Foreign blocking statutes generally are triggered in disputes involving global companies or companies that do business on a global basis, where a lawsuit is filed in one country and relevant records are located in another.

These statutes increasingly are raising important and difficult issues for U.S. attorneys that are litigating matters but need to obtain documents or information from a foreign jurisdiction.

Recently, I discussed the topic with Carla R. Walworth, a partner in the New York office of Paul Hastings.

The following, which appears in Q & A form, is what Ms. Walworth had to say about foreign blocking statutes:

Q: What is a foreign blocking statute?
A: That’s an intriguingly simple question! The short answer is that it’s a foreign statute that purports to directly prohibit (or “block”) collecting documents or information in that foreign jurisdiction for use in litigation in another country. So, for example, France has a blocking statute that prohibits collecting electronic business records in France for use in litigation in the United States, unless done through the Hague Convention.

Article 1A of the French "blocking statute," French Penal Code Law No. 80-538, provides:

“Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.”

Article 2 provides:

"The parties mentioned in [Article 1A] shall forthwith inform the competent minister if they receive any request concerning such disclosures.”

The longer answer is that so-called “blocking statutes” should be distinguished from other foreign data privacy statutes protecting personal information from disclosure in any context. Examples of these statutes include foreign banking statutes protecting bank records and the EU’s data privacy protocols protecting personal information such as religious preference or sexual orientation. The data privacy statutes are intended to protect privacy, whereas the blocking statutes are intended to avoid discovery and protect the sovereignty of a state and its citizens from litigation in other jurisdictions.
Q: How can a foreign blocking statute be implicated?

A: It generally is triggered in disputes involving global companies or companies that do business on a global basis, where a lawsuit is filed in one country and relevant records are located in another. If you get the sense that this issue could implicate a lot of companies, you are absolutely right! Indeed, with globalization of so many businesses on the rise, such statutes will be implicated more often.

So, for example, if a French company is doing business in the U.S. and is sued in U.S. courts over that business, a U.S. court could require discovery of the French company’s documents stored at their headquarters in France. This implicates the French blocking statute, which could prohibit providing the records in the U.S.

Q: What does the U.S. Supreme Court’s decision in Society Nationale do with foreign blocking statutes?

A: Not surprisingly, U.S. courts are not bound to follow the strictures of foreign law, particularly those that are viewed by U.S. courts as designed specifically to thwart U.S. discovery procedures. So in Society Nationale, the U.S. Supreme Court held that U.S. litigants could employ The Hague Convention to obtain documents in France, a procedure that comports with the French blocking statute, but which U.S. litigants often find unwieldy, slow, and ineffective, particularly for third party discovery. But the Court went further to hold that litigants are not bound to use The Hague Convention exclusively and that U.S. courts have the inherent authority to require discovery by other methods including by direct order, even if that may violate the law in other jurisdictions. To do otherwise, the Court reasoned, would permit the laws of foreign jurisdictions to govern discovery in the U.S. The Court further held that district courts have the authority to supervise discovery to protect foreign litigants from unfair disadvantage and to ensure due respect for comity principles, while declining to set forth any specific rules or guidelines.

For a very thorough discussion of how Society Nationale is applied to determine whether a U.S. court should order discovery of records located in France, take a look at Strauss v. Credit Lyonnais, 249 F. R. D. 429 (E.D.N.Y. 2008).

Q: If a U.S. company is unable to obtain information because of the foreign blocking statute, can it still be subject to sanctions?

A: Unfortunately, yes. Two types of sanctions might apply. First, a U.S. court can sanction a litigant who refuses to comply with a discovery order to produce documents from a foreign jurisdiction. A court will take into account many factors in determining whether to sanction a party to a U.S. suit, including the party’s good faith and the difficulty in producing the information, but the mere existence of a foreign blocking statute and even the threat of foreign sanctions are not dispositive. Sanctions may vary from paying fees and costs, to an order that certain facts cannot be disputed or evidence cannot be admitted, to an entry of a default judgment against the offending party.

In a foreign jurisdiction, there may also be the risk of sanctions for complying with a U.S. discovery order. A French attorney was convicted and fined under the blocking statute for collecting information by interviewing former members of a Board of Directors in France in connection with litigation pending in the U.S. In Re
Q: If so, how do courts justify the imposition of sanctions if production of the material is beyond the control of the party?

A: The Supreme Court in *Society Nationale* held that, to do otherwise, would permit foreign courts to direct how U.S. courts conduct discovery in suits pending in the U.S.: 

An interpretation of the Hague Convention as the exclusive means for obtaining evidence located abroad would effectively subject every American court hearing a case involving a national of a [signatory] state to the internal laws of that state. Interrogatories and document requests are staples of international . . . litigation, no less than of other suits, yet a rule of exclusivity would subordinate the court's supervision of even the most routine of these pretrial proceedings to the actions or, equally, to the inactions of foreign judicial authorities. 482 U.S. at 539.

Q: Doesn't this present a real Catch-22 situation?

A: It really is a Catch-22 and we haven't even begun to see a robust development of the law in the U.S. or on a global basis, other than a few cases that illustrate what happens when it all goes wrong.

The evolution of law outside the U.S. is rather fascinating; a number of commentators have noted significant legal differences leading to a real global "culture clash". U.S. courts value full discovery as part of the "truth-seeking" function of the courts and they tend also to see "openness" as an important value, for example, open courts deriving from First Amendment principles. We tend to forget that other countries have very different history and values. If we think about it, the idea that post-World War II European citizens might prefer to have significant checks on government and might have significant concerns of government intrusion, their very rigorous protection of personal records can be better understood. And some countries view U.S. discovery procedures as a violation of their sovereignty.

While some interested organizations such as the Sedona Conference and the EC Data Protection Working Party are calling for greater cross-border cooperation, these efforts are only in their very early stages and there is no way to predict whether they will make progress or not at reconciling these competing approaches to global disputes.

Q: How concerned should U.S. companies be about blocking statutes?

A: When an attorney is convicted in a foreign jurisdiction, companies, their law departments, and their attorneys tend to take that quite seriously. And as the pace of globalization picks up even in an uncertain world economy, it has to be an issue of significant concern. Global business leads to global disputes. And the volume and wide dispersion of electronic records only exacerbates the problem. Global companies do business in very different legal environments, so in some sense the
Q: What steps can U.S. companies take to avoid running up against one of these statutes?

A: Some companies respond by keeping business out of jurisdictions presenting these problems, but for many, the lost opportunity costs just don’t make that an option. For them, a macro- and micro-strategy can make sense. The macro-strategy requires working through organizations that might positively influence both awareness and change on the issues, such as the Sedona Conference and through industry submissions to the EC Working Party. The micro-strategy requires a thoughtful and well-planned response to litigation in multiple jurisdictions, a strategy that will allow the company to provide as much legitimate discovery as possible, prepare to make its best case in the event of discovery dispute in the U.S., and permits the company to avoid unnecessary disputes in foreign jurisdictions. These strategies require significant and careful planning and good advice from counsel in the jurisdictions at issue.