

Localizing Internal Investigations in APAC: Beyond the Western Playbook

When an allegation arises from Asia-Pacific, the understandable instinct is to follow the so-called “best-practices” model of internal investigations: assess the allegation, compose an investigation plan, collect data, interview witnesses, write a report, remediate, and so forth. The sequence itself is sound, but applying it broadly without regard to geography can lead to challenges and missed opportunities.

Internal investigations conducted in APAC should be localized, which is to say they should be adjusted, sometimes significantly, to take into account local language, workplace culture, data rules, regulatory expectations, and other elements that differ widely across the region and seldom match the headquarters’ playbook. Going local can mean the difference between an “inconclusive” investigation and a report filled with useful findings.

Local Counsel

Companies typically engage local counsel for advice on specific issues of local law: Can we collect an employee’s phone? Is consent required? Can data leave the country? What do local labor laws require in respect of termination? These are important issues on which to seek advice, but the value of capable local counsel goes far beyond that. A seasoned local lawyer can assess how the workforce will react to the investigation, advise which witnesses to approach first and which to interview later, and explain why a witness who appears evasive may in fact be frightened, caught in a loyalty conflict, or wary of headquarters. These factors, more practical than legal, can have a meaningful impact on an investigation’s findings. If the objective is to obtain reliable information, working closely with experienced local counsel from the outset is well worth the investment.

Where China is involved in particular, conducting an investigation alongside Chinese counsel can strengthen the company’s position before regulators in both China and the company’s home jurisdiction. To Chinese authorities, it demonstrates respect for local law, which must be shown, not merely implied. Attitude is everything in China, and applying wholesale a “foreign” approach to an internal investigation in China is not only disrespectful, it could be illegal depending on the circumstances. Conversely, working hand-in-hand with a Chinese law firm is an outward sign of deference and respect that carries weight before the authorities.

With respect to U.S. and European authorities, if a company concludes that Chinese law prohibits transferring certain material out of the country, a bare assertion saying so carries little weight. On the other hand, a well-documented analysis from Chinese counsel, one that identifies the relevant law, explains the restriction, and sets out the steps the company took to comply with both regimes, is a materially stronger position should the need arise.

Not all local firms are equal, however, and choosing the right one is a consequential decision. It is not enough to ask the local team for a name or to search online for firms with a good reputation. By way of a real-world example, a U.S.-based multinational had engaged a local firm to prosecute its patent applications in Vietnam. After twelve patents were successfully obtained, the firm raised its fees. When the client inquired, the firm explained, somewhat obliquely, that the patent officer had increased his demands for approving the client’s applications: the kickbacks had gone up, so the legal fees had to follow. A firm whose job was to protect the company’s interests in the market was doing exactly the opposite. The example is vivid, but it is not unique. Local counsel should be vetted with the same rigor as any third-party intermediary, because in the eyes of an enforcement authority, that is precisely what they are.

The Interview Setting

Conducting witness interviews remotely via Zoom or Teams has become the default approach starting from COVID onwards. A video interview is efficient and saves costs, and sometimes it is the right approach. But it can come off as cold and accusatory: outside lawyers in the U.S. or Europe on a screen, and a single employee alone in a conference room. The employee usually answers what is asked and volunteers nothing more.

An in-person interview of the same employee could produce a different result. Of course, there are the intangibles: Being in the same room allows the interviewer to observe hesitation, assess the witness's demeanor, and read (and use) body language far better than by video. But at an even more basic level, being in the room can break the ice and make it seem more like a work meeting than an interrogation, leading to a warmer witness and better information. For a key witness, conducting the interview in person may well be worth the extra effort and cost.

By way of real-world example, a U.S. multinational was investigating allegations of misconduct by employees in India. When it came time to interview the key witness, who was based in Hyderabad, two lawyers from a local law firm visited the company's office to meet with the employee in person. Before getting into the substance, the lawyers brought up a recent cricket match where the stakes were high and India prevailed, leading to a lively discussion. The group made small talk for 15 minutes, the witness became more at ease, even sharing his WhatsApp messages during the interview, and the lawyers left with solid evidence supporting the allegations. Had it been conducted remotely, the witness likely would have "clammed up" and sought to finish the interview as soon as he could. Cricket, instead of crickets.

Language

Investigation teams often default to English for interviews because it is the company's working language, or because it is the only language the team and witnesses have in common. Conducting an interview in English is not wrong, but it could be a missed opportunity. An employee who handles business comfortably in English may still recount a delicate sequence of events more accurately and thoroughly in Mandarin, Hindi, Japanese, or Vietnamese. When speaking in a non-native language and under stress, people naturally tend to give shorter, more cautious answers, possibly omitting details or informal asides that could expose new leads or even crack the case.

When planning interviews, therefore, the team should make a deliberate determination on which language(s) to use, whether a vetted interpreter is required, whether the notes should preserve the original wording, and whether the document translations capture the nuance on which the analysis depends. Here, too, is where working closely with local counsel pays dividends.

Data Collection and Cross-Border Transfer

Data collection has become a minefield. Local laws governing employee, customer, and patient data, cybersecurity, state secrets, device access, monitoring, and cross-border transfer differ markedly from one country to the next. Certain categories of data cannot leave the country at all without a security assessment, certification, or notice to a regulator. Consent is advisable in some jurisdictions and insufficient in others.

In China, for instance, the Personal Information Protection Law (PIPL), Data Security Law (DSL), Cybersecurity Law, and the state-secrets regime all bear upon what a company may collect, review, transfer, and disclose. A further set of provisions restricts providing data – and more broadly, information – from inside China to a foreign court or enforcement authority without government approval. That could place a multinational squarely between a Chinese prohibition and a home regulator's request, a delicate position that must be managed carefully.

Before the collection stage, the team should assess, and document the assessment, where data is located, where it may be reviewed, where it may be hosted, who may access it, whether it may be transferred abroad, and whether it must be redacted or summarized. It is good practice to create a data handling protocol, with provisions for each country involved in the investigation, as part of the investigation plan. Otherwise, a well-intentioned email to headquarters attaching an interesting piece of evidence could attract unwanted scrutiny and sideline the investigation.

Privilege

A company should not assume that privilege applies to an investigation in APAC. A number of jurisdictions, China among them, do not recognize the legal professional privilege that U.S. and UK lawyers are accustomed to. Engaging local counsel does not, by itself, confer privilege. Work product that would be protected in the U.S. or Europe, including interview memos and legal analyses, may be required to be provided to a local regulator. Moreover, producing it to a local regulator may be deemed to waive the privilege in jurisdictions that recognize the doctrine. On the other hand, taking steps to preserve privilege while acting in a country that does not recognize it could support a privilege claim in a country that does.

A thorough discussion and approach to privilege should be settled at the outset of the investigation, including who directs the investigation, who communicates with whom, and what is recorded and circulated. These choices are difficult to adjust once an investigation is underway.

Adjusting the Standard Playbook

The core principles do not change: independence and objectivity, proper scoping, evidence preservation, anti-retaliation measures, disciplined reporting, and proportionate remediation. Each, however, must be implemented through a local lens. That means asking practical questions early on in the process, including:

- Which local firm should be engaged?
- Who should lead the investigation?
- What language should each interview use?
- Which witnesses should be interviewed in person, and in what order?
- What data can be collected, reviewed, hosted, and transferred?
- Are there local labor-law constraints on interviews or discipline?
- Does the jurisdiction recognize privilege?

Conclusion

A successful approach to conducting investigations in APAC combines global investigative expertise with a thorough understanding of the local language, workplace, and law, and does so from the outset. If the goal is an effective and defensible investigation that obtains reliable evidence, a localized approach is almost always the better one.

This alert is provided for general informational purposes only and is not legal advice. Please contact Brian Burke (brian@burkelawstrategy.com) to discuss how these developments may apply to your situation.