abound in the region, including vague state secrets rules, constantly changing data protection regimes, varying attorney-client privilege laws, and the ever-present challenge of language and cultural differences. Based on our experience conducting internal investigations across Asia, however, thoughtful counsel can balance these competing interests while conducting internal investigations in China, Korea, and other Asian jurisdictions while satisfying inquiries from local regulators and the U.S. government.

Where in the World Are Your Documents, and Why Does It Matter?

The first order of business is to determine where the documents relevant

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to the investigation are located and what local laws may apply. Besides the logistical difficulties of compiling documents across borders (and often different languages and file formats), the patchwork of Asian data protection laws is a trap for the unwary.

In China, for example, the State Secrets Law prohibits the unauthorized export of state secrets, which are broadly defined to include documents related to seven areas deemed important to the national interests of the People's Republic of China (PRC). These include categories that will be familiar to U.S. lawyers with experience in the U.S. export control regime, such as national defense, diplomacy, and science and technology, but also economic development and a catchall category for other matters classified as secret by the PRC government. Data sent to Hong Kong, a separate administrative region within China, is considered an export under the law, a critical factor for the many international law firms with an office in Hong Kong but not mainland China.



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Other domestic laws in countries such as Malaysia, Singapore, and Korea prohibit transferring any personal data out of the country of any personal data, which is defined differently in different jurisdictions. In an internal investigation requiring a deep dive into employee files and email accounts, personal data can be ubiquitous.

Counsel conducting an investigation should deal with these issues in the planning stage, especially in light of the increasingly sprawling and redundant server networks of international law firms, cloud storage providers, and document review platforms. Simply put, investigators should “know your data”—your documents may not be located where you think they are,

and they may not contain the information you assume they do. Because of the often-undefined contours of these laws, and the consequences of noncompliance, outside investigators should work with experienced and trusted local counsel to ensure that a well-intentioned internal investigation does not inadvertently lead to additional legal trouble.

Preserving 'Upjohn' Protections Despite Language And Cultural Differences

U.S. counsel are obviously familiar with the *Upjohn* warning, which warns an employee that the investigating lawyers represent the company and that the company, not the employee, controls the privilege. But this bedrock aspect of U.S. internal investigations is not shared across Asia, where employees are not steeped in U.S. practices. Even local counsel may be unfamiliar with the *Upjohn* principle and mistakenly believe that conversations with counsel are confidential. And, as in any investigation, witnesses may be reluctant to cooperate once informed that the company can disclose their statements to third parties, or employees may not respect their own confidentiality obligations by avoiding discussion about the investigation with others.

To ensure that confidentiality is protected, company personnel should explain to witnesses the importance of cooperating with the investigation. That principle should be underscored through a written *Upjohn* warning in the witness's native language. Translation services can provide such documents in a pinch, but third-party vendors may not appreciate the legal sensitivities involved. In such cases, native-speaker team members or local counsel are best

positioned to ensure that legal concepts are communicated clearly and with the appropriate context.

Attorney-Client Privilege: Don't Assume Too Much

The attorney-client privilege is another bedrock concept in U.S. and other legal systems that often does not apply in Asia and should not be taken for granted. While common law jurisdictions such as Hong Kong, Singapore, and Malaysia generally recognize legal privilege, civil law jurisdictions such as China and Korea do not.

In China, attorney-client communications fall under a lawyer's obligation to keep client information confidential, but lawyers can be compelled to disclose evidence that may threaten "national or public security," may be required to testify, and can be sanctioned for concealing important facts. Other than a narrow privilege applicable after an indictment, Korean lawyers have confidentiality obligations and may refuse to testify regarding confidential information detrimental to a client. But attorney work product in Korea can be seized by prosecutors or regulators and can be authenticated without the lawyer's testimony. Adding to this complexity, Asian jurisdictions are split on whether in-house counsel are also entitled to legal attorney status.

Investigators should ensure that any internal investigations are conducted at the explicit direction of legal counsel and that it is clearly established at the outset that the investigation is for the purpose of providing legal advice. As an added protection, however, investigators should limit exposure of privileged

documents in jurisdictions where privilege does not exist or is limited.

First, Do No Harm: Balancing U.S. and Local Reporting Requirements

Where regulators from multiple jurisdictions may be involved—and especially where there may be significant penalties that arise from such investigations—it is critical to think globally when devising a defense and investigation strategy, because actions that may appear helpful in one jurisdiction may have profound negative consequences in another.

Different regulators and enforcement bodies may also engage in parallel investigations arising from the same activity, occasionally leading to "turf" fights over who will receive credit for an investigation or prosecution. More often, however, regulators and enforcement bodies are in communication with each other and share relevant information, even across borders. Investigators should carefully assess the regulatory players to minimize inadvertent foot faults.

Investigations in Asia should not be approached lightly. A thoughtful plan implemented by experienced counsel with the relevant knowledge of local laws and customs can ensure that an investigation does not result in unnecessary surprises. Asia's importance in the global economy increases daily, increasing the likelihood that companies will need to conduct internal investigations as they expand operations overseas in search of new resources and new customers.