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PART VII

ACCESS TO INFORMATION AND EVIDENCE

CHAPTER 1

INTRODUCTION AND GENERAL THEMES

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1 INTRODUCTION

1 In the ancient past, disputes may have been resolved by battle or reference to the gods, but modern procedural systems invariably insist that judicial decisions should be based on evidence. That orientation means that – to some extent – judicial systems need to provide litigants with the means to obtain evidence, and to provide criteria governing what should be regarded as proper proof.

2 Part VIII is about both the methods provided to enable litigants to obtain evidence and the screening that rules of evidence offer to filter material presented by one side and objected to by the other side.

3 As is often the case and particularly true with regard to Part VIII, there is a spectrum of attitudes among nations on these questions and the US stands at one end of that spectrum. With regard to court-assisted gathering of evidence, the American system relies on a process known as 'discovery'. And as Trocker recognized, 'the controversy over discovery is not one opposing the common law to the civil law, but rather one putting the United States against the rest of the world. '[1] And as Vallines Garcia has noted, 'generally speaking, none of the EU Member States – not even the UK – has rules of broad discovery like the ones applicable to civil litigation in the US federal courts.'[2]

4 Given these circumstances, the American practice may be taken often to represent one end of a spectrum of arrangements, with the practices of other nations contrasted with that relatively extreme approach. But at the same time, it must be emphasized that enthusiasm for American style discovery is not limited to the US; in 2003 a Korean scholar published a 380-page book urging that the civil law world embrace the American attitude.[3] This study may suggest reasons for giving more serious consideration to US methods.

5 Part VIII focuses as well on the contrasting practices of Argentina, Germany, Israel, Japan, and the UK. Though those comparisons hardly exhaust all possibilities, the contrasts canvas a variety of possible approaches to the problem of gathering information for decision of a case.

6 These comparative efforts are particularly pertinent in light of recent efforts to generate harmonized procedural approaches. The Principles of Transnational Civil Procedure (PTCP), developed by the American Law Institute and UNIDROIT and published in 2006,[4]

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[1] N Trocker, 'Transnational Litigation, Access to Evidence, and US Discovery: Learning from American 'Exceptionalism'?' in R Stürner and M Kawano (ed), *Current Topics in International Litigation* (Mohr Siebeck 2009) 146, 147.

[2] E Vallines Garcia, 'Harmonising Access to Information and Evidence' in F Gascon Inchausti and B Hess (ed), *The Future of the European Law of Civil Procedure* (Intersentia 2020) 123, 124-125.

[3] K-C Huang, *Introducing Discovery into Civil Law* (Carolina Academic Press 2003).

[4] Principles of Transnational Civil Procedure 2004 (ALI / UNIDROIT).

introduced the possibility of such harmonization, though carefully limited to cross-border commercial disputes. The more ambitious Model European Rules of Civil Procedure (ERCP), developed by the European Law Institute and UNIDROIT and published in 2020,[5] present a contrast to the contemporary US attitude, but also contrast with previous European attitudes in at least some countries. Many of the participants in this CPLJ project also played prominent roles in the development of the ELI/UNIDROIT Rules. As the ERCP recognize at the beginning of their Part VII on Access to Information and Evidence, this topic is 'central to civil procedure' because it is necessary to 'ensure access is a real rather than a merely theoretical right.'[6]

7 The chapter will end with some consideration of the possibility of further harmonization between the US scheme and the evolving attitudes of other nations. To do so, it also introduces the major themes pursued in the remaining chapters of Part VIII, and also indicates ways in which these issues relate to matters addressed in more detail in other topics of this treatise, particularly Part IV (Cost of Litigation), Part VII (Structure of Civil Litigation), Part X (Digital Revolution and Procedure), and Part XV (Cross-border and International Dimensions).

8 Subsequent chapters of Part VIII inquire more deeply into important specifics of evidence gathering techniques (Chapter 2); limits on disclosure and access to evidence (Chapter 3); types of evidence (Chapter 4); admissibility of evidence (Chapter 5); and ascertainment of facts in dispute in civil litigation (Chapter 6).

9 This chapter begins with some historical background to current circumstances in various jurisdictions; each system has evolved from its beginnings to its current reality, so a full appreciation of that reality calls for some awareness of the antecedents. It then turns to core considerations such as the connection to the requisites for initiating litigation (pleading); judicial control of the evidence-gathering process in litigation; the scope of the concept of relevance; the role of cost in calibrating requirements for production of evidence; the growing importance of digital material as evidence; and the complications attending evidence gathering in cross-border litigation.

2 HISTORICAL BACKGROUND

10 In the mists of time, modern notions of evidence gathering were not known. For the Anglo-American tradition, a core factor was the role of the jury, which was the institution for resolving factual disputes. A millennium ago, English juries were self-informing. As a consequence, there was hardly a role for legal rules regarding what material could be considered in deciding a case, or for procuring that information.[7] As time passed, that

[5] Model European Rules of Civil Procedure 2020 (ELI / UNIDROIT).
[6] Ibid 200.
[7] See J Langbein, 'Historical Foundations of the Law of Evidence' (1996) 96 Columbia Law Review 1168, 1169-1170.

role for the English jury receded, eventually leading to the modern notion that the jurors must not be personally aware of the facts in dispute but must instead reach a decision based on what is presented by the parties in court. As Langbein put it in 1996, the centrality of the jury was 'the great chasm that separates the modern Continental legal systems from the Anglo-American systems.'[8]

11 In the English common law, the evolution away from the self-informing jury focused on the pleadings. This focus led to increasingly demanding requirements in common law pleading about what must be included in the complaint and answer and ensuing pleadings.[9] These intense pleading exchanges somewhat educated the parties about the contentions and evidence their adversaries would rely upon at trial. But by the end of the nineteenth century in the US there was profound impatience with the procedure system, which relied on what Dean Pound in 1906 called the 'sporting theory of justice,' in which the lawyers relied on surprise to win at trial.[10] As introduced below, that objection eventually prompted the adoption in the US of the Federal Rules of Civil Procedure (USFRCP) in 1938.

12 In England, the jury trial gradually passed from the scene in civil litigation by the end of the nineteenth century.[11] But the common law did not initially offer extensive tools for lawyers to obtain evidence to prove their cases. Beyond the pleadings themselves, only a bill of particulars was authorized.[12] There was, however, a parallel set of Courts of Equity, building on a canon law tradition, in which litigants could obtain judicial assistance in obtaining evidence to prove their cases. Indeed, litigants would sometimes seek a 'bill of discovery' from the Court of Equity to gather evidence to use before the common law courts.[13]

13 In the civil jurisdictions of continental Europe, meanwhile, the court played the primary role in gathering evidence, as well as deciding factual disputes.[14] Parties could urge the court to require their adversaries to provide evidence under their control for use in the litigation. But under the principle *nemo tenetur edere contra se* the continental courts

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[8] Ibid 1168.

[9] For example, Chief Justice Charles Doe of the New Hampshire Supreme Court objected that '[h]alf the labor of the bar was bestowed on questions of pleading.' S C Eastman,' 'Chief Justice Charles Doe' (1897) Green Bag 245, 246.

[10] R Pound, 'The Causes of Popular Dissatisfaction with The Administration of Justice' (1906) 29 Reports of the American Bar Association 395, 404-405.

[11] A Zuckerman, *Civil Procedure* (Butterworth 2003) 357, fn 15; N Andrews, *English Civil Procedure* (Oxford University Press 2003) 775-776.

[12] See 'Developments in the Law – Discovery' (1961) 74 Harvard Law Review 940, 946-947.

[13] See McMahon P, 'Rediscovering the Equitable Origins of Discovery' in J Goldberg, H Smith and P G Turner (ed), *Equity and Law* (Cambridge University Press 2019) ch 12; D Morman, 'The Complaint for a Bill of Discovery – A Living, Breathing, Modern Day Dinosaur' (2004) 78 Florida Bar Journal 50; F James,' 'Discovery' (1929) 38 Yale Law Journal 746.

[14] This is not to say that the court routinely undertook an active investigation of the evidence. To the contrary, under the 1806 French code, the parties were given sole responsibility for presenting legal arguments and evidence.

would not require a party to produce evidence that would harm its position. This attitude could produce something like what Dean Pound derided as the 'sporting theory of justice.' As Trocker has noted, it fostered 'the primitive nature of a legalized fight where each litigant strove to defeat his/her opponent leaving no room for cooperation between the parties.'[15] And as Damaska observed a quarter century ago, Continental Civil Procedure 'exhibits a considerable degree of tolerance -- almost an insouciance, to common law eyes -- for the incompleteness of the evidentiary material.'[16] As Jongbloed noted in 2008, 'A disadvantage of the obligation to tell the truth is that, as a result, a party may sometimes have to provide evidence against himself.'[17]

14 It will be seen, then, that similar tensions existed by the early twentieth century in both common law and civil law systems. True, even in the nineteenth century the American attitude permitted more aggressive evidence gathering than continental systems. For example, in 1874 there were German protests about American evidence-gathering efforts in relation to litigation pending in the US.[18]

15 But it is a mistake to think that nineteenth century American discovery was comparable to what the American Federal Rules introduced in 1938. For example, in 1891, the US Supreme Court ruled that an American court could not require a plaintiff to submit a medical examination performed by a doctor nominated by the defendant because that would contravene 'the right of every individual to the possession and control of his own person.' It also observed that the US Congress had authorized only production of books or writings.[19] And in 1911, the US Supreme Court denounced as a 'fishing bill' any effort by a party 'to pry into the case of his adversary to learn its strength or weakness.'[20] Studies of discovery by American legal scholars of the era confirm that before 1938 things were very different in the US from what the Federal Rules introduced.[21]

16 The watershed event, then, was the adoption of the Federal Rules in 1938. As Subrin has written, the package of discovery instruments included in those rules was

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[15] N Trocker (n 1) 156.

[16] M Damaska, 'The Uncertain Fate of Evidentiary Transplants' (1997) 45 American Journal of Comparative Law 839, 843.

[17] A Jongbloed, 'Judicial Case Management and Efficiency in the Netherlands' in C H van Rhee (ed), *Judicial Case Management and Efficiency in Civil Litigation* (Intersentia 2008) 93, 97.

[18] See G Born, *International Litigation in United States Courts* (3d edn, Aspen Publishing 1996) 829. Later in this chapter, there is some discussion of the distinctive American attitude toward requiring production evidence abroad for use in American litigation, and also permitting discovery in the US under American discovery rules to obtain evidence for use in litigation before foreign tribunals. For more detailed information, see Part XV on cross-border and international dimensions of civil procedure.

[19] *Union Pacific Ry Co v Botsford*, (Supreme Court, US) [141 US 250 (1891)]. Two Justices dissenting in an opinion observing: 'It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration.'

[20] *Carpenter v Winn* (Supreme Court, US) [331 US 533 (1911)] 540.

[21] See C Langdell, 'Discovery Under the Judicature Acts, 1873, 1875 (pts 1-3)' (1897) 11 Harvard Law Review 137, 205; (1898) 12 Harvard Law Review 151. See also James (n 13).

'revolutionary.'[22] As he explained, the proposed rules 'included every type of discovery that was known in the United States and probably England up to that time.'[23] Moreover, the new rules 'eliminated features of discovery that in some states had curtailed the scope of discovery and the breadth of its use.'[24] Thus, unlike the 1891 US Supreme Court decision,[25] the Federal Rules authorized a court order compelling a party to submit to a medical examination.[26] And though the Court had in 1911 rejected a 'fishing expedition' effort by pretrial discovery, in 1947 it declared: 'No longer can the time honoured cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case.'[27]

17 Even in the UK, such broad discovery was not routine. As introduced below, the English attitude toward relevance sounds like the American one, but the English reliance on disclosure and absence of pretrial depositions in the UK meant that discovery there was not nearly as freewheeling as in the US. And in the 1990s, the Lord Woolf reforms in the UK emphasized restraint of excessive litigation expenditures, including on discovery.

18 Japan based its original 1890 civil procedure code entirely on the German Code of 1877. Germany, in turn, 'does not know the kind of "pretrial discovery" practiced by parties and their counsel in American and English litigation.'[28] It does, however, provide for exchange of information under the supervision of the judge that 'is in many respects similar to that fulfilled by Anglo-American discovery.'[29] But the reception of evidence in Germany is narrower than in the US; 'the current state of affairs in Germany [in 2003] resembles recent developments in England.'[30]

19 Japanese law has changed greatly since 1890, however. In particular, the major revision in 1948 was heavily influenced by the US Occupation Forces, and a further major revision in 1996 sought to expand evidence gathering. Presently, as a result, Japanese and German law are very different. Though Germany requires a special showing to support a court order to produce documents, under Japanese law nonprivileged documents are subject to a production order, somewhat like the US approach. But the scope of document production is not nearly as broad as in American discovery, and the party seeking a production order must identify the specific documents sought.

20 Until 1 January 2021, Israeli procedure followed prevailing English common law rules as they existed before Lord Woolf's reforms in England in the 1990s. Under the current

[22] S Subrin, 'Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules' (1998) 39 Boston College Law Review 691, 734-736.
[23] Ibid 718.
[24] Ibid 719.
[25] See above n 19 .
[26] See Rule 35 USFRCP.
[27] *Hickman v Taylor* (Supreme Court, US) [329 US 495 (1947)] 507.
[28] P Murray & R Stürner, *German Civil Justice* (Carolina Academic Press 2004) 239.
[29] Ibid.
[30] Ibid 241.

rules, there are 'liberal' and 'strict' interpretations bearing on pretrial discovery, so judges have considerable discretion in tailoring procedures to individual cases before them. In Argentina, the rules of procedure were strongly influenced by the traditions of continental Europe (particularly Spain), and access to evidence follows those traditions. US discovery practices have been studied in Argentina, but have not been adopted.

21 So as noted at the outset, one could take the history to show that in reality it can be seen as 'the United States against the world.'[31] But a key point is that US practice has evolved. Though the 1938 Federal Rules proved to be a watershed event, it is not clear that the true dimensions of the change were immediately apparent. As Subrin has said, the drafters of those rules 'would be amazed at how immense many cases now become and how prominent a role discovery plays in that process' [32] By the 1960s, a study commissioned by the American rulemakers found that '[d]iscovery has become an integral part of litigation.'[33]

22 Beginning in the 1970s, there was vigorous push-back in the US against broad discovery.[34] Amendments to the American discovery rules occurred in 1993, 2000, and 2015 that introduced and emphasized limits. The scope of discovery was reformulated to focus on relevance to disputed issues in the case and to insist that the discovery be proportional. [35] Numerical limits were placed in written interrogatories. [36] Pretrial depositions were limited to ten per party[37] and the duration of a deposition was limited to one day of seven hours.[38] In short, American discovery of the 2020s is different from American discovery of 1970.

23 At the same time, judicial assistance in obtaining evidence has become more available outside the US. No longer does *nemo tenetur edere contra se* protect parties against producing information harmful to their positions in litigation. As will be noted at the conclusion of this introductory chapter, there has been some harmonization between American attitudes and the approaches of other systems, but it must be appreciated that they remain very different.[39] As emphasized in the 2020 ERCP, its provisions on access

[31] See Trocker (n 1).
[32] Subrin (n 22), 743-744.
[33] W Glaser, *Pretrial Discovery and the Adversary System* (Russell Sage Foundation 1968) 51.
[34] For efforts from the 1970s to 1990s, see R Marcus, 'Discovery Containment Redux' (1998) 39 Boston College Law Review 747.
[35] See Rule 26(b)(1) USFRCP.
[36] See Rule 33(a)(1) USFRCP.
[37] See Rule 30(a)(2)(A)(i) USFRCP.
[38] See Rule 30(d)(1) USFRCP.
[39] For discussion, see R Marcus, 'Reflections from an Outlier: An American Reaction to the EU Rules on Evidence' (2021) 11 International Journal of Procedural Law 106.

to evidence are 'very different from US-style discovery,'[40] and designed to 'prevent an interpretation' that 'could lead to the introduction of US-style discovery.'[41]

3 RELATION TO REQUIREMENTS TO PLEAD A CLAIM

3.1 General Remarks

24 As noted above, common law pleading became, by the nineteenth century, an increasingly elaborate exercise in which the outcome often turned more on the skill of the pleader than the merits of the case. In the mid-nineteenth century, the common law regime was replaced in many American states by what came to be known as 'fact pleading,' which required only that a complaint need contain only 'a statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended'[42] Despite that change in stated requirements, many American judges continued to adhere to common law pleading requirements.[43]

25 Those enduring rigors were among the objections raised by Dean Pound in his 1906 call for American procedural reform. As with discovery, the 1938 Federal Rules sought to ease the path of plaintiffs. Rather than requiring allegation of facts, they called only for 'a short and plain statement of the claim, showing that the pleader is entitled to relief.'[44] In 1957, the US Supreme Court emphasized a relaxed view of the new requirements: 'A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.'[45] This came to be known as 'notice pleading.'

26 At least in the American system, these pleading standards bear also on production of evidence because they must be satisfied before a litigant gains access to discovery. In 2007, the Supreme Court 'retired' the rule announced in its 1957 case, and in its place required that plaintiffs include 'factual' allegations in their complaint sufficient to make

[40] Comment to Rule 100 ERCP para 1.
[41] Comment to Rule 101 ERCP para 1.
[42] Act to simplify and abridge the Practice, Pleadings and Proceedings of the Courts of this State [1848 N.Y. Laws 521] (New York, US) Ch 379, Sec 120(2).
[43] For example, one court referred to '[t]he cold, not to say inhuman, treatment with the infant [New York] Code received from the New York judges.' *McArthur v Moffet* (Wisconsin Supreme Court, US) [128 N.W. 445 (1910)] 446.
[44] Rule 8(a)(2) USFRCP.
[45] *Conley v Gibson* (Supreme Court, US) [355 US 41(1957)] 45-46. According to Hazard, this formulation 'turned Rule 89 on its head by holding that a claim is insufficient only if the insufficiency appears from the pleading itself.' See G Hazard,' 'From Whom No Secrets Are Hid' (1998) 76 Texas Law Review 1665, 1685.

the claims asserted 'plausible.'[46] Thus, the American requirement to get a case into court (thus permitting discovery to occur) has become more demanding.

27 But the American requirements to get a case into court seem considerably less exacting than those in other countries. As an illustration, consider Rule 12.1 in the Appendix to the ALI/UNIDROIT Principles of Transnational Civil Procedure: 'The plaintiff must state the facts on which the claim is based [and] describe the evidence to support those statements.'[47] It adds in Rule 12.3 that the statement of facts 'must, so far as reasonably practicable, set forth detail as to time, place, participants, and events.'[48] In the Comment to Rule 12, the drafters make clear that 'notice pleading is not enough,' and add that 'the facts pleaded in the statement of claim and defense establish the standard of relevance for exchange of evidence, which is limited to matters relevant to the facts of the case as stated in the pleadings.'[49]

28 There is thus a rather direct link between pleading requirements and pretrial access to evidence.

3.2 Pre-Action Discovery/Disclosure

29 As noted above, in general evidence production may be ordered only after proceedings have begun, so the more demanding the requirements for pleading a claim the more difficult is to do so without first obtaining disclosure.[50]

30 Pre-suit access is less urgent in the US than in many jurisdictions because the pleading requirements remain quite relaxed. Factual allegations must be credited as true in evaluating the sufficiency of a complaint. Not only is it not required to identify the evidence in the complaint, it is sometimes said that 'mere evidence' should not be included in the complaint. So the US Federal Rules permit pre-suit discovery only to obtain evidence that may become unavailable unless obtained before suit is filed, and also permit such pre-suit discovery only when the prospective party seeking it shows

[46] *Bell Atlantic Corp v Twombly* (Supreme Court, US) [550 US 544 (2007)]. See also *Ashcroft v Iqbal* (Supreme Court, US) [556 US 662 (2009)]

[47] G Hazard, R Stürner, M Taruffo and A Gidi, 'ALI/UNIDROIT Principles of Transnational Civil Procedure. Appendix: Rules of Transnational Civil Procedure (A Reporter's Study)' (Study LXXVI, UNIDROIT 2005), Rule 12.1

[48] Ibid Rule 12.3.

[49] Ibid comment to Rule 12A.

[50] For general discussion, see S Dodson 'Presuit Discovery in a Comparative Context' (2012) 5 Journal of Comparative Law 51.

that it cannot initiate a suit for some reason other than lack of evidence.[51] Indeed, it as a truism under the Federal Rules that discovery is not available to plead a claim.[52]

31 Curiously, other countries are more forthcoming with such discovery. As Dodson reported in 2012, 'presuit investigative discovery is surprisingly prevalent in common-law systems.'[53] As part of the Woolf reforms, the UK adopted a pre-action Practice Directive designed to promote a 'cards-on-the-table' approach to impending litigation.[54] This Directive permits a prospective plaintiff to send the prospective defendant a detailed set of allegations and summary of the evidence plaintiff possesses, and also identify defendant's documents that plaintiff wants to inspect. Although defendant is not subject to a court order to respond, failure to respond in good faith can lead to adverse cost apportionment if litigation ensues, a prospect which 'provides a potent incentive for adopting reasonable attitudes' in this pre-litigation setting.[55] As noted below, however, the Woolf Reforms also sought to cut back on excessive discovery. [56]

32 Moreover, several American states offer pre-suit discovery even though not necessary to preserve evidence, to enable the prospective plaintiff to determine whether there is a basis for commencing litigation.[57]

33 In civil law countries, which also don't permit party-initiated discovery, the opportunity for pre-suit demands for evidence is not common, but courts may be less likely to insist on detailed factual allegations and listing of evidence when the evidence is largely in the defendant's hands.[58] An example is provided by the 2010 decision of the German Supreme Court in a case in which the defendant was hired to guard valuable cargo while it was at an American port, but the cargo was stolen. In order to support substantial liability, plaintiff had to prove intentional or reckless action by defendant. In light of the

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[51] See Rule 27 USFRCP.

[52] See eg, *Nature's Plus Nordic A/S v Natural Organics Inc.*, (District Court, Eastern District of New York, US) [108 F.Supp.3d 52 (2015)], holding that plaintiff may not use discovery to obtain the facts necessary to establish a claim under the plausibility standard, even though those facts are within the control of the defendant. See generally C Wright, A Miller and R Marcus, *Federal Practice & Procedure* (3rd edn, Thomson Reuters 2010) Sec 2071.

[53] Dodson (n 50) 52. It is not clear, however, that this practice has actually been as successful as hoped.

[54] See Practice Direction – Pre-Action Conduct and Protocols (UK) para 1; see also Andrews (n 11) 7-8 (reporting that 'pre-action protocols' under the new system' 'encourage the exchange of early and full information about the prospective legal claim').

[55] A A S Zuckerman, *Zuckerman on Civil Procedure: Principles and Practice* (2nd edn, Sweet & Maxwell 2006) 42.

[56] See below Section 4.4.

[57] Dodson (n 50) 58-59 (identifying Texas as 'perhaps the strongest proponent' of such pre-suit discovery, and also listing Alabama and Ohio and Pennsylvania as providing such inquiry). See also L Hoffman, 'Access to Justice, Access to Information: The Role of Presuit Investigatory Discovery' (2007) University of Michigan Journal of Law Reform 217.

[58] Dodson (n 50) 61.

disparity of information between the parties, the burden of proof was mitigated because defendant was so much closer to the events.[59]

34 This approach is explained by Murray and Stürner, in Germany '[t]he court may, however, allow more general assertions of fact or less specific citations to sources of potential proof if the likely sources of proof are within the control of the opposing party or some third party. '[60] Moreover, sometimes procedures introduced to preserve evidence that might otherwise be lost can also be used to obtain prelitigation access to evidence.[61] For example, in Japan, Art 234-42 of the Code of Civil Procedure (JCCP) was originally introduced as a way to preserve evidence that might be lost, but it has sometimes been used as a means to obtain pre-suit access to evidence, something that occurs with some frequency in medical malpractice cases.

35 In Japan, there is also a system called 'Bar association inquiry', provided in the Attorney Act.[62] This provision permits a lawyer to petition a local bar association asking that the association make an inquiry in its name from an organization designated by the requesting lawyer. This procedure applies only to information held by an organization, not an individual. If it finds the request appropriate, the bar association will request the information from the organization, which is legally obliged to respond (though there is no sanction for failure to do so). This method is frequently used to prepare for litigation. In Israel, a rule authorizes the court to appoint a person to obtain pre-suit access to evidence in the hands of the prospective respondent, and to copy the evidence.[63] Such an order may issue if the court is persuaded that there is a real risk that the evidence would be concealed, altered, or destroyed.

36 In other countries, there may be special arrangements for pre-suit access to evidence in particular kinds of cases. In Argentina, for example, in consumer protection and environmental contamination cases information may be obtained by a subpoena issued by a court. As Vallines Garcia has noted, 'it is very important for *prospective* claimants to have access to the relevant information and the relevant evidence so that the information and that evidence may be deployed in the complaint initiating the main proceedings.'[64] But this solution has seemingly not been widely adopted.

37 In England and some other countries, a search order (often known as an *Anton Piller* order[65]) may be obtained. But such orders are usually limited to situations in which the petitioner can demonstrate that there is a serious risk that the defendant will destroy or

[59] Case I ZR 192/08 (BGH, Germany), Order of 24 November 2010.
[60] Murray and Stürner (n 28) 595; see also Dodson (n 50) 61, fn 80.
[61] See below Section 4.4.
[62] See Attorney Act No. 205 of 1949 (Japan) Art 23.
[63] Rule 123(a) ICPR.
[64] Vallines Garcia (n 2) 154.
[65] See *Anton Piller KG v MFG Processes Ltd* (Court of Appeal, UK) [1976] 1 All ER 779.

remove material sought. In Israel, such a showing is required to support pre-litigation access by court order.[66]

38 Interestingly, the ERCP state that 'any prospective claimant who intends to commence proceedings' may apply for a court order for access to evidence.[67]

3.3 Preservation of Potential Evidence in Advance of Litigation

39 The US does permit pre-suit court orders to preserve potential evidence, particularly witness testimony when the witness may be unavailable after litigation formally begins and the party seeking the preservation order is unable to cause the litigation to be initiated.[68] But because even a defendant may be able to file a suit for a 'declaratory judgment' of non-liability when the petitioner would be the defendant in such a suit there may not be many situations in which the petitioner is unable to initiate litigation.[69]

40 A procedure called 'preservation of evidence' is available in Japan under Art 234-42 JCCP. Either party can seek a court order to secure evidence if otherwise the evidence is likely to become unavailable or be altered. Such an order may be obtained before commencement of the action. Such production of evidence can be used to obtain documents, witness testimony, expert evidence or an article relevant to the matter. Typical uses of this procedure include situations in which there is a risk of falsification of medical records pertinent to a medical malpractice claim, or a risk a witness might die, or in a case in which ongoing construction could alter a building that is the subject of the suit, or other such situations. A court order in such situations enables the parties to copy or secure the potential evidence.

41 In Argentina, the only situation in which pre-suit access to evidence is possible is when there is a risk that otherwise the evidence will be lost.[70] As in Japan, this procedure may be used to obtain access to medical records in a case of possible medical malpractice.

42 In Israel, a rule provides that the court may, at any time, order the taking of evidence in advance of litigation, as well as the mode of its taking, if there is a reasonable fear that it will not be possible to hear the witness at the hearing.[71] In addition, on agreement of all parties, if represented by attorneys, agree to the pre-litigation taking of evidence. The evidence so obtained will be taken in the same manner as evidence taken in court. If the advance testimony has not been heard by a judge, or has not been recorded, it will be

[66] See Rule 123(a) ICPR.
[67] Rule 101(1) ECRP.
[68] See Rule 27 USFRCP.
[69] See Title 28 United States Code (USC) Sec 2201; Rule 57 USFRCP.
[70] Art 326 of the Code of Civil Procedure (Argentina) (ACCP). This provision permits pre-litigation applications for 'anticipated evidence' based on a showing of 'justified reasons for fear that production of the evidence could be impossible or very difficult during the evidence period.'
[71] Rule 73 ICPR.

read to the witness and, if he affirms its correctness, he will sign it, as will the person who took it. Should there be an objection to a question, that objection will be noted and, shortly after receiving the material the court will rule on the objection.

43 But, separate from a court preservation order, the US does recognize a general obligation of a prospective party to preserve materials reasonably seen as potential evidence in the unfiled case. In 2015, the Federal Rules were amended to recognize this common law obligation and to authorize sanctions – including an adverse judgment – against parties that fail to take 'reasonable steps' to preserve evidence after its potential use in litigation should be reasonably foreseen.[72] Failure to take such measures can lead to adverse inferences, or even entry of an adverse judgment. In England, active destruction of evidence before the start of proceedings may lead to an adverse inference if it qualifies as an attempt at perversion of justice.[73]

44 In Japan, there is no general duty to 'preserve evidence' in anticipation of litigation. But Art 234-42 JCCP provides that a potential litigant can apply to the court for an order to preserve evidence. If a party destroys a document after such an order is entered in an effort to prevent its use as evidence, or alters a document in a material way, the court may presume that the other party's assertion is true. A similar presumption is available for violation of a production order for non-documentary evidence.[74] Though there is no general legal requirement to preserve evidence for use in litigation, it should be noted that many other measures not directly tied to impending litigation – such as the Companies Act, the Public Records and Archives Management Law, and provisions of the tax laws – prescribe a statutory retention period. If documents subject to such a statutory retention requirement are destroyed before the end of the period, sanctions such as fines can be imposed.

45 In Argentina, there are no severe consequences for failure to preserve or provide evidence. But if public officials have a duty to retain records (for example, the obligation to preserve public records of environmental information for ten years), failure can lead to disciplinary or criminal action if there is proof of a wilful act to destroy the records.[75]

46 Destruction of evidence may thus lead to penal liability. In the US, it may be treated as obstruction of justice. Similarly, in Israel the Penal Law provides:

> If a person does anything with the intention to prevent or foil a judicial proceeding or to cause a miscarriage of justice, whether by frustrating the summons of a witness, by concealing evidence or in some other manner, then he is liable to three years

[72] Rule 37(e) USFRCP.
[73] See *Doublas v Hello! Ltd (No 3)* (Court of Appeal, England) [EWCH 55 (Ch) (2003)] para 86.
[74] Art 232.1 JCCP.
[75] See below Section 3.4.

imprisonment; for this purpose, 'judicial proceeding' includes a criminal proceeding and the implementation of a direction by the Court.[76]

47 In sum, there are various approaches to the question of pre-suit preservation of evidence, ranging from pre-suit orders that evidence be retained to adverse inferences for failure to retain evidence that was lost to actual penal sanctions for failure to preserve evidence. It is worth noting, however, that the party injured by the loss of evidence usually may not seek penal sanctions, which are left to the public authorities.

3.4 Access to Evidence Independent of Litigation

48 Court-ordered access to evidence for use in litigation is not the only way prospective litigants may obtain evidence to support their claims, and to satisfy pleading requirements. One possibility, of course, is pre-suit investigation. Particularly with the advent of the Internet and social media,[77] such access may be obtained more readily than during the twentieth century.[78] Similarly, more traditional means of investigation continue to be available.

49 *Governmental information*: Many countries have legislation that authorizes requests for information maintained by the government. In the US, the federal Freedom of Information Act (FOIA)[79] provides broadly that federal governmental agencies must respond to requests for such information, though it also exempts large categories of information from disclosure. No showing of need (such as the desire to initiate litigation) is required to obtain such access. As a consequence, 'litigants, or potential litigants, may resort to the FOIA as a supplement or substitute for discovery' [80] If access is denied, the requester may file an action in court against the agency to obtain access and, on occasion, use American discovery to obtain information about whether the agency complied with its statutory obligations in producing responsive material. [81] Many American states have similar legislation regarding information held by state governments.[82]

50 Other countries have similar legislation. In Japan, the Administrative Information Disclosure Act of 2001 permits anyone to request disclosure of administrative documents held by an administrative agency. Requesting parties may pursue their claims for information in court if they are denied access to the information. The Freedom of Information Act 2000 in the UK permits citizens to request information from public authorities about their activities. In Argentina, there are broad constitutional and

[76] Sec 244 Penal Law (Israel), 5737-1977 (Obstruction of Justice).
[77] See below Section 5.
[78] But one should keep in mind that privacy and other limitations may affect the use of such evidence.
[79] Title 5 USC Sec 552.
[80] Wright, Miller and Marcus (n 52) Sec 2005, 53.
[81] Ibid 55-58, fn 23-24.
[82] See eg, the California Public Records Act, the California Government Code Sec 6250-6268

statutory directives require be provided any person who so demands.[83] In Israel, the Freedom of Information Law[84] provides that any Israeli citizen, or any person domiciled in Israel, has the right to request the disclosure of information held by a public authority.

51 *Filings in court*: Particularly because one litigation may involve issues already presented in another litigation, access to court filings can provide a prospective litigant important evidence or grounds for making factual allegations.

52 In many countries, court filings are open to the public. In the US, there is an extensive body of constitutional and common law on the public right of access to court filings.[85] But it must be noted that ordinarily court files do not include materials exchanged in discovery.[86] Similarly, in Japan materials filed in court in civil cases are generally publicly available for inspection, but non-parties must prove a recognized interest to copy the materials.[87]

53 But this attitude does not prevail in all countries. 'Case records in civil cases in Germany are not open to the public either before or after judgment.'[88] Only the parties and their attorneys are permitted routine access to the official records of their cases.[89]

54 *Substantive rights of access to information*: Independent of pending litigation, there may be a right of access to information that will provide potential litigants with material on which to base their suits. For example, in Japan shareholders of a company have a right to access the stock acquisition rights ledgers, accounting documents, corporate bond ledgers.[90] Similar rights of access exist in other countries.[91] In Germany, a party is obligated to produce a record if, pursuant to substantive law, the party tendering

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[83] See Inter-American Court of Human Rights, *Claude Reyes y Otros v Chile,* Judgment of 19 September 2006 [Series C No 151], para 77*;* Supreme Court (Argentina) *Asociación Derechos Civiles c. PAMI s/ amparo,* Fallos: 335:2393, Judment of 4 December 2012; id., *Stolbizer, Margarita c. Estado Nacional s/ amparo,* Judgment of 1 September 2015*.*

[84] Freedom of Information Law (Israel), 5758-1998.

[85] See *Landmark Communications Inc v Virginia* (Supreme Court, US) [435 US 829 (1978)] 839 ('The openness of the courts and the conduct of judges are matters of utmost public concern.'); *Nixon v Warner communications Inc* (Supreme Court, US) [435 US 589 (1978)] (public access to trial exhibits); R Marcus, 'A Modest Proposal – Recognizing (At Last) That The Federal Rules Do Not Declare That Discovery is Presumptively Public' (2006), 81 Chicago-Kent Law Review 331, 335-339.

[86] See Rule 5(d)(1)(A) USFRCP (directing that pretrial disclosures and discovery materials must not be filed in court 'until they are used in the proceeding or the court orders filing').

[87] See Art 91 JCCP; Art 47 Code of Criminal Procedure (Japan).

[88] Murray and Stürner (n 28) 182.

[89] Art 299 Code of Civil Procedure (Germany) (GCCP). The same rule prevails in Israel.

[90] See Art 125, 252, 442, 684 Companies Act (Japan)

[91] In the US, for example, many provisions of state law provide such rights. See eg, Minnesota Statutes Sec 302A.61(4) (right of a shareholder to inspect corporate records); Texas Business Organizations Code Sec 21.218(b) (providing that a shareholder may examine books, records of account, minutes, and share transfer records); Ohio Revised Code Sec 1701.37(c); B Jeffries,' 'Shareholder Access to Corporate Books and Records: The Aggregation Debate' (2011) 59 Drake Law Review 1087; J Young,' 'Texas Law on Shareholders' Inspection: How Does it Stack Up Against Delaware Law and the Model Business Corporations Act' (1986) 40 Southern Methodist University Law Review 845.

evidence may demand production of the record or document.[92] The same rule applies to documents in the possession of third parties.[93] As an alternative, however, German law has since 2002 empower a court to order a party or non-party to produce a relevant document.[94] As a consequence, a party may apply to the court for a production order rather than relying on a substantive right to production (which may require a separate suit).

55 Such rights of access may also be protected by requirements that records be preserved, not so much as potential evidence but due to substantive obligations associated with certain activities, often for regulatory purposes. In Argentina, for example, public records must be maintained for ten years. Argentine commercial law similarly requires that books and records also be retained for ten years.[95] In Israel, for example, the Archives Law[96] requires public or governmental entities to preserve documents they produce or accept for varying periods from two years to eternity.

56 In Argentina, substantive provisions recognize a right to obtain information without regard to pendency of litigation concerning certain topics. Thus, the Free Access to Environmental Public Information Act[97] and Article 4 of the Consumer Protection Act[98] provide for such access.

3.5 Relation between Access to Evidence and Pleading Requirements

57 As noted initially, the US has singularly relaxed pleading requirements, in part in service to principles of access to justice.[99] The more demanding the requirements for initiating litigation, the greater the need for access to evidence to prepare adequate pleadings. The discussion in Part VIII therefore has a bearing on the rigor imposed on those initiating litigation (see Part VII), but there seems to be limited correlation between pleading requirements and access to evidence in different legal systems.[100] That general topic is beyond the scope of Part VIII, but it should be borne in mind in relation to the matters covered here.

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[92] Art 422 GCCP.
[93] Art 429 GCCP.
[94] Art 142 GCCP.
[95] Art 328 Civil Code (Argentina).
[96] Archives Law (Israel), 5715-1955.
[97] Ley de Defensa del Consumidor (Consumer Protection Act) [Ley 24.240] (Argentina)
[98] Regimen de Libre Acceso a la Información Publica Ambiental (Free Access to Environmental Public Information Act) [Ley 25.831] (Argentina).
[99] On access to justice, see Part IV.
[100] For an argument that high standards of pleading and proof in civil law countries result in a denial of justice, see Huang (n 3) Ch 2.

4 ROLE OF PARTIES AND COURT

4.1 General Remarks

58 Until litigation commences, litigation-related access to information may be obtained, if at all, only on court order.[101] In much of the world, even after litigation commences mandatory access to information requires advance judicial approval. As Hazard put it, 'recognizing in a party a *right* to require production of evidence, as distinct from a party's right to ask the *court* to require production of evidence, violates a constitutional principle of adjudication in the civil law system.'[102] This section examines from a variety of perspectives and concerns that bear on the need for prior judicial approval to gather evidence for use in litigation.

4.2 The US Approach – Advance Judicial Approval Usually Unnecessary

59 It is a contemporary hallmark of American litigation methods that lawyers control almost all aspects of proceedings. The 'case management' movement of the late 20th century has weakened that control significantly, but it remains in place, particularly regarding gathering of evidence for use in litigation.

60 It was not always so. Building on the English experience in the Courts of Equity. Some American courts tried at first to use court officers to take testimony. In those courts, evidence – particularly testimony – was gathered by court officials and under court control. As Kessler has written, judicial control was not entirely alien to the American mode:

> While the investigatory magistrate is a French approach, it is also, despite our deep-rooted assumptions to the contrary, not un-American. American lawyers (…) think of our system as firmly adversarial, committed to norms of fairness that have never meant much in the dark inquisitorial world of continental Europe. Yet the truth is that inquisitorial procedure is neither alien to our traditions nor inherently unfair. As late as the nineteenth century, Anglo-American courts of equity (…) employed a mode of procedure, which like that used in the courts of continental Europe, derived from the Roman-canon law tradition and was thus significantly inquisitorial.[103]

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[101] See above Section 3 for discussion of possibilities for such access. As noted in Section 3.4, the law may provide for access to certain information without regard to pending or prospective litigation. For example, access to government records or court records need not depend on the requester's intention to initiate litigation. But prelitigation access to information or evidence to prepare for litigation ordinarily depends on some sort of court order, as does court-imposed requirements to preserve evidence.

[102] G Hazard, 'Discovery and the Role of the Judge in Civil Law Jurisdictions' (1998) 73 Notre Dame Law Review 1017, 1024.

[103] A Kessler, 'Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial' (2205) 90 Cornell Law Review 1181, 1183.

61 Kessler's 2017 book examined the early efforts in the New York Court of Chancery (the analogue to Equity) to adhere to this Equity tradition and leave the development of the evidence to the judge and court examiners.[104] But the New York court found that it lacked sufficient staff to support this effort, which 'created opportunities for lawyers to insert themselves into chancery proceedings,' producing a 'chain reaction [in] which lawyers came to exercise ever greater control over these proceedings.'[105] The result was a significant increase in cost and delay of proceedings, which Kessler likens to 'modern-day anxieties regarding discovery abuse.'[106]

62 As went the state courts in New York, so went the American nation. By the twentieth century American lawyers were in full control of litigation, pursuing pleading niceties denounced by Dean Pound.[107] Much of that pleading pirouette engendered by common law procedure abated due to the relaxed pleading requirements of the Federal Rules as adopted in 1938.[108]

63 Under the Federal Rules, it has always been required that advance court approval be obtained to require a party to submit to a medical examination by a professional selected by the requesting party.[109] As adopted in 1938, the rules also required advance judicial approval before a party was required to produce documents, but that requirement for advance approval was removed in amendments in 1970.[110] Advance approval was never required for noticing a deposition [111] or submit written interrogatories to another party.[112]

64 But the requirements for initiating a claim in other systems may sometimes provide similar evidence without the need for judicial involvement. For example, in Israel a plaintiff seeking to prove a medical issue must provide as an annex to the statement of claim, a medical expert opinion.[113] The defendant may then require the plaintiff to submit to a medical examination by a professional selected by the defendant, and the plaintiff must comply with that requirement without delay unless his objection is sustained.[114] A court order is not required.

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[104] See A Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture* (Yale University Press 2017).
[105] Ibid 62.
[106] Ibid 106.
[107] See Pound (n 10).
[108] See above text to n 45-46.
[109] Rule 35 USFRCP. Note that the court has no authority to order a non-party to submit to such an examination.
[110] See Rule 34(a)(1) USFRCP.
[111] See Rule 30(b)(1) USFRCP.
[112] See Rule 33(a) USFRCP.
[113] Rule 87(a) ICPR.
[114] Rule 87(b) ICPR.

65 As to document production and depositions, in the US a party may use a subpoena to compel a non-party to provide discovery.[115] The attorney for the requesting party may sign the subpoena; no action by the court is required.[116] There are distance limitations on the requirement to appear and offer testimony[117] and the serving party is directed to avoid undue expense or burden on the non-party.[118] But the non-party is obligated to comply with the subpoena unless it serves its objections within 14 days after service of the subpoena.[119] And under the subpoena rule the other parties to the litigation are entitled to advance notice and a copy of the subpoena only if the subpoena seeks production of documents.[120]

66 As should be apparent, these provisions permit broad-ranging unilateral activity by litigation attorneys. Gradually, over recent decades this latitude has been limited. For interrogatories and depositions, there are now numerical limits in the rules unless the court by order permits more.[121] Formal discovery may not begin until the parties meet and confer on a discovery plan, which must be submitted to the court.[122] The court then is required to enter a 'scheduling order' limiting the time for discovery and, may also impose other limitations on discovery.[123]

67 But it is still true that most American discovery activity takes place without court involvement. Deposition notices, document requests, and written interrogatories are not filed in court, so the judge is not aware they have been served.[124] The parties are directed to meet and confer before a discovery motion is filed 'in an effort to [resolve the discovery dispute] without court action.'[125] According to many American plaintiff lawyers, the reality for them is that they receive little or no discovery until they have made such a discovery motion. To the extent that is true, the American reality may not be radically different in terms of court involvement from the practices in other nations. But the formal arrangements are certainly quite different. Thus, though the ERCP proclaim that 'each party should have access to all forms of relevant and non-privileged evidence,'[126] they also direct that the only method to obtain such access is by application to the court.[127]

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[115] See Rule 45 USFRCP.
[116] See Rule 45(a)(3) USFRCP.
[117] See Rule 45(c) USFRCP.
[118] See Rule 45(d)(1) USFRCP.
[119] See Rule 45(d)(2)(B) USFRCP.
[120] See Rule 45(a)(4) USFRCP. Normally, however, if the subpoena calls for a deposition the deposition requires notice to all parties. See Rule 30(b)(1) USFRCP.
[121] See Rule 30(b)(2)(A)(i) USFRCP (limit of 10 depositions per side); 33(a)(1) USFRCP (limit of 25 interrogatories). Israel also has a numerical limit for interrogatories. See Rule 56(b) ICPR.
[122] See Rule 26(d) & 26(f) USFRCP.
[123] See Rule 16(b) USFRCP.
[124] See Rule 5(d)(1)(A) USFRCP.
[125] See Rule 37(a)(1) USFRCP.
[126] Rule 100(a) ERCP.
[127] Rule 101(1) ERCP.

68 The clear norm in the civil law world, as recognized by Hazard[128] and in keeping with the ERCP, is that a court order must be obtained as a prerequisite for production of documents. Similarly, in Argentina advance judicial authorization is a prerequisite for access to documentary materials. In Germany, it appears that the pleadings themselves must identify the evidence relied upon. Although the court must consider all proof proffered by a party, '[o]nce a party has brought forward or identified the evidence, the responsibility for eliciting and evaluating that evidence shifts to the court.'[129]

69 But Japan does not entirely fit this civil law model, for it is a hybrid system that partially incorporates elements of US practice. Unlike German law, which authorizes the court to issue a production order on its own initiative, Japanese law permits such orders only on application of a party. Japanese law generally contains a stronger emphasis on party control than German law.

70 This difference between prior court approval and unilateral litigant initiation implicates a number of subsidiary concerns, examined below.

4.3 Mandatory Disclosure

71 Some information exchange may not depend on litigant demand or court action in the case. In England, before the Woolf reforms of the 1990s, just such activity occurred. By RSC Order 24, rule 2(1), 'the parties to an action between whom pleadings are closed must make discovery by exchanging lists of documents and, accordingly each party must, within 14 days after the pleadings in the action are deemed to be closed as between him and any other party, make and serve on that other party a list of the documents which are or have been in his possession, custody or power relating to any matter in action between them in the action.' Under the Woolf reforms, the role of the court is to apply proportionality principles to avoid overburdening the process. More particularly, for relatively low-value cases there is a standard disclosure that is required. But the basic point is that a prior application to the court is not necessary to start this process.

72 Israel's civil litigation provisions resemble those in England. Under Rule 57 ICPR, the litigants are required to exchange affidavits of discovery regarding all documents that are pertinent to the disputed issues and in the hands of the litigant within 30 days of the closing of the pleading phase. If a pertinent document is no longer in this party's control, it has to provide details regarding the reason the litigant no longer has the document. But there is no requirement to list documents the litigant never possessed. However, a party that fails to disclose a document it should have disclosed may not later use that document as evidence unless the court permits its use on the ground that the earlier failure to disclose was reasonably justified. And the duty to disclose applies to helpful

[128] See above text to note 102.
[129] Murray and Stürner (n 28) 161.

and damaging documents – *nemo tenetur edere contra se* does not obtain in Israeli courts.

73 In the early 1990s, the US introduced a form of mandatory disclosure, but it created great controversy. Initially, as adopted in 1993, it required each side to disclose without a formal discovery request all information that 'bears significantly on any claim or defense.'[130] The idea was like the policy behind the disclosure rule in England:

> [L]itigation in this country is conducted 'cards face up on the table'. Some people from other lands regard this as incomprehensible. 'Why,' they ask, 'should I be expected to provide my opponent with means of defeating me?'[131]

74 This reaction is, of course, the modern version of the ancient notion of *nemo tenetur edere contra se*. It found strong supporters in the US. Three Justices of the Supreme Court dissented from the adoption of this disclosure rule, joining in an opinion by Justice Scalia, who objected:

> By placing upon lawyers the obligation to disclose information damaging to their clients – on their own initiative, and in a context where the lines are not clear but require the exercise of considerable judgment – the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and to assist the opposing side.[132]

75 To placate this opposition, the new disclosure rule permitted individual district courts to 'opt out' and declare that disclosure would not be required in those districts. This provision produced national disuniformity that prompted amendment to the disclosure rule in 2000, so that it only requires disclosure of material that a party 'may use to support its claims or defenses.'[133] Thus, the ancient *nemo tenetur edere contra se* limitation continues applies to mandatory disclosure in the US. But those requirements are, in turn, fortified with a fairly common provision that a party that fails to disclose evidence may not later use it in the litigation.[134] More to the point, perhaps, this disclosure is followed by formal discovery, during which a party may not withhold evidence on the ground that it would harm its case.

76 Meanwhile, some US district courts have adopted standard 'disclosure protocols' for certain types of cases, such as individual claims for employment discrimination, that

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[130] For a description of the American mandatory disclosure controversy of the 1990s, see R Marcus, 'Of Babies and Bathwater: The Prospects for Procedural Progress' (1993) 59 Brooklyn Law Review 761, 805-812.
[131] *Davies v Eli Lilly & Co* (Court of Appeal, UK) [1987] 1 WLR 428.
[132] *Amendments to Federal Rules of Civil Procedure* (Scalia Dissenting) [146 FRD 507 (1993)] 511.
[133] See Rule 26(a)(1)(A) USFRCP.
[134] See Rule 37(c)(1) USFRCP.

make formal discovery requests unnecessary.[135] But except for that, there seems no significant likelihood that the US will soon abandon party-controlled discovery. An American judge said in 1992 that '[s]ome observers of civil litigation believe that discovery rights will be taken from lawyers within the next decade or two, to be replaced by a system of standard disclosures.'[136] So long as parties are not required to disclose evidence that harms their case or strengthens the case of the requesting party, it is unlikely that mandatory disclosure will replace US discovery.

4.4 Scope of Relevance

77 Though many legal systems embrace the idea that parties should have access to all 'relevant' evidence, the functional scope of that principle varies greatly. As noted above, disclosure regimes in some countries appear to require disclosure of all 'pertinent' information, whether harmful or helpful to the disclosing party. Such systems depend upon good faith by the parties or their lawyers, and they seem to call on the lawyers to make good faith judgments about what is pertinent – the sort of judgment Justice Scalia thought incompatible with the duties of an American lawyer.[137] One might regard those disclosure regimes as being too aspirational and trusting concerning parties' judgments about relevance.

78 In England, an 1889 decision called for production of 'any documents which contain information which would advance one party's case or damage the other's or would lead to a train of enquiry which may have either of those consequences.'[138] Under the Woolf reforms of the 1990s, Rule 31 of the Civil Procedure Rules (UKCPR) focuses on documents 'directly relevant' to the proceedings. One goal of the Woolf Reforms was certainly to cut back on excessive discovery. But in this century an English court observed that 'to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue.'[139] It is clear that this definition rejects the principle of *nemo tenetur edere contra se*. Indeed, the standard disclosure rule includes documents that 'adversely affect [the producing party's] own case.'[140]

79 Israel has a similarly broad view, so the party seeking production need only show that the document may be relevant to the proceedings.[141] And courts treat such applications

[135] See E Lee and J Cantone, 'Pilot Project for Discovery Protocols for Employment Cases Alleging Adverse Action' (2016) 100 Judicature 6; K Carlson, 'The Use of Initial Discovery Protocols for Employment Cases Alleging Adverse Actions' (2014) (1) The Federal Lawyer 47.
[136] *Wauchop v Domino's* (District Court, Northern District of Indiana, US) [143 F.R.D. 199 (1992)] 200.
[137] See above text to n 132.
[138] *Dreyfus v Peruvian Guano Co* (Court of Appeal, UK) [1889] 41 Ch. D. 151.
[139] *R v A (No. 2)* (House of Lords, UK) [2002] 1 AC 45.
[140] Rule 31.6(b)(1) UKCPR.
[141] *Feldman v Deutsche Apotheker und Ärztebank EG* (Supreme Court, Israel), 6553/14, Judgment of 16 March 2015.

liberally, so the litigant resisting production must ordinarily demonstrate that requiring production would produce undue hardship.[142]

80 In Argentina, the question of relevance normally arises at the point a document (or other evidence) is offered in evidence rather than with regard to initial production. Evidence is deemed 'pertinent' if it refers to facts alleged by the parties or is conducive to resolution of the case.[143] There may be an inclination to find in favour of production in doubtful cases.

81 The Japanese system is similar to that of Argentina. In Japan as well, relevance issues arise when the party proffers documents or other objects to the court as evidence. If the court concludes that the material proffered is not necessary as evidence, it denies the motion to adopt this evidence.[144] The concept of 'necessity as evidence' in Japanese law has almost the same meaning as 'relevance' in common law. Decisions on whether proffered items satisfy the 'necessity as evidence' standard can be made at the free discretion of the court,[145] and the court need not give a reason for its conclusion. The same 'necessity as evidence' standard applies to a request that the court issue a document production order.

82 At least with regard to requests that the court direct production of documents or other evidence, these assurances might be questioned in light of the specificity required to obtain a production order, which seem to require that the requesting party be able to demonstrate that the document requested exists and is in the custody of the adverse party. Thus, the ERCP Rules provide that an applicant for a production order must show that the requested evidence is 'necessary for the proof' of its claims and that it 'cannot otherwise gain access to this evidence without the court's assistance.' [146] The commentary makes clear 'that the applicant must support [the application] with adequate details.'[147]

83 This approach can curtail access to unknown information in the possession of the adversary that is important to proof of the requester's case. As Trocker said of American document discovery, '[i]nformation may be requested even if the party making the request does not know that the information exists or cannot describe it with specificity.'[148] Contrast that attitude with the attitude toward document production in the ALI/UNIDROIT Appendix of Rules from 2006:

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[142] *Israel land Authority v Kiryat Neve Shalom NPO* (Supreme Court, Israel) 5452/16, Judgment of 8 August 2016.
[143] Art 360.3, 364 ACCP.
[144] Art 181.1 JCCP.
[145] Ibid.
[146] Rule 102(2)(a) and (b) ERCP.
[147] Comment 2 to Rule 102 ERCP.
[148] Trocker (n 1) 155.

> A party is not entitled to disclosure of information merely that 'appears reasonably calculated to lead to the discovery of admissible evidence,' which is permitted under Rule 26 of the Federal Rules of Civil Procedure in the United States. 'Relevant' evidence is that which supports or contravenes the allegations of one of the parties.[149]

84 In Japan, for example, a narrow view of relevance is applied. The court has free discretion to decide whether to accept and use evidence proffered by the parties.[150] Similar discretion exists in deciding whether to order production; one of the considerations is whether the evidence sought is the most relevant; if not, production may not be ordered.

85 As recognized by the PTCP, the American attitude toward relevance is quite broad. In the next section we will introduce the cost and burden consequences of this attitude. But at present, the main point to be made is that even though the scope of discovery in Rule 26(b)(1) USFRCP has been revised over the last quarter century, it is still very broad.[151] According to the American evidence code, as in England, evidence is relevant if 'it has any tendency to make a fact more or less probable than it would be without the evidence.'[152] Particularly in this era of pervasive digital communication,[153] a vast array of materials may exist that would bear on a claim in court.

86 For example, consider an employee who claims that her employer fired her for discriminatory reasons. Could she readily identify every email, text or other communication that occurred among her employer's personnel about her? Could that material be relevant? If her supervisor told the president of the company in an email that she was doing a 'great job,' would that be relevant to her claim if the employer discharged her for poor performance? If the president responded to the supervisor's email with a racial slur directed at the plaintiff, would that not be relevant to her claim of discrimination? But how would she know about this exchange of email in order to seek a production order regarding this specific exchange?

87 The American rules do not require such specificity, much less that it must be made to the court before any production occurs. Instead, they direct that the production request 'describe with reasonable particularity each item or category of items to be inspected.'[154] The discharged employee could, therefore, request production of 'all communications among employees of the employer regarding plaintiff.' The point of such a request, as Trocker discerned, is that the plaintiff can request production of items that *she doesn't know exist*. In a sense, that is why the American system is called

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[149] Comment 22H at Hazard, Stürner, Tarufo and Gidi (n 47) 132.
[150] Art 181(1) JCCP.
[151] For discussion see Wright, Miller and Marcus (n 52) sec 2008 ff.
[152] Rule 401(a) Federal Rules of Evidence (US).
[153] See below Section 5.
[154] See Rule 34(b)(1)(A) USFRCP.

'discovery' rather than 'disclosure.' It truly empowers litigants to discover things they did not know existed.

88 One could prefer a system in which hidden evidence remains hidden. For a time in the US, some seemed to think that our constitutional rules limiting search and seizure in criminal cases in effect meant that criminal activity that did not give rise to reasonable suspicion sufficient to support a search warrant was for that reason not criminal. And similarly, perhaps, our employee challenging her discharge might confront the argument that because she could not specify the exact evidence she needed to prove her case, the employer should be insulated from liability.

89 It does not seem that many nations take such a view, however. Instead, the problem they cite with broad discovery or disclosure is either that it produces undue costs and burdens or that it unduly overrides important privacy concerns, to which we turn.

4.5 Cost and Burden

90 If access to evidence is important, as Stürner has written, it nevertheless 'cannot be seen as an absolute right. It has to be balanced with other pertinent rights. In a number of procedural systems, procedural economy has reached the status of an overriding principle.'[155] In the US, parties resisting discovery do not argue that requiring production will cause them to lose the case (the *nemo tenetur edere contra se* argument). Instead, they contend that the cost of locating and producing what the other side has demanded exceeds its value as evidence. Routinely, the requesting party contends that this charge is false.

91 The responding party has a reasonable argument. With regard to discovery, the cost and burden problem emerged in England soon after the Judicature Acts in the 1870s expanded discovery opportunities. As reported in 1915, during that heady period 'every practitioner took advantage of every privilege allowed him in the Rules in the conduct of the action. He asked for all the discovery and all the amendments and extensions the Rules could possibly warrant.'[156] As a consequence, 'costs mounted up aggressively.'[157]

92 One countervailing pressure in England could be the costs rule – the losing party had to reimburse the winning party for its costs of winning. In many cases, that may serve as a constraint. But as Zuckerman has written, the recovery of costs might sometimes cut the other way:

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[155] M Stürner, 'The ELI/UNIDROIT European Rules of Civil Procedure: Access to Information and Evidence,' in F Gascon Inchausti and B Hess (ed), *The Future of the European Law of Civil Procedure* (Intersentia 2020) 205, 208.
[156] S Rosenman, 'Studies in English Procedure' (1915) 63 University of Pennsylvania Law Review 273, 289.
[157] Ibid 291.

> [O]nce it is clear that a dispute is destined to go all the way to trial, the indemnity principle [with regard to litigation costs] tends to erode resistance to costs (…). Indeed, a point may come where the parties would have reason to persist with investment in litigation, not so much for the sake of a favorable judgment on the merits as for the purpose of recovering the money already expended in the dispute, which may well outstrip the value of the subject matter in issue.[158]

93 Lord Woolf's reforms introduced greater restraint; as an English court put it in 2002, 'the Parties no longer have any absolute right to insist on the calling of any evidence they choose provided only that it is admissible and arguably relevant.'[159]

94 Like Japan, the US does not routinely impose the winner's litigation costs on the loser; that is the 'American Rule.' That reality may counsel prudence in initiating broad discovery forays. But as the *Harvard Law Review* recognized more than sixty years ago: 'Even when invoked sparingly, discovery may impose on both parties and non-parties burdens of cost and inconvenience that are disproportionate to the significance of the litigation to those who must bear such burdens.' [160] So the idea of focusing on proportionality has been with us for a long time.

95 American discovery, particularly document discovery (with its obligation on the responding party to search for as well as to produce large amounts of material). As noted above, there may be a strong incentive for the requesting party to make a broad discovery request in hopes that it will reveal a 'hot document' that would otherwise be held back on the ground that it was not specifically requested. That possibility encourages broad drafting of broad requests even though they may include enormous amounts of chaff along with shreds of wheat. Moreover, it is said that American litigators 'suffer from a double distortion: they overvalue the additional information and undervalue the costs incurred by the responding party in providing the information.'[161] And under the American Rule, that cost will be borne by the opposing party even it wins the case. Proportionality seems to be the needed cure.

96 These features of the American approach may recede or vanish under a different approach. In Japan, for example, the requirement of an advance judicial order for production and a narrow definition of relevance means that the cost of responding to production orders is not significant.

97 As many outside the US recognize, American discovery can be hugely expensive. An experienced American judge observed 20 years ago that broad discovery can give the

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[158] A Zuckerman, 'Lord Woolf's Access to Justice: Plus ca Change . . .', (1996) 59 Modern Law Review 773, 778.
[159] *GKR Karate (UK) Ltd v Yorkshire Post Ltd* (Court of Appeal, UK) [2000] 1 WLR 2571, 2577.
[160] 'Developments in the Law – Discovery' (1961) 74 Harvard Law Review 940, 942.
[161] A Wistrich and J Rachlinski, 'How Lawyers' Intuitions Prolong Litigation' (2013) 86 Southern California Law Review 571, 604-606.

plaintiff 'a gigantic club with which to beat his opponent into settlement. No corporate president in her right mind would fail to settle a lawsuit for $100,000 if the [discovery response] would cost $300,000.'[162] But this is probably not the norm; 'lawyers in the ordinary cases have learned how to manage time and expense.'[163] It is mainly in high stakes, high conflict 'bet the company' cases that discovery costs tend to escalate.

98 As in Lord Woolf's reforms in England, so in the US: the solution to excessive expenditures on discovery has been to insist that discovery be proportional. That concept was introduced into the Federal Rules in 1983, and the Reporter for the Rules Committee at the time announced that this change heralded a '180-degree shift.'[164] But that shift did not happen, and in 2015, the proportionality objective was moved up into the basic definition of the scope of discovery.[165]

99 Deciding whether something is proportional can be a difficult task. For one thing, though most lawsuits are about money, money may not regularly be a suitable measure. Consider a suit to desegregate a city school system or to cure unconstitutional conditions of confinement at a prison. Surely provable monetary damages would not be a suitable measure of the true importance of such a case.[166] Moreover, it may be that the need for discovery is not of itself sufficient to demonstrate that the discovery is proportionate. Even after Lord Woolf's reforms in England in the 1990s, costs remained a serious issue and Lord Jackson was commissioned to do a study of those in the English system. His conclusion: 'Disproportionate costs do not become proportionate because they were necessary (…). The fact that it was necessary to incur certain costs in order to prove or disprove a head of claim is obviously relevant, but it is not decisive of the question whether such costs were proportionate.'[167]

100 In sum, one can avoid overly costly discovery by making discovery very difficult, but that may also undercut the commitment to access to court and access to needed evidence. But a system that values that access must also grapple with the problem of whether the cost is not justified, and whether the availability of the demand for discovery itself can distort litigation outcomes by forcing a settlement.

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[162] *McPeek v Ashcroft* (District Court, District of Columbia, US) [202 F.R.D. 31 (2001)] 34.
[163] B Garth, 'Two Worlds of Civil Discovery: From Studies of Costs and Delay to the Markets in Legal Services and Legal Reform' (1998) 39 Boston College Law Review 597, 605.
[164] A Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility* (Federal Judicial Center 1984) 32-33.
[165] See Rule 26(b)(1) USFRCP.
[166] Note that the American rule invites consideration on this subject of 'the importance of the issues at stake in the action' and' 'the parties' relative access to relevant information.' See Rule 26(b)(1) USFRCP.
[167] R Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationery Office 2009) 37.

4.6 Confidentiality and Privacy

101 The narrower the opportunity to compel production of documents or information, the narrower the potential intrusion into privacy. In the EU, for example, the GDPR reflects a very broad commitment to guarding privacy in ordinary human affairs. Because prevailing concepts of relevance and the need to obtain advance judicial authorization for production of documents depend on demonstrating that specific documents exist, as explored in section 4.3 above, court-ordered production is likely to present fewer risks of intrusion into confidential or private matters.

102 As often is the case, the US stands alone on this score. Putting aside tensions between US discovery and protections like those in the GDPR applicable to information generated in countries with such protections, the reality for litigation internal to the US is quite different. The general American attitude is not sympathetic to efforts to keep relevant evidence under wraps. Instead, it is standard to say that 'the law has the right to every person's evidence.' Providing full disclosure to further accurate results in court proceedings is conceived as the preeminent concern. Regarding discovery demands, the byword is: 'Except for a few privileged matters, nothing is sacred in civil litigation.'[168]

103 As already seen, American litigation permits broader demands for production of potential evidence, and the First Amendment of the American Constitution guarantees the right to speak about a wide variety of matters. Coupled with broad discovery, this constitutional right to speak might permit wide dissemination of confidential matters. That would not apply to genuinely privileged matters for they are exempted from mandatory production (treated in a later chapter of Topic 8), but because privileges are interpreted narrowly in the US a great deal of private confidential information arguably relevant to a lawsuit might not be protected from the 'free speech' activity of the litigant who obtained it pursuant to the court's production order.

104 Indeed, some litigation might be initiated largely to obtain information via discovery for public dissemination rather than to obtain relief in court. In 1964, an American court of appeals observed that discovery serves in part to 'force a full disclosure' to the public.[169] In 1975 another court of appeals said that 'certain civil suits may be instigated for the very purpose of gaining information for the public.' [170] There have even been

[168] *Coca-Cola Bottling Co v Coca-Cola Co* (District Court, District of Delaware, US) [107 F.R.D. 288 (1985)] 290

[169] *Olympic Ref Co v Carter* (Court of Appeals, Ninth Circuit, US) [332 F.2d 260 (1964)] 264.

[170] *Chicago Council of Lawyers v Bauer* (Court of Appeals, Seventh Circuit, US) [522 F.2d 242 (1975)] 258.

(unsuccessful) efforts to state a 'claim' for discovery as the primary objective of civil litigation.[171]

105 The American Federal Rules authorize a court protective order limiting public disclosure of confidential non-privileged matters obtained through discovery for 'good cause.'[172] But it is regularly said that the party seeking such protection must make a detailed showing to support any limitation on use of information turned over due to court order for a non-litigation purpose.[173] In 1984, the US Supreme Court ruled that a protective order supported by good cause did not violate the First Amendment right of free speech.[174] But the debate about whether there should be any restrictions on use of material obtained through US discovery has continued for decades.[175]

106 These concerns are not limited to production of documents in the US. Pretrial depositions are routinely available (subject only to a numerical limitation), and are regularly videotaped. Absent a protective order, the party that took the deposition may post it online. A prominent example is the suit brought by parents of the children killed at Sandy Hook Elementary School, an event that an American business called InfoWars, operated by a man named Alex Jones, claimed was a fake, leading to harassment of the parents of the murdered children by InfoWars followers. These parents sued Jones, and videos of his deposition have been posted online. For example, a Google search for 'youtube Alex Jones deposition' will give the viewer a chance to view the deposition testimony of Mr. Jones.

107 A different issue exists in the US concerning materials filed with the court. Under current American law, very different considerations apply to maintaining confidentiality of material filed in court compared to materials exchanged in discovery but not filed in court. For one thing, the Federal Rules now say that discovery materials are not to be filed in court until they are 'used in the proceeding.'[176] But when that happens, there is a public interest in access to these materials because they bear on a decision by the court. Without regard to whether there is a public interest in the contents of the materials, the public does have an interest in observing the conduct of the courts. For this purpose, it should be able to inspect materials on which a court bases its decision. As a consequence, materials exchanged between the parties during discovery may be

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[171] See *Finley v Kondaur Capital Corp* (District Court, District of Massachusetts, US) [909 F.Supp.2d 966 (2012)], 976. In this case, plaintiff, proceeding without a lawyer, included a 'count' in his complaint for discovery. The court dismissed that claim, noting that 'discovery is not a claim one can make in a complaint; it is a process litigants undertake after they have filed their initial pleadings.'

[172] Rule 26(c) USFRCP.

[173] For specifics, see Wright, Miller and Marcus (n 52) sec 2035-2044.1.

[174] *Seattle Times Co v Rhinehart* (Supreme Court, US) [467 US 20 (1984)].

[175] For discussion, see Marcus (n 85); R Marcus, 'The Discovery Confidentiality Controversy' (1991) University of Illinois Law Review 457; R Marcus, 'Myth and Reality in Protective Order Litigation' (1983) 69 Cornell Law Review 1.

[176] Rule 5(d)(1)(A) USFRCP.

filed under seal only if the court finds that they satisfy more exacting requirements than are needed to support a protective order.[177]

108 Given the narrower attitude toward the scope of discovery and the absence of pretrial depositions (much less videotaped depositions), these issues are less pressing in other counties, though they may become more important due to the vast increase in use of digital means of communication.

109 Germany is an example of a much restricted attitude toward access to private materials. Compared to American latitude in circulating even discovery materials, German courts are strikingly constrained:

> The principle of publicity is somewhat compromised with respect to the written records and documents in the proceeding. The case record (*Akte*) is confidential and access to the record and documents on file is limited to the court and the parties and their counsel, unless the court allows access to others for good cause shown (…). Even following final judgment, German courts may not disseminate information from their files about private parties to other government agencies or other persons except under statutorily prescribed circumstances.[178]

110 In Japan, Art 220(4) JCCP, regulates access to evidence in a manner different from Germany. The general presumption is that use of documents is not restricted, though there are a number of exceptions.[179] The most notable restriction regards documents that were prepared exclusively for the internal use of an organization or the person possessing them (such as a diary). With commercial organizations, this limitation can prevent disclosure of a wide array of material.[180] But the Supreme Court of Japan substantially narrowed this restriction on disclosure by ruling that it applies only when there is a demonstrated risk that disclosure would cause extremely serious disadvantages to the holder of the document.[181]

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[177] *In re Avandia Marketing Sales Practices and Products Liability Litigation* (Court of Appeals, Third Circuit, US) [924 F.3d 663 (2015)] (emphasizing that a much stronger showing is required to justify filing under seal in court than is necessary to obtain a protective order that applies to exchange of materials in discovery).

[178] Murray and Stürner (n 28) 187.

[179] Exceptions include (1) documents containing matters that may result in criminal prosecution of the holder of the document; (2) documents containing matters that may harm the reputation of the holder or the holder's relatives; (3) documents concerning public information developed where disclosure may harm the public interest; (4) documents containing secrets learned in the course of their duties by professionals such as lawyers, doctors, or religious officials; and (5) documents containing technical or professional secrets. Art 220(4) JCCP.

[180] For discussion of the 'internal use' exception to disclosure, see C Goodman, 'The Evolution of Document Production in Japanese Civil Procedure: Context, Culture, and Community' (2007) 33 Brooklyn Journal of International Law 125.

[181] Case 1787 (Supreme Court, Japan), Judgment of 12 November 1999 [Minshu Vol. 53 No. 8].

111 In England, pursuant to Rule 31.22 UKCPR, a party to whom a document has been disclosed may use it only for the purpose of the proceedings in which it is disclosed, though it appears that if the document is used as evidence in court the document may be used for other purposes. At the same time, it has been held that there is no principle of English law by which documents are protected from disclosure by reason of 'confidentiality' (as opposed to privilege) alone.[182]

112 Israel also has a more protective attitude toward privacy than the US, though more in terms of use as evidence than in terms of disclosure. Thus, if information is obtained by 'an infringement of privacy' it ordinarily may not be used in court unless the victim of the infringement consents.[183] But the Israeli Supreme Court has distinguished between disclosure and admissibility, so that it may be required to disclose the existence of the document, though inspection may be denied.[184]

113 Procedural legislation in Argentina, in general terms, does not contain strong limitations on access to evidence based on the protection of the right to privacy or intimacy. But protection of privacy has constitutional status, and material obtained in violation of privacy rights may be rejected as evidence in court. Courts presented with such issues balance the level of invasion to privacy, the importance of the rights at stake in the litigation.

5 THE GROWING IMPORTANCE OF DIGITAL EVIDENCE

114 In the 21st century the world has experienced a revolution in methods of communication. Until the recent past, human communications did not ordinarily create a document that itself could be subject to disclosure or discovery. People either spoke to each other face-to-face, or they spoke on the telephone. They could be asked during depositions or in open court about what they remembered of those communications, but document production would not ordinarily provide information about them.

115 Those days are gone. Now people regularly communicate by email or text or other digital means. In addition, they may utilize a variety of social media, such as Facebook, Twitter, TikTok and many others. They may post videos (like the deposition of Alex Jones mentioned above) on YouTube. Beyond that, people with smartphones often record events that lead to proceedings in court, and surveillance cameras may often capture images of such events in public and in private. All of these things can be regarded as 'documents' and subjected to disclosure or discovery. Some might even say that they are better evidence of what happened than the recollection of witnesses.

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[182] *Science Research Council v Nasse* (House of Lords, UK) [1980] AC 1028.
[183] Protection of Privacy Law (Israel), 5741-1981.
[184] U Goren, *Issues in Civil Procedure* (13th edn, Nevo 2020) (in Hebrew) 381 ff.

116 Coming from northern California, the home of Silicon Valley, Facebook, Twitter, YouTube, Apple, and many other such enterprises, one of the contributors to Topic 8 is surrounded by such evidence. Not surprisingly given the American appetite for discovery, these developments have revolutionized American discovery and created a multi-billion dollar industry. An American judge commented in 2017: 'More data has been created in the last two years than in the entire previous history of the human race, and the amount of data is expected to increase 10-fold by 2020.'[185]

117 As noted above, the importance of this transformation was not limited to the volume of data. Instead, in comparison to the mode of communication that existed before the Digital Age, it now seems that *most* communications create something one could regard as a document subject to discovery. Rather than talking face to face, people began two decades ago to communicate by email. More recently, they have often switched to texting or using other modes of electronic communication. All of these means of communication can be the object of American discovery. More than a quarter century ago, American lawyers observed: 'Employees say things in email messages that would never be stated directly to a person or consciously memorialized in writing.'[186] Another lawyer said the advent of email had made it reasonable to forgo a pretrial deposition and instead take the risk of a 'blind' cross-examination at trial:

> The advent and indeed overuse of e-mails has made blind cross-examination through the use of documents even simpler, and the use of depositions almost superfluous. Witnesses do not talk to each other anymore. They merely e-mail each other. Hundreds of e-mails. Thousands of e-mails. We are drowning in a flood of e-mails, and they are all part of e-discovery. The overuse of e-mails has made blind cross a much less risky task. Each witness's testimony is set forth in his or her own words through a series of 'instant messages' and endless e-mail exchanges (…). All you have to do for effective blind cross is have the witness repeat what he or she wrote and then merely ask if the witness believed it to be a true statement at the time he or she wrote it.[187]

118 Thus, it is not surprising that an American lawyer remarked in 2017 that 'no area of law is evolving faster than E-Discovery [American discovery seeking production of digital material].'[188] Other American lawyers urge that such discovery should be 'considered a specialized substantive expertise in the same vein as, for example, patent law.'[189]

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[185] *Gordon v TGR Logistics* Inc (District Court, District of Wyoming, US) [321 F.R.D. 401 2017)].
[186] J Pooley and D Shaw, 'Finding Out What's Out There: Technical and Legal Aspects of Discovery' (1994) 4 Texas Intellectual Property Law Journal 57, 63.
[187] M Neubauer, 'Mastering a Blind Cross-Examination' (2009) 35 Litigation Magazine 23.
[188] M Lange, 'E-Discovery Trends to Watch in 2017' (February/March 2017) Today's General Counsel 26
[189] J Kwoun and K Wan, 'High Stakes for Missteps in EDD' in *New Jersey Law Journal* (New Jersey, 31 December 2007) E2.

119 The American discovery rules were amended in 2006 to address the proper handling of discovery of this material, but to fit this new form of discovery into the existing arrangement.[190] Thus, the rule regarding production of documents was expanded to include production of 'electronically stored information,' which was defined in an expansive way to include newly-developed forms of digital information.[191] Soon this term was shortened to an acronym – ESI. The requesting party is authorized to request production of ESI in a specified form.[192] The responding party may object to the form, but in any case must specify the form in which it will produce ESI.[193] But the producing party need not produce ESI in more than one form.[194] And a responding party may object to searching sources 'not reasonably accessible because of undue burden or cost' unless ordered to do so by the court.[195] In sum, the orientation is to recognize the increasing importance of ESI as critical evidence while also recognizing that due both to accessibility and quantity this form of discovery can pose distinctive difficulties.

120 Not surprisingly, American divorce lawyers 'have found a virtual treasure trove in sites like Facebook,' [196] and Facebook and Twitter 'have increasingly become litigation resources, providing a wealth of statements and images used to contradict the claims and defense of the opposing party.'[197] Plaintiff lawyers in America have begun invoking proportionality in some forms of litigation to resist broad demands by defendants for access to plaintiffs' social media postings.[198]

121 It is not clear that this development has thus far had a similar impact outside the US, in part because evidence disclosure is narrower in other countries. To take an example mentioned above, consider the discharged employee who sues her former employer, claiming that the discharge was discriminatory. In an American court, she would normally demand production of all internal communications (via email, texting, etc.) at the employer about her, or about her job performance, or about the reason for her

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[190] For more information about American E-Discovery, see R Marcus, 'E-Discovery Beyond the Federal Rules' (2008) 37 University of Baltimore Law Review 321; R Marcus, 'E-Discovery & Beyond: Toward Brave New World or 1984?' (2006) 25 Review of Litigation 633; R Marcus, 'Only Yesterday: Reflections on Rulemaking Responses to E-Discovery' (2004) 73 Fordham Law Review 1.

[191] See Rule 34(a)(1)(A) USFRCP.

[192] See Rule 34(b)(2)(D) USFRCP.

[193] Ibid.

[194] See Rule 34(b)(2)(E)(iii) USFRCP.

[195] See Rule 26(b)(2)(B) USFRCP.

[196] A Scott, 'Lawyers Relish Mining Social Networking Sites for Gold' *San Francisco Daily Journal* (San Francisco, 1 October 2010).

[197] P Cowie & M Nicholas, 'Employment in an Age of Social Media' *San Francisco Recorder* (San Francisco, 4 November 2013).

[198] See E Mulligan, 'Defense Social Media Discovery Requests Can be a Dangerous Weapon in Drug and Device Cases – Learn How to Counter Them' (May 2022) Trial Magazine 18 ff. This article reports that' 'many large drug and device companies no consistently push hard to exhaust plaintiffs with this type of discovery' and arguing the '[U]ltimately the scope of social media discovery that you will have to gather, review, and produce turns on proportionality.'

discharge. She would not, of course, be able to identify specific items and would instead rely a general description.

122 In Japan, such a production request would likely fail. For one thing, the plaintiff would have to convince the court that specific documents exist, something she could not know regarding emails or texts not sent to her. For another, this material would likely be considered 'self-use documents,' and immune to production if the holder of the document could demonstrate that disclosure would cause it an extremely serious harm. Thus, it seems that technological change has not had as great an impact on litigation practice in Japan as in the US.

123 In England, conditions may approximate those in the US. For purposes of disclosure, UKCPR 31.4 defines 'document' as including 'anything in which information of any description is recorded.' The pertinent Practice Direction addresses 'disclosure of electronic documents.' [199] This has led to a tremendous increase of sources of information used in litigation, though tricky questions about admissibility may be presented.

124 In Israel, technological change has had an important effect on discovery or disclosure. Copies or scans of documents are easily made. But access to email may be limited in a manner similar to the approach in Japan to 'self-use' documents; private email messages are protected by the court and may be accessed only for special reasons.[200]

125 As the Digital Revolution gains momentum, it is likely that many countries will need to confront issues of both access and admissibility.

6 CROSS-BORDER IMPLICATIONS OF AMERICAN DISCOVERY

6.1 General Remarks

126 Cross-border issues are addressed in detail in Part XV of the CPLJ project. Nonetheless, because American discovery may have cross-border consequences, it seems useful to address those in this introductory chapter of Part VIII.

6.2 Assistance for Domestic Litigation

127 The 1970 Hague Convention on the Taking of Evidence Abroad[201] creates a method for seeking production of evidence located in another country that is also a signatory to the

[199] Practice Direction 31B para 1.
[200] *Zinger v Yahaav Hamias Technologies (1990) Ltd*, (Supreme Court, Israel) 2552/16, Judgment of 10 May 2016.
[201] See Title 28 USC Sec 1981.

Convention. Art 23 of that Convention, however, permits signatory nations to refuse compliance with certain requests.

128 The broad nature of American discovery might prompt civil law countries to invoke Art 23. As Hazard has observed, '[t]he immediate impact of American discovery in a civil law jurisdiction is experienced by the judges as an invasion of their role and responsibility.'[202] Thus, Argentina, which adopted the Convention in 1986, invoked Art 23 to refuse to provide pre-trial discovery of documents: 'The Argentine Republic will not comply with warrants whose purpose is a procedure known in "Common Law" countries by the name of "Pretrial Discovery of Documents."'[203] Germany has recently modified its position under Art 23; since 1 July 2022 Letters of Request will be executed by German courts, but only under very narrow circumstances designed to avoid fishing expeditions.

129 Common law countries do not necessarily take a different view of this topic. Thus, the UK is a party to the Convention but it has also invoked Article 23 and has declared that it 'will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents.' Israel, whose attitudes on these topics largely resemble those of the UK, has taken a more nuanced approach.

130 Japan has not ratified the 1970 Hague Convention, but it is a member of the 1954 Hague Convention on Civil Procedure, and may provide access to evidence in Japan pursuant to that treaty. In addition, it has Consular Treaties with the US and the UK, making it possible to use these arrangements to take a deposition in Japan, but not to obtain production of documents other than official documents.

131 Given the internationally designed methods of the 1970 Hague Convention, then, it might be expected that US discovery would not deviate significantly from the international norms. But in 1987, the US Supreme Court held that an American federal court was not required to employ the Convention's procedures rather than the discovery provisions of the Federal Rules when the party asked to provide discovery was subject to its jurisdiction because it was a party to the US litigation.[204] In effect, this can mean that a non-US litigant subject to the personal jurisdiction of an American federal court must persuade the American court to resort to the Convention's procedures instead of those in the Federal Rules.[205] That may often prove difficult.

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[202] Hazard (n 102) 1022.
[203] Art 2 Act of Ratification of the Hague Evidence Convention 1986 [Ley 22.480] (Argentina).
[204] *Societe Nationale Industrielle Aerospatiale v US District Court for the Southern District of Iowa* (Supreme Court, US) [482 US 522 (1987)].
[205] For discussion of these issues, see Wright, Miller and Marcus (n 52) sec 2005.1.

6.3 American Discovery for Evidence Used in Non-US Litigation

132 The fact there is no US litigation under way does not mean that US discovery is off limits. Instead, a statute[206] permits an American federal court to authorize discovery under the Federal Rules from anyone 'found' within the federal district in which the court sits. This discovery could consist of document production or a deposition, or both.

133 This statute appears to have been intended both to make available the benefits of American discovery to litigants with cases pending in non-US jurisdictions and to encourage other countries to treat favourably requests from American courts for discovery abroad. That purpose may not have been achieved; the frequency of invocation of Article 23 of the 1970 Hague Convention suggests that it did not.

134 But participants in non-US litigation may find the opportunities provided by this statute an inviting supplement to the narrower evidence production authorized in the tribunal before which they are litigating. In 2004, the US Supreme Court interpreted the statute broadly.[207] The setting was a request for evidence to be submitted to the Directorate-General for Competition of the Commission of the Commission of the European Communities, before which there was pending an antitrust complaint against Intel Corporation, an American company 'found' within the jurisdiction of the American federal court.

135 The Court emphasized that a district court had significant discretion in deciding whether to grant such discovery. But in the process it rejected a number of arguments that might narrow the statute: (1) the petitioner was an 'interested party' within the meaning of the statute even though it was not a formal party to the proceeding in Europe; (2) the Commission constituted 'tribunal' under the statute; (3) the proceeding before the Commission was 'pending' within the meaning of the statute even though it was still in the investigative stage; and (4) the American court could permit discovery without finding that the material sought would be discoverable under the procedures of the non-US tribunal.

136 This means that American discovery may be available even if there is no US litigation under way. And it seems that requests for such discovery have occurred more frequently since the 2004 decision.[208] But there are limits. In 2022, the US Supreme Court held that private adjudicatory bodies are not 'foreign or international tribunals' within the meaning of the statute because they are not governmental or intergovernmental bodies.[209] So parties to private arbitration may not use this statute to obtain evidence

[206] Title 28 USC Sec 1982.
[207] *Intel Corp v Advanced Micro Devices Inc* (Supreme Court, US) [542 US 241 (2004)].
[208] See generally Y Wang, 'Exporting American Discovery' (2020) 87 University of Chicago Law Review 2089.
[209] *ZF Automotive US Inc v Luxshare Ltd* (Supreme Court, US) [142 S. Ct. 2098 (2022)].

for use in the arbitration. Given the proliferation of international arbitration, this limitation may be significant.

137 Perhaps more significant is that non-US firms are not subject to American discovery under this statute because they are not 'found' in the US if their headquarters are located abroad.[210] Perhaps ironically, this limitation can mean that a US company is subject to US discovery with regard to litigation abroad with a non-US company, but that the opposing company is not subject to US discovery. Whether American courts exercising their discretion on whether to authorize discovery in the US will insist on reciprocity when exercising their discretion to permit discovery in the US may become important.

7 CROSS-BORDER IMPLICATIONS OF AMERICAN DISCOVERY

7.1 General Remarks

138 This introductory chapter makes clear that the US has a distinctive system of evidence production, and the remaining chapters of topic will bear that out. It is understandable that other countries have declined to embrace the American way. But it is worthwhile briefly noting reasons why one might consider adopting some of the features of American discovery.

7.2 Assuring a Decision on the Merits

139 There seems widespread agreement that enabling parties to obtain and present the evidence they need to prevail in litigation. For example, the ERCP begin their Part VII by assuring the reader that '[e]ffective access to information and evidence are basic tools that ensure justice is a real rather than a merely theoretical right.'[211]

140 It may be that disclosure requirements like those in the UK genuinely provide meaningful access to needed evidence, and it may be that American adversarialism prevents such breakthroughs in the US. That certainly was the attitude of some in regard to the early effort at disclosure of both helpful and harmful evidence in the US.[212] At least to an outsider, however, there may be reason to suspect that systems once committed to the principle *nemo tenetur edere contra se* may still resist production of harmful information. The eventual US version of required disclosure applies only to information the disclosing party intends to use to prove its case, not harmful information. Coupled with a narrow approach to relevance and an insistence that the party seeking production of documents describe precisely the documents sought and show that they are essential to present the case, the outsider's suspicion may mount.

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[210] See *Eli Lilly v Novartis Pharma AG* (Court of Appeals, Fourth Circuit, US) [37 F.4th 160 (2022)].
[211] ERCP 200.
[212] See above text to n 133.

141 And it also seems that in many instances the injured party cannot prove (or perhaps even plead) its case without access to information under the control of opposing parties. Recall the illustration of the discharged employee who contends she was fired for discriminatory reasons. There may be abundant support for that conclusion in the employer's records, but the employee likely cannot describe those items with any certainty. That would likely be a major obstacle in most non-US legal systems. Even under the more flexible Japanese approach those documents might be regarded as 'self-use documents' that are exempt from disclosure if the holder can demonstrate that disclosure would cause extremely serious disadvantages. There may often be a valid argument that denying access to this plaintiff because she can't specify exactly what she wants deprives her of 'justice that is real.'

142 Of course, permitting discovery on the scale authorized under American procedures, particularly with regard to documents, can be both costly and intrusive. But the US rules have been modified over the decades to reduce that risk and (as in the UK) to place considerable weight on proportionality. The horror stories that non-US parties hear are not about the ordinary US case. As Dean Garth observed, 'lawyers in the ordinary cases [in US courts] have learned how to manage time and expense. They have to do so, since their clients will not pay for scorched earth tactics.'[213] The horror stories are about a small proportion of all US litigation, and American discovery often serves to provide justice that is real due in part to relatively expansive discovery.[214]

7.3 The Distinctive Role of Civil Litigation in the US

143 For most of the world, the enforcement of public law is the responsibility of public officials. Not surprisingly, they often have very aggressive tools to obtain evidence. One might view this as the 'strong state' approach to public regulation. There is much to be said for this approach. Public officials can weigh competing considerations in make decisions about when to pursue relief in court, and compromise immediate demands in service to long-term objectives.

144 But that is not the American way. Instead, as Dean Carrington observed more than a quarter century ago:

> Private litigants do in America much of what is done in other industrial states by public officers working within an administrative bureaucracy. Every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accompanied by serious risk of exposure at the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeed can be uncovered.

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[213] Garth (n 163) 605.

[214] For further discussion of such points, see R Marcus, 'Extremism in the Pursuit is Our' 'Virtue': The American Infatuation with Broad Discovery' in C H van Rhee and A Uzelac (ed), *Truth and Efficiency in civil Litigation: Fundamental Aspects of Fact-finding and Evidence-taking in a Comparative Context* (Intersentia 2012) 165.

> Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct.[215]

145 That orientation has emerged from what Kagan saw as an effort to 'implement the socially transformative policies of an activist, regulatory welfare state through the political and legal institutions of a decentralized, non-hierarchical governmental system.'[216] That is what American private litigation does.

146 A related explanation for choosing private enforcement is that it is not dependent upon public officials, who may not be vigorous enough about enforcement of public policies that they do not favour. When elections can significantly change the political orientation of the legislature or the executive branches of government, there may be considerable value to enabling private litigants to pursue public goals through 'private' litigation, often leavened with provisions overturning the American Rule and enabling the successful plaintiff to recover attorneys' fees and other costs generated by the suit.[217] Broad swathes of American law exhibit this characteristic, from anti-discrimination law to antitrust law to consumer protection law to environmental protection law. In each of these areas, private litigants, armed with American discovery, can pursue public ends through litigation even if the public officials involved are less than entirely vigorous in their efforts.

147 This American equilibrium regarding the large role of private litigation distinguishes it from most other countries.[218] And it might be that some other countries could benefit from dispersed authority to pursue private ends through litigation. But for that to work, enhanced opportunities to obtain needed evidence are necessary.

148 In the US, moreover, this activity can lead to submission of cases to a jury of ordinary citizens. That right is sacrosanct in the US, and also dependent in significant measure on broad access to evidence that can be presented to the jury. That also explains why the US has more elaborate rules on admission of evidence than most countries (addressed in a later chapter of Part VIII). But 'citizen judges' might be attractive elsewhere, nevertheless. The chief point, however, is that the US approach suits the US system, and some others might consider aspects of that system that could be worth emulating.

8 CONCLUSION

149 This project is not a brief for adoption of American discovery. Particularly given the constraints introduced in American discovery over recent decades, it may be that more

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[215] P Carrington, 'Renovating Discovery' (1997) 49 Alabama Law Review 51, 54.
[216] R Kagan, *Adversarial Legalism* (Harvard University Press, 2001) 40.
[217] For a thorough study of this phenomenon, see S Farhang, *The Litigation State* (Princeton University Press 2010).
[218] Not necessarily from all; eg, consider class actions in Australia and Brazil.

convergence is possible even though the rest of the world is not likely to come to a wholehearted embrace of the American approach. On that score, consider the 1997 observations by Lowenfeld about international private arbitration:

> I do not believe that the limits placed in continental Europe (or Latin America) on what Americans call 'discovery' is an inevitable by-product of the way judges are selected, or the way the proceedings before the judge are conducted (…). I believe many elements of civil procedure are portable, that is, the experience gained in one jurisdiction can be usefully applied in another.
>
> (…). Over time, the better features of American document discovery have become routine [in international arbitration] – i.e., that all of the relevant documents in the parties' possession or control ought to be made available to both sides and to the decision makers, and that the arbitrators ought to have to make each discovery request subject to their order. The contention heard frequently in the past that each side is responsible for proving its own case and that the other has no obligation to help in this process is seldom heard any more.
>
> The extravagant aspects of American-style discovery, however, are out: requests for 'all documents, correspondence or memoranda (…)' without specification are now rarely seen and never in my experience granted. Discovery from persons not affiliated with the parties is very rare, and the idea that every witness must be deposed, i.e., interrogated by opposing counsel before he or she appears as a hearing, – a standard practice in American civil litigation – has not been adopted in international litigation.[219]

150 Writing a decade ago, Trocker reached similar conclusions with regard to obtaining evidence outside the national forum for the litigation:

> Recent trends and developments in procedure law well as in attitude to litigation, on a worldwide scale, are shedding a different light on American style discovery and are opening interesting perspectives for the taking of evidence across national frontiers. Two developments are of particular interest.

151 First, persons and entities involved or interested in transnational litigation resort to U.S. discovery with increasing frequency in order to get access to facts and information necessary to successfully vindicate substantive rights, taking advantage of United States liberalism in providing assistance to foreign courts as well as to litigations (prospective or actual) in foreign proceedings in the gathering of evidence located on U.S. soil. Foreigners are thus discovering the valuable aspects of American discovery.

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[219] A Lowenfeld, 'Introduction: The Elements of Procedure: Are They Separately Portable?' (1997) 45 American Journal of Comparative Law 649, 652-654.

152 Second, legal systems traditionally aimed at discouraging litigation through strict fact pleading requirements and severe relevancy standards for probative material to be admitted in court, are revisiting their attitudes and policies in this field. In a substantial number of countries, there is a significant trend to admit or impose forms of pre-action disclosure; to admit or impose exchange of information before commencement of proceedings, to adopt mechanisms and procedures suitable to promote greater openness between the parties as well as between prospective litigants, which in their structure and underlying purposes are not very different from frequently condemned U.S. pre-trial devices.[220]

153 For the present, it remains true that 'none of the EU Member States – not even the UK – has rules of broad discovery like the ones applicable to civil litigation in the US federal courts.'[221] Much the same can be said of the Asian systems, such as Japan, and the countries of Latin America, such as Argentina. But the systems are not diverging and may be converging gradually.

[220] Trocker (n 1) 181.
[221] Vallines Garcia (n 2) 124-125.

ABBREVIATIONS AND ACRONYMS

ACCP	Code of Civil Procedure (Argentina)
ALI	American Law Institute
Art	Article/Articles
BGH	*Bundesgerichtshof* (Federal Court of Justice) [Germany]
cf	*confer* (compare)
ch	chapter
CIDH	*Corte Interamericana de Derechos Humanos* (Interamerican Court of Human Rights)
edn	edition/editions
ed	editor/editors
etc	et cetera
eg	*exempli gratia* (for example)
ELI	European Law Institute
ERCP	Model European Rules of Civil Procedure 2020 (ELI / UNIDROIT)
ESI	Electronically Stored Information
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
FOIA	Freedom of Information Acts (US)
GCCP	Code of Civil Procedure (Germany)
GDPR	General Data Protection Regulation (EU)
HCCH	Hague Conference on Private International Law
ibid	*ibidem* (in the same place)
ICPR	Civil Procedure Regulations 2021 (Israel)
ie	*id est* (that is)
JCCP	Code of Civil Procedure (Japan)
n	footnote (internal, ie, within the same chapter)
no	number/numbers
para	paragraph/paragraphs
PTCP	Principles of Transnational Civil Procedure 2004 (ALI / UNIDROIT)
RSC Order	Rules of the Supreme Court (UK)
Sec	Section/Sections
SCC	Supreme Court Canada
supp	supplement/supplements
trans/tr	translated, translation/translator
UK	United Kingdom

UKCPR	Civil Procedure Rules 1998 (UK)
UNIDROIT	*Institut international pour l'unification du droit privé* (International Institute for the Unification of Private Law)
US / USA	United States of America
USC	United States Code
USD	United States Dollar
USFRCP	Federal Rules of Civil Procedure (US)
v	versus
vol	volume/volumes
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LEGISLATION

International/Supranational

Hague Convention on Civil Procedure 1954 (HCCH).

Hague Convention on the Taking of Evidence Abroad 1970 (HCCH).

Model European Rules of Civil Procedure 2020 (ELI / UNIDROIT).

Principles of Transnational Civil Procedure 2004 (ALI / UNIDROIT).

National

Administrative Information Disclosure Act 2001 (Japan).

Act of Ratification of the Hague Evidence Convention 1986 [Ley 22.480] (Argentina).

Act to simplify and abridge the Practice, Pleadings and Proceedings of the Courts of this State [1848 N.Y. Laws 521] (US).

Attorney Act (Japan).

California Government Code (US).

Civil Code (Argentine).

Code of Civil Procedure (Japan).

Code of Civil Procedure (Germany).

Code of Criminal Procedure (Japan).

Codigo Procesal Civil y Comercial de la Nacion (Code of Civil Procedure) (Argentina).

Companies Act (Japan).

Civil Procedure Regulations 2021 (Israel).

Civil Procedure Rules 1998 (UK).

Environmental Public Information Act [Ley 25.831] (Argentina).

Federal Rules of Civil Procedure (US).

Federal Rules of Evidence (US).

Freedom of Information Act (US)

Freedom of Information Act 2000 (UK)

Freedom of Information Law (Israel).

Ley de Defensa del Consumidor (Consumer Protection Act) [Ley 24.240] (Argentina).

Minnesota Statutes (US).

Ohio Revised Code (US).

Penal Law (Israel).

Practice Direction – Pre-Action Conduct and Protocols (UK).

Protection of Privacy Law (Israel).

Regimen de Libre Acceso a la Información Publica Ambiental (Free Access to Environmental Public Information Act), [Ley 25.831] (Argentina).

Texas Business Organizations Code (US).

United States Code (US).

Zivilprozessordnung (Code of Civil Procedure) (Germany).

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Carpenter v Winn (Supreme Court, US) [331 US 533 (1911)].

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Landmark Communications Inc v Virginia, (Supreme Court, US) [435 US 829 (1978)].

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Coca-Cola Bottling Co v Coca-Cola Co (District Court, District of Delaware, US) [107 FRD 288 (1985)].

Societe Nationale Industrielle Aerospatiale v US District Court for the Southern District of Iowa (Supreme Court, US) [482 US 522 (1987)].

Davies v Eli Lilly & Co (Court of Appeal, UK) [1987] 1 WLR 428.

Wauchop v Domino's (District Court, Northern District of Indiana, US) [143 FRD 199 (1992)].

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Case 1787 (Supreme Court, Japan), Judgment 12 November 1999 [Minshu Vol. 53 No. 8].

GKR Karate (UK) Ltd v Yorkshire Post Ltd (Court of Appeal, UK) [2000] 1 WLR 2571.

McPeek v Ashcroft (District Court, District of Columbia, UK) [202 FRD 31 (2001)].

R v A (No. 2) (House of Lords, UK) [2002] 1 AC 45.

Intel Corp v Advanced Micro Devices Inc (Supreme Court, US) [542 US 241 (2004)].

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Ashcroft v Iqbal (Supreme Court, US) [556 US 662 (2009)].

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Feldman v Deutsche Apotheker und Arztebank EG (Supreme Court, Israel), 6553/14, Judgment of 16 March 2015.

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Israel land Authority v Kiryat Neve Shalom NPO (Supreme Court, Israel) 5452/16, Judgment of 8 August 2016.

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ZF Automotive US Inc v Luxshare Ltd (Supreme Court, US) [142 S. Ct. 2098 (2022)].

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