Pretrial Discovery: A Bane to Transnational Litigation

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Introduction

Discovery is a procedural requisite mostly in countries following the common law system. It refers to an act of gathering or investigating the evidences pertinent to an ongoing litigation. It is a classic trait embedded in the adversarial form of legal system where the parties to the litigation is expected to prove their claim(s) to a large extent by virtue of the evidence produced before the court.

I. Discovery – A Procedural Requisite in a Common Law System

In common law countries like the United Kingdom[1] or even India[2], discovery is allowed by the court once the civil suit has been admitted for hearing. During the trial, depositions are taken into account which later forms part of the final hearing, meanwhile prior to the trial the parties, pursuant to the leave of the court are allowed to seek discovery and inspection of documents. It is imperative to note that the disclosure and discovery of documents are applicable in circumstances when the witness concerned is available for trial or only if the document is deemed relevant by the court.

A. Pre-trial Discovery

However pretrial discovery forms a crucial part of American civil litigations, especially the ones involving considerable stakes. The Federal Rules of Civil Procedure[3] elucidates the pretrial disclosures and discoveries to be followed by the district court of the United States of America. The Federal Rules 26 and 30 deals extensively with the pretrial depositions which can be made by the parties or any person affiliated to the parties to the litigation, employees of corporate parties or even a non- party witness who in this case is considered to be "third party". It is important to note that such depositions can be taken by way of right and a court permission is not necessary. Upon refusal to depose[4], a party could move before the court to seek an order to compel a response or even impose severe sanctions.

B. Discovery – a non-requisite in the Civil Law System

The civil law system follows an inquisitorial form of practice wherein the judge is responsible to ascertain the truth. In most countries following the civil law system the whole process of seeking discovery and disclosures are often frowned upon and considered to be a waste of court's precious time.

While in the adversarial system the role of the advocates is to present their arguments on the basis of the evidence so as to establish their claims. The role of the judge is to ensure that the contentions asserted by the parties are aligning with the law in force especially taking into account the pleadings and the evidence placed before the court[5].

In the civil law systems the judge is essentially responsible to decide a certain case in accordance to the truth of the matter. In order to ascertain the truth the judge calls in for the evidence that is relevant to the case, the advocates to the case is responsible for assisting the judge by providing comments and suggestions. The main role of the judge in an inquisitorial form is to identify the legal and factual issues and deliberate rightfully upon them to render a verdict.

The whole process of discovery which is very specific to legal systems have in the past created much noise and effected international business relations. It is at this point relevant to discuss the concept of foreign blocking statutes.

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[1] The Civil Procedure Rules 1998, UK Statutory Instruments, 1998 No. 3132 (L.17) Part 31 Disclosure and Inspection of documents.

[2] The Code of Civil Procedure, Act No. 5 of 1908, Order XI Discovery and Inspection.

[3] Federal Rules of the Civil Procedure, December 1, 2023, TITLE V Disclosures and Discovery.

[4] Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.

[5] G. C. Hazard, Jr. Notre Dame Law Review, Discovery And The Role Of The Judge.

II. The French Blocking Statute

The French Blocking Statute referred to as the "Loi de Blockage"[6] in its own unique capacity was created to protect national, sensitive information in connection to maritime trade area. Thereafter in 1980 the scope of the statute was broadened and a double prohibition was created. According to the addendum to the former Article 1, "Subject to international treaties or agreements and laws and regulations in force, it is prohibited for any person to request, search for or communicate, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature for the purposes of establishing evidence in view of foreign judicial or administrative procedures or in the context of such procedures".

A. Non-compliance of the "Loi de Blockage"

Failure to comply the provisions aforementioned resulted in criminal charges for French citizens either punishable by imprisonment or by fine. Evidently there seemed to be a deadlock situation, for French companies with roots in the U.S, this was indeed a dilemma. In the event of a legal dispute they either had to undergo the process of discovery and run the risk of being prosecuted in the French criminal courts or adhere to the provisions of the blocking statute and jeopardize their business base in the U.S.

B. Christopher X v MAAF

In the landmark decision of Christopher X v MAAF[7] the criminal chamber of the French Supreme Court confirmed the conviction of a French lawyer[8] a fine of 10,000 Euros upon breaching the provisions of the blocking statute. An important issue was raised in this process, the French Supreme Court affirmed the decision of the lower court in addressing that the Hague Convention[9] which was primarily established to foster international judicial cooperation[10] was to be followed. The blocking statute has been a point of challenge for several litigations that concerned the production of evidence in foreign proceedings.

For instance a former state office holder requested before a civil court[11] to disclose documents and information which was located in France so he could testify before a parliamentary committee abroad. The presiding judge observed that allowing the said request shall contradict the provisions of the blocking statute and urged the petitioner to seek resort to the provisions set forth in the Hague Convention. In 2005 the Paris Commercial Court rejected a request for disclosure issued by a U.S Judge stating that the said request was breaching the blocking statute and a recourse to the Hague Convention was advised.

III. The Hague Convention On Taking Evidence Abroad

The Convention was established to ensure that the international judicial cooperation among sovereign nations were maintained. The Convention defined three methods of taking in evidence abroad (1) submitting the Letter of Request (2) inquiries made by consular agents and diplomatic officers (3) inquiries made by specially appointed commissioners . The Letter of Request formed an integral part of the Convention, it created a bridge between a common law and a civil law nation especially in connection to the process of securing evidence.

A. Letter of Request- A bridge between the legal systems

The Letter of Request provided a narrower scope of

[6] Statute No 68-678 of July 26, 1986 modified by the Statute No 80-538 of July 16, 1980.

[7] French Supreme Court, Criminal Section, December 12, 2007, No 07-83.228.

[8] The French lawyer was sanctioned by the court for his abusive conduct. This case involved the mutual insurance company MAAF and the California department of Insurance. The convict was working for an American firm and representing the California department. He reached out to a former director of MAAF who was a defendant in a ongoing litigation in California to draw information informally and in the process faced the sanction from the French court.

[9] The Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters, 23 U.S.T.2555, T.I.A.S No.7444 (signed July 27, 1970) (codified at 28 U.S.C 1781) ("Convention").

[10] International judicial cooperation" refers to mutual assistance which the sovereign nations observe in matters such as (a) service abroad of process and other judicial documents; (b) taking testimony abroad, and obtaining documentary and other evidence abroad for domestic litigation (c) proof of foreign law and official foreign records (d) recognition and enforcement of foreign judgements. Rudolph B. Schlesinger, Comparative Law 386 (4th Edition. 1980).

[11] TGI Nanterre, summary proceedings December 22, 1993 Jurisdata no 1993-050136.

discovery which was not aligning with the broad and exhaustive pretrial discovery rules enshrined under the Federal Rules of the Civil Procedure and as such the U.S courts and the litigants were not entirely satisfied with the Convention. It is pertinent to mention that all the other signatories to the Convention with the exceptions of Barbados, Czechoslovakia, Israel and the United States entered into a declaration to the Article 23 of the Hague Convention.

Pursuant to the declaration, a contracting country could also refrain from executing the Letter of Request if the information was sought for pretrial discovery. These liberties contravened the Federal Rules and as such the U.S preferred to seek relief under the Federal Rules of the Civil Procedure instead of the Convention which was heavily opposed by the signatories[12] to the Convention who believed that their sovereignty was threatened by the U.S methods of obtaining evidence. It is noteworthy to state that several contracting nations started adopting the blocking statutes to restrain or completely prohibit the practice of discovery and disclosure.

The House of Lords upon interpreting the language of the Letter of Request held that the description of the documents sought for was vague and in this way the Letter of Request was seeking an indirect discovery[13] of evidence instead of direct evidence and in the process limited the effect of the Letter of Request to specifically identified documents.

B. Societe Nationale Industrielle Áerospatiale v United States District Court for the S.Dist of Iowa

In a landmark judgment[14] a very important question surfaced in the course of the case whether the U.S courts and the litigants under special circumstances were required to follow the protocol of the Hague Convention in obtaining evidence from abroad. The plaintiffs were citizens of the United States and have been subjected to an injury in a plane crash in Iowa. The manufacturer Áerospatiale was sued for the injuries resulting from the crash. In the event of a second phase of discovery a protective order was sought for by the defendants that the materials to the discovery is in France and the Hague Convention should be the rightful way to proceed, the motion was denied and upheld by the appeal court who observed that the Convention was not mandatory and was not appliable to the persons subject to the jurisdiction of the court.[15] The most important issue that surfaced in the course of this matter was under what circumstances would there be an obligation to invoke the Convention, the court along with substantial dissent stated that the U.S procedures of discovery outside the U.S was subjected to fairness and comity.

IV. Principle of Comity

The doctrine of Comity was developed in the Netherlands to bridge the gap between territorial sovereignty and the need for international commerce, the main objective was to resolve the conflicts of law. Comity is a legal principle which warrants a jurisdiction to give effect to the judicial decrees and decisions delivered in other jurisdictions.[16] The courts in the Áerospatiale matter opined that in the spirit of cooperation the U.S courts could proceed to evaluate the extraterritorial discovery in keeping with the interests of the foreign states that might be affected in the process. The comity analysis with reference to the Áerospatiale case represented fairness, judicial reasonableness and foreign discovery.

[12] The Hague Convention is currently in force between Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, The Federal Republic of Germany, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Singapore, Sweden, the United Kingdom and the United States.

[13] M. T. Burns, The Hague Convention on Taking Evidence Abroad: Conflict over Pretrial Discovery, Mechanisms of Liberalization.

[14] Societe Nationale Industrielle Áerospatiale v United States District Court for the S.Dist of Iowa, 107 S.Ct. 2542 (1987).

[15] Societe Nationale Industrielle Áerospatiale 782 F.2d 125 (8th Circuit 1986).

[16] Brown v Babbitt Ford, Kellogg Citizens National Bank v Felton, Jackson v Shuttleworth, in these leading cases the Supreme Court of the U.S defined the doctrine of comity as follows: "Comity in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Conclusion

Although in the Áerospatiale judgement it was held that Hague Convention was not considered to be inferior to the Federal Rules and also cautioned the judges not to pass it off "as an unnecessary hassle", however the U.S continues to consider the Convention to a be privilege for foreign countries to avoid discovery. To sum up the process of discovery could be very time consuming and contradictory to the blocking statutes established by several sovereign nations to protect the information which might be relevant to national interests. At the same time it would be an interesting practice to request for the discovery of relevant information only, thereby reducing the exhaustive process. Multiple attempts have been made over the years to reform the French Blocking Statute, in 2022 the French government further strengthened the position of the blocking statute.

Companies that will be receiving requests for information meant for foreign litigation and forming subject matter of the blocking statute will have to be reported to the French government body "SISSE"(Strategic Information and Economic Security Service) within a specific time, an official opinion ascertaining whether the requests form part of the blocking statute shall be issued within a month to the requesting officials. The primary objective behind this modification is to protect highly sensitive information pertaining to national interest. Having said that it seems that the Convention continues to be the communicating bridge between the countries for the purpose of obtaining evidence abroad.