

Cross-border e-discovery in an age of change

Brian Stuart of FTI Consulting details the challenges facing legal teams and how they can be overcome

Technology in the legal industry has advanced to such a degree that the global e-discovery landscape today would be unrecognisable to a lawyer from five years ago. New licensing deals offered by the mature software vendors (eg 'software as a service' and cloud hosting) have made it attractive for law firms to bring e-discovery software in-house. With automation, e-discovery processes have become more scalable and repeatable. Market pressure will often draw clients to the cheapest vendor rather than the right partner for the circumstances. Whether it is e-discovery in support of a legal dispute, an internal investigation or a regulatory inquiry, conducting such an exercise across international borders brings added complexity.

Getting it wrong, especially when dealing with cross-border matters, comes at a high cost. Earlier this year in *Triumph Controls UK v Primus International Holding Co*, the judge concluded that Triumph's approach to technology-assisted review (TAR) was not verifiable, and thus insufficient. The judge ordered manual review on an additional 55,000 documents, adding significant costs and delays to the case. Countless cases – the Delta/AirTran baggage fee antitrust litigation and *CrossFit v National Strength and Conditioning Association* are examples – demonstrate courts' willingness to issue sanctions to parties failing to produce thorough and/or appropriate data.

It is important not to sacrifice quality while scrutinising budgets. Investing in professional expertise and quality e-discovery services across every stage will ensure every matter is handled carefully and proficiently, while enabling downstream cost reductions without compromising outcomes.

CROSS-BORDER COMPLEXITIES

E-discovery across borders brings added complexity and sound e-discovery today requires greater expertise than ever before. The worldwide regulatory and data protection landscape is tightening, as we are seeing in the recently reopened Danske Bank probe, and countries including China, Canada, Australia,



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Singapore and several powerhouse states in the US are adding new privacy, cyber security and other restrictions. The Danske anti-money laundering issue arose in its Estonian branch but has triggered regulators across the EU and US to demand a response from the Danish bank.

Co-ordination between regulatory bodies adds to the complexity of cross-

border e-discovery and increases the importance of thoroughness and accuracy.

It also extends to how regulators use data once it is produced. Several US regulators are now armed with advanced analytic tools that allow them to compare data sets across different client submissions. In sanctions investigations, the transaction data will not only reveal breaches made by the party under

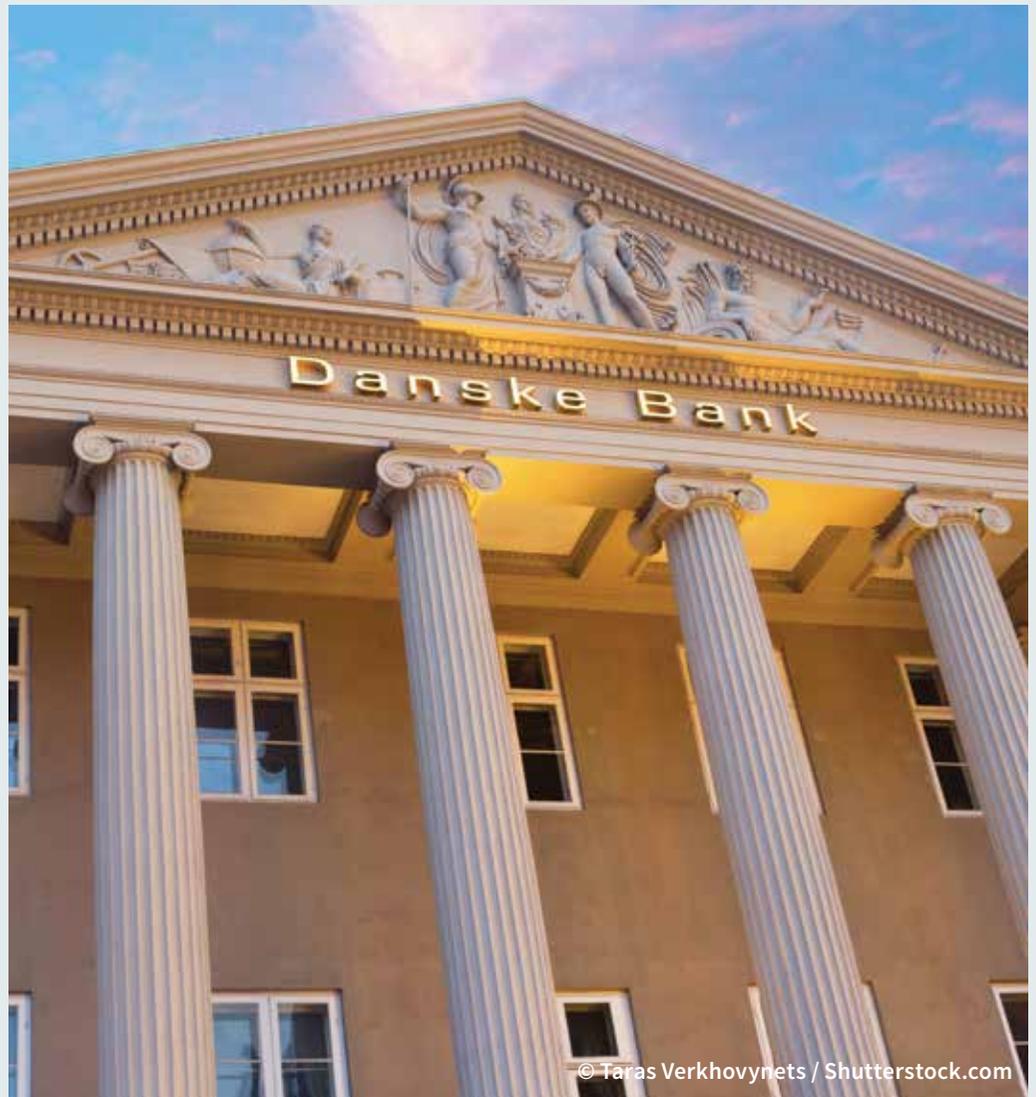
investigation but also roles played by various parties on transactions with other sanctioned parties. Multinational organisations are also likely to be required to respond to data requests from several authorities simultaneously. Navigating the volume and tight timelines of these requests, and the need to review foreign-language documents while adhering to data privacy and privilege laws, requires specialised expertise.

The lift and shift of data across borders requires skill and precision to manage the most pressing phases of cross-border e-discovery, as well as foresight and experience to address the challenges in the most cost-effective and strategic way. This includes the ability to quickly deploy mobile review operations and investigators to any location. It is often necessary to work with multiple stakeholders, including IT, facilities and business leadership to minimise disruption to the business.

Some of the challenges in cross-border e-discovery and how legal teams can address them include:

- System identification:** Counsel will be collecting data from email and other communications sources, and some situations may also require the extraction of transactional and other types of data from business applications. As part of early case assessment, the team must determine the full scope of the systems from which data will be collected, and secure support from an expert with sufficient technical skills to delve into the systems and retrieve data to support the investigation. When counsel start to present their case, they may need to declare the history of the systems from where the data was collected. Comprehensive systems profiling will arm counsel to defend any challenges to the completeness of the system.

- Collections:** Ideally, your team will have resources in each of the countries where relevant data resides and should assign experts fluent in the local languages, customs and culture. Outside providers should offer resources on a global scale, in addition to software deployment options that can be tailored to the nuances of each region. Investigations often involve complex collections



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from mobile or remote devices that may be replicated on numerous systems or difficult to access, so counsel should also obtain support from digital forensic investigators with experience in these scenarios.

- Data processing:** It is essential to adapt and modify workflows as various stages, people and data come under pressure. Effective processing will involve detecting dominant languages in the dataset, flagging documents that contain multiple languages so that they can be prioritised in a review strategy. The removal of duplicative data across borders accelerates the review. The

de-duplication efforts should also consider the country in which the unique instance of an evidence item is to exist. When deciding this, you will want to take account of the scale of review services available in that country and the ease with which relevant and producible data can be transferred to other jurisdictions. In virtually all cross-border matters, multiple sources of data are in scope. To extract, manipulate, analyse and make sense of such datasets requires experts with diverse technical skills, including experience with document management systems, data hosted in the cloud and on social media



platforms, as well as core enterprise management and finance systems. To make use of the data, you will need managed document review experts, as well as technologists skilled in the use of data analytics and machine learning to detect patterns and gaps in transactions.

■ **Reporting:** Market-leading e-discovery software, such as Relativity and Ringtail, provide advanced data analytics tools and visualisations that allow teams to see the entire lifecycle of evidence, and allow users to zoom in or see a bird's-eye view of the project as it progresses. Counsel must ensure that the e-discovery team includes people with a sound understanding of how to maximise advanced analytics to provide the most insightful analysis and reporting.

■ **Review:** Local language expertise is critical, particularly during the review phase. Reviewers must understand nuances, such as dialect, so they can

run versions of keywords in the appropriate languages adapted for local expressions and usage. A managed review service that utilises qualified lawyers with a robust underlying QC methodology can help teams fully exploit cost savings derived from TAR. Outside experts can also be invaluable in enabling in-country review and supporting review decisions.

■ **Productions:** There is no straight line to follow in productions, and counsel must carefully evaluate legal considerations that will impact what can be produced and where. It is imperative to understand the data privacy and transfer regulations for each country before producing across borders, and define with regulators how they will use, share and dispose of the data to ensure compliance with potentially conflicting laws. In some cases, a protective order may be needed to preserve confidentiality and privacy over highly sensitive materials.

As technology continues to advance and bring the promise of faster, better, cheaper processes, in-house legal teams and law firms must remember that people remain at the heart of successful cross-border e-discovery. Corporations must treat these matters as the high-stakes business processes that they are to significantly strengthen their position, and ultimately reduce overall cost and risk relating to litigation and regulators across borders.

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Global presence, local expertise

As technology continues to advance and bring faster, better and cheaper processes, it's crucial to remember that people remain at the heart of successful cross-border e-discovery.

To help clients deal with the challenges of cross-border matters in a cost-effective and strategic way, we have grown our team of senior technology experts in the region, including the UK, France, Spain, South Africa, UAE and India.



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