

DISCOVERY AND DISCLOSURE: CIVIL LITIGATION TOOLS FOR OBTAINING EVIDENCE IN THE UNITED STATES, ENGLAND, AND THE NETHERLANDS

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The ever-increasing cost of civil litigation was once thought to be a unique trait of the United States civil justice system. However, the expense of civil litigation is on the rise across the globe, due in no small part to the time-consuming nature of obtaining evidence. This article provides an overview of disclosure and discovery in the United States, England, and the Netherlands, in an effort to provide practitioners with a comparative summary of the tools available to trial attorneys who practice in these three judicial systems. This article also provides a brief overview of 28 U.S.C. § 1782, which authorizes federal district courts in the United States to enter orders pertaining to discovery to be used in foreign or international proceedings.

Civil Discovery in United States Federal Courts

As a general rule, a party in United States federal court litigation may seek discovery of any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. There is no requirement that the information sought be admissible in evidence in order for the information to be discoverable.² The available tools for discovery in United States federal courts generally include written questions and answers,³ requests for production of documents,⁴ requests for admissions,⁵ and depositions of witnesses.⁶ Parties may also seek discovery from non-parties.⁷ Discovery is generally conducted without court supervision or involvement unless a dispute arises.

While mandatory disclosures exist in federal courts, such disclosures typically occur only in the beginning of the civil discovery process.⁸ Unless exempt by court order, mandatory initial disclosures generally must be made by the parties within fourteen (14) days after the parties' Rule 26(f) discovery conference. Importantly, counsel have a duty to confer with one another to ensure that discovery is planned, is consistent with the requirements under the federal and local rules, and to make adjustments in the discovery plan as needed.

Discovery in United States federal courts (and typically also in state courts) can be a lengthy, expensive, and onerous process. This is in part because the scope of discovery is broad, and document requests typically have no limitation in number. Further, United States federal rules allow parties to take discovery depositions of parties and witnesses. Such face-to-face depositions allow counsel to make a close evaluation of witness credibility. The advantage in this process is that parties typically have no surprises before trial; thorough discovery ensures they know their strongest and weakest points. As a result, pretrial settlements are common in civil actions because all sides usually can confidently evaluate their case.

Civil Disclosure in English Courts

Civil Procedure Rules of England and Wales – Part 31 governs the disclosure and inspection of documents in civil proceedings. Disclosure is not automatic in English courts. Rather, disclosure commences once a court enters an order for disclosure; this typically occurs at the first Case Management Conference (CMC), after the statements of case have been served. In both fast track and multi-track claims, the parties to litigation will generally be required to provide a “standard disclosure,” in which documents that are “relevant” to the dispute are to be disclosed (*i.e.*, documents which assist the disclosing party's case, but also those which

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² See Fed. R. Civ. P. 26(b)(1).

³ See Fed. R. Civ. P. 33.

⁴ See Fed. R. Civ. P. 34.

⁵ See Fed. R. Civ. P. 36.

⁶ See Fed. R. Civ. P. 30-32.

⁷ See Fed. R. Civ. P. 45.

⁸ See Fed. R. Civ. P. 26(a)(1).

are detrimental to that party, and/or assist the other party).⁹ Parties are required to make a reasonable search for documents subject to standard disclosure,¹⁰ and there exists an affirmative obligation to search for and disclose documents that are currently or were formerly in a party's control.¹¹ The definition of "document" extends to electronic documents, including e-mails and other electronic communications. In specific cases, pre-action disclosure or disclosure orders against a non-party may also be possible.

Unlike civil litigation in United States federal courts, in which depositions are routine and do not require court-approval, a party in England must seek an order from the court in order to depose an individual.¹² Witness evidence is typically in the form of written statements, and oral evidence will most often be limited to the replies provided by the witness under examination and cross examination at trial.

Obtaining Civil Evidence in the Netherlands

The scope of potential disclosure in the Netherlands is narrower than under American and English law. Indeed, the Netherlands is often recognized as a jurisdiction where obtaining evidence from opposing parties and third-parties is quite difficult. Parties generally have freedom to decide which information is disclosed and which information is held back. Information supporting a party's case is typically submitted whereas information detrimental to a party's case is withheld.

The general rule in the Netherlands is that a party is not obliged and cannot be compelled to disclose documents at its disposal to any other party.¹³ However, depending on the circumstances, a party could seek disclosure of documents from opposing parties and/or third parties on the basis of article 843a Code of Civil Proceedings ("CCP"). The following conditions must be met in order to successfully apply for disclosure: (a) a party must have a legitimate interest in obtaining disclosure of documents; (b) a party must specify the documents and/or information to be disclosed (*i.e.*, article 843a CCP cannot be used for a fishing expedition); and (c)

the sought documents must relate to a legal relationship (*e.g.*, a contract or tort) of the party.¹⁴ A party is only obliged to disclose documents if it would not be possible to obtain the information through other means, such as through witness hearings.

If a party has reason to think that another party will destroy particular documents, or that there will be great difficulty in obtaining the documents at a later stage, article 843a CCP provides the interesting option of having the documents and/or data attached prior to disclosure proceedings; this option may be of particular interest where documents are on board a vessel calling at a port in the Netherlands. Logbooks, certificates, and AIS and VHF recordings can easily be attached and thereby safeguarded for the purpose of future proceedings. Once the documents and/or data are attached, a party can seek disclosure through article 843a CCP proceedings, either in pending proceedings on the merits or in summary proceedings.

United States Discovery in Aid of Foreign Tribunals

28 U.S.C. § 1782 authorizes U.S. federal district courts to enter orders permitting discovery to be used in foreign or international proceedings. Upon receipt of an application for an order for discovery for use in foreign proceedings, the district court will first determine whether three statutory requirements are met: (1) the person from whom discovery is sought must reside or be found within the district in which the application is filed; (2) the discovery must be for use in a proceeding before a foreign tribunal; and (3) the application must be made by an interested person. An "interested person" reaches beyond litigants to include any person with a reasonable interest in obtaining judicial assistance.¹⁵

Upon finding that the statutory requirements are met, the district court will then weigh the following four discretionary factors to determine whether to enter an order for discovery under the statute: (1) whether the person from whom discovery is sought is a party in the foreign proceeding; (2) the character and nature of foreign proceedings and the receptivity of the foreign government to the assistance from a United States court; (3) whether the request conceals an attempt to circumvent foreign evidence-gathering restrictions and policies; and

⁹ See Civil Procedure Rule 31.6.

¹⁰ See Civil Procedure Rule 31.7.

¹¹ See Civil Procedure rule 31.8.

¹² See Civil Procedure Rule 34.8.

¹³ See *HBU/Groendijk*, Supreme Court, 29 June 2007, NJ 2007/639.

¹⁴ See Article 843a Code of Civil Procedure (CCP).

¹⁵ See *Intel v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

(4) whether the request is unduly burdensome or intrusive.¹⁶

In the maritime context, the matter of *Bravo Express Corp. v. Total Petrochemicals & Refining U.S.* addresses whether the actual pendency of a judicial proceeding is required in order to obtain U.S. discovery in aid of foreign tribunals.¹⁷ There, a vessel owner sought assistance in obtaining discovery from a vessel charterer's affiliates in connection with a crude oil leak in Angolan waters for which the owner was falsely blamed and held responsible by Angolan authorities.¹⁸ Despite a seven-year delay between the underlying events and the 28 U.S.C. § 1782 request, the proceedings were found to be reasonably contemplated when the owner's attorney submitted an affidavit stating that an action was to be imminently filed.¹⁹

A district court must balance the dual aims of the statute by providing efficient means of assistance to participants in international litigation and by encouraging foreign countries by example to provide similar means of assistance to courts in the United States.²⁰ 28 U.S.C. § 1782 does not authorize foreign litigants to obtain discovery that would not otherwise be available to domestic litigants under the Federal Rules of Civil Procedure.

However, there is no requirement that the evidence sought to be produced in the United States would be discoverable under the laws of the foreign jurisdiction.²¹ Accordingly, 28 U.S.C. § 1782 can be an effective method by which a foreign "interested party" may avail itself of the many discovery tools available to U.S. litigants, and which may not otherwise be available to the "interested party" in its foreign jurisdiction.

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¹⁶ *Intel v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

¹⁷ *Bravo Express Corp. v. Total Petrochemicals & Refining U.S.*, 613 Fed. Appx. 319, 2015 U.S. App. LEXIS 9178 (5th Cir. June 2, 2015).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Application of Esses*, 101 F.3d 873 (2d Cir. 1996).

²¹ *Intel v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004); *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79 (2d Cir. 2004); *In re Chevron Corp.*, 633 F.3d 153 (3d Cir. 2011).