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Data Protection
Uptick in Privacy Legislation, Enforcement Expected in Latin America, Speakers Say


By *Katie W. Johnson*

April 30 — Companies and attorneys need to take the rapidly developing data privacy legal landscape in Latin America seriously, panelists said at an April 30 session of the American Bar Association Section on International Law 2015 Spring Meeting.

“The protection of personal data has become a critical issue for companies working in the region,” Maria Paula Aguila, an attorney at Rivero Mestre LLP in Miami and moderator of the session, said.

Victoria King, global privacy officer at United Parcel Service Inc., described privacy in Latin America as a “relatively new development.”

Approaches to data protection in Latin America include comprehensive frameworks like that in the European Union, sectoral laws like those in the U.S. and less-developed legal frameworks, such as constitutional rights, Eric Bukstein, assistant general counsel for global data privacy at Honeywell International Inc., said.

Seventy percent of the national constitutions in Latin America contain data privacy provisions, such as the right to access personal data, according to the speakers' presentation materials. Fifty percent of countries in the region have comprehensive data protection laws, and “100% of the countries have sectoral data protection laws,” the materials said.

King said she expects accelerated legislation and enforcement in the region. If the proposed European Union data protection regulation is passed, it “will set the standard,” she said.

Enforcement on the Rise?

Although there hasn't been much enforcement by Latin America data protection authorities, King said that is changing.

When faced with an enforcement action, companies should ask what is driving the enforcement, such as the cultural and social contexts of the action, Ash Mishra, chief compliance officer at Mars Inc., said. For example, in Brazil, consumer actions always spike up in the year before an election, he said.

Bukstein added that “having good partners on the ground” in that particular country will help a company understand the context of the action.

For example, in anticipation of litigation or investigations, the first step for an attorney is to identify local counsel when he or she needs to access data in another country, Elizabeth Goergen Silver, an associate at Gibson, Dunn & Crutcher LLP in Washington, said.

Compared to other Latin American countries, Mexico has been more active in enforcing its data protection law, Bukstein said. In addition, Colombia, Costa Rica, Peru and Brazil are likely to be active enforcers, he said. Brazil is considering draft data protection legislation.

Mishra said it is “almost impossible” to comply with all laws, especially given the pace of changes. Therefore, a company should ask itself where it wants to be compliant, he said. Considerations include where a

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company's business is located, where its employees are located, where its money is located and where its customers are located, he said.

In some instances, privacy laws are "so draconian" that a company "can't win," Mishra said.

Countries to Watch

King said Brazil is the "country to watch." In January 2015, the Brazilian Ministry of Justice launched a public consultation on a draft data protection law (14 PVL 171, 1/26/15).

Concerns with the proposed bill include prescriptive technical mandates, the need for a data protection authority, joint liability requirements, no preemption of other federal and state laws and the lack of a focus on the distinction between data controllers and data processors, King said.

She noted that before Brazil enacted an Internet rights statute in 2014, the government backed off of a provision that would have required global Internet companies to maintain any collected personal data of Brazilians on servers located in the country (13 PVL 519, 3/24/14).

Brazil is a "big economy," and developments there could "end up setting the tone," King said.

Other countries with developing laws include Chile, which is considering a proposed data protection law (14 PVL 171, 1/26/15), and Colombia, which has issued new data protection regulations, Bukstein said. In addition, enforcement and regulations in Costa Rica are "developing pretty rapidly," he said.

Mishra encouraged attorneys to look at regulator hiring and compensation levels to determine "what's coming down the road."

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For More Information

Further information about the consultation on Brazil's Preliminary Draft Bill for the Protection of Personal Data, including the text of the bill, is available, in Portuguese, at <http://participacao.mj.gov.br/dadospeessoais/texto-em-debate/anteprojeto-de-lei-para-a-protecao-de-dados-pessoais/>.

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