ABA Urges Respect For Foreign Privacy Laws

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"Commerce among nations should be fair and equitable." -- Benjamin Franklin

The global economy of the 21st century has given rise to an important international conflict of laws, the tension between foreign privacy laws and expansive discovery law in U.S. courts. Countries such as Germany, France and Switzerland, have established laws that protect the personal information of their citizens (including data privacy laws, banking secrecy legislation, as well as so-called "blocking" statutes). U.S. courts are increasingly being asked by litigants to compel discovery of information located outside of the U.S. despite such laws, and by their opponents to respect the policies that may preclude or limit such discovery. These litigants express concern that the courts simply fail to understand the untenable position a global company is put in when such discovery proceeds. It is an issue my colleagues have had to litigate.

The American Bar Association last week weighed in on the issue, adopting a policy urging U.S. courts to respect foreign privacy laws when managing discovery in civil litigation. The House of Delegates passed Resolution 103A by a vote of 227 to 188 stating that U.S. courts in civil discovery disputes should consider and respect foreign privacy laws "where possible in the context of the proceedings before them."

Those in favor of the resolution emphasized the "Hobson's choice" for litigants who must choose between following laws in one jurisdiction or another, but not both, when discovery orders require disclosure. The U.S. Supreme Court recognized the need to respect non-U.S. law in the discovery context of civil litigation at least as far back as 1987, when it held in Aerospatiale v. District Court of Iowa, 482 U.S. 522 (1987), that international comity compels American courts to take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state. But most U.S. courts do not give weight to foreign statutes that limit pretrial discovery, even when based on different and stricter views of privacy rights and disclosure obligations.

Growing globalization guarantees that more and more disputes in U.S. courts will involve protected data located in and subject to the laws of foreign countries. The ABA is concerned that the courts of other countries may take a hardened view of U.S. laws and regulations to the detriment of U.S. litigants in their courts. Rulings by courts here that may be seen as parochial or insufficiently accommodating of interests of other legal regimes could also stymie the growth of global commerce, including the cross-border movement of personnel and the hiring of local employees.