

PART VII

EVIDENCE AND ACCESS TO INFORMATION

CHAPTER 2

EVIDENCE-GATHERING TECHNIQUES

Thalia Einhorn

cplj.org/publications/7-2-evidence-gathering-techniques

TABLE OF CONTENTS

1 Introduction	1
2 Gaining Access to Evidence Held by the Other Party	2
2.1 Pre-Litigation Discovery.....	2
2.2 Discovery Planning and Initial Disclosure.....	6
2.3 Document Production and Inspection	8
2.4 Electronic Disclosure	13
2.5 Pre-Trial Depositions	17
2.6 Interrogatories.....	20
2.7 Physical or Mental Examinations	22
2.8 Expert Testimony.....	27
2.9 Obtaining Evidence from Non-Parties.....	34
3 Preservation of Evidence	36
4 Enforcing Discovery Obligations	42
5 Conclusions	44
Abbreviations and Acronyms.....	50
Legislation	52
Cases	53
Bibliography	55

1 INTRODUCTION

- 1 The overriding objective of a trial is to settle disputes justly in a peaceful manner according to law. As noted by the prophet Zechariah, seeking the truth is a precondition to peace.¹ There can be no justice without truth. Ascertaining the truth is the biggest challenge that courts face in providing justice for all. It is the duty of the legal system to provide the parties and the courts with the means to bring out the evidence necessary to establish the truth at a proportionate cost.
- 2 From the parties' point of view, the success, or failure, of a claim will usually depend upon the available evidence. Hence the importance of evidence-gathering techniques. Collecting and analysing evidence is usually the most expensive element of litigation. This chapter focuses on the general principles that apply in each of the legal systems surveyed, namely the US, England, Israel, Germany, Japan and Argentina.
- 3 Some matters are common to all legal systems. In all of them, the key question is whether evidence is relevant. To answer this question, the first step is to identify which party has to prove an allegation to the satisfaction of the court. Subject to few statutory exceptions, the party making an allegation bears the burden of proving it. The second step is to identify the factual elements that need to be proved with respect to each allegation, as well as the cost of collecting the relevant evidence as compared with its likely importance to the case.
- 4 In all legal systems there is no need to prove facts that are agreed, admitted or not contested. Regarding the remaining facts, each party should be capable of producing the evidence in his possession or readily accessible to him from other sources. To the extent that the evidence the party can provide by itself is insufficient to prove its claim or defence, as the case may be, there will be need to gather the evidence from other sources – from the other party or from non-parties, also with a view to determine what evidence the other side will use to prove its case, what may be called counter proof. Where gaps in the evidence exist, for which there is no hard evidence, expert evidence may provide persuasive information regarding what most likely happened. It is this aspect of evidence-gathering that is the focus of this chapter.
- 5 As this study demonstrates, even though all legal systems share the same goal of ascertaining the truth, the evidence-gathering techniques differ from one jurisdiction to another, to a large extent on the basis of their historical roots.² A system that places the ascertainment of facts in the hands of a jury (the US and originally also England) requires a different approach, emphasizing the role of the litigating attorney than a system in which a professional judge is charged with this task (Germany, Japan and Argentina).

¹ 'Render the judgment of truth and peace in your gates. . . love the truth and peace', Zechariah 8: 16, 19.

² Cf Part VII, Chapter 1.

Another pertinent difference is due to the respective roles of the legal profession, the lawyers and the courts – the split in England between solicitors and barristers and the different training of judges (acting first as lawyers in common law systems, as opposed to professional judges trained at the outset to adjudicate cases in civilian legal systems), and the adversarial system in the common law systems as opposed to the inquisitorial system in civilian legal traditions.

- 6 It seems neat to divide the six countries into two groups – the US, England and Israel (owing to the British Mandate 1922-1947) that are common law systems, and on the other – Germany, Japan and Argentina that are civilian legal systems. However, as detailed in this chapter, over the years, reforms were introduced in all systems to make litigation more efficient and cost-effective. In the common law countries these costs have become excessive, resulting with the adoption of measures to reduce costs for fear of denial of access to justice altogether. With the exception of the United States (perhaps due to the still existing trial by jury), a measure of convergence can be observed. The originally pure adversary systems in England and in Israel rules have been introduced providing judges with more control over court proceedings, whereas the inquisitorial systems have promoted the autonomy of the parties to decide the kind of evidence that will be produced in court to establish their case.
- 7 This chapter addresses the pre-litigation/pre-filing discovery; discovery planning and initial disclosure; document production and inspection; electronic disclosure; pretrial depositions; interrogatories; physical or mental examinations; expert testimony; obtaining evidence from non-parties; preservation of evidence; enforcing discovery obligations; and conclusions.

2 GAINING ACCESS TO EVIDENCE HELD BY THE OTHER PARTY

2.1 Pre-Litigation Discovery

- 8 Already at the early stage, before bringing the claim, a lawyer should do his utmost to gather evidence needed to assess whether or not to initiate proceedings in court. At present, the civil procedure rules of most legal systems do not provide a potential party with the means to compel the other party to provide him with evidence.
- 9 Yet, all countries have adopted legislation on freedom of information, providing access to information held by government and municipal, or local, departments, agencies, public libraries, and archives.
- 10 In the United States of America and Germany, such legislation has been adopted at the federal level as well as by the separate states. In Argentina, the Right of Access to Public Information Act, adopted in 2016 at the federal level, invited the separate provinces and the Autonomous City of Buenos Aires to adhere to the provisions of the federal law (Sec. 36).

- 11 At the supra-national level, a right to freedom of information has been adopted by the European Union in Article 15 of the Treaty on the Functioning of the European Union. Regardless of whether the defendant is the state, or a governmental agency, or, for example, a public hospital, the potential claimant may apply directly to receive any information held by these entities that will aid him in taking the decision to initiate proceedings.
- 12 Regarding other pre-filing evidence-gathering techniques the situation in the surveyed countries is as follows.
- 13 In the United States, the potential party cannot request the court to make an order for discovery, or inspection, at the pre-filing stage (Rule 26(d)(1), Federal Rules of Civil Procedure, FRCP). The Federal Rules forbid formal discovery until after the parties have a conference to develop a discovery plan (Rules 26(d), 26(f), FRCP). However, since gathering factual information is at the ‘core of our [American] civil discovery system’,³ there are rules regarding how information must be preserved and produced in civil disputes (cf part 3 below).
- 14 In England the Civil Procedure Rules (UKCPR) contain case-specific Pre-Action protocols concerning, among others, personal injury claims, defamation, construction and engineering disputes, and professional negligence, as well as the general Pre-Action Conduct and Protocols (PDPACP). All of these protocols expect parties to exchange early and full information about a prospective claim. Such an exchange should assist them in evaluating the strength of their case as well as its value, and enable them to resolve the dispute without litigation. A party who unreasonably, without justification, fails to comply with the aims of the protocol practice may face penalties or sanctions by the court in any subsequent litigation.⁴ Such a justification may be found if the limitation period is about to expire, when an interim remedy is required to protect or preserve evidence or the defendant’s assets, or where the potential defendant may be expected to initiate proceedings in a foreign country to escape the jurisdiction of the English court. Compliance with the protocol should be ‘proportionate’ and ‘appropriate’.
- 15 An application to the court for pre-action disclosure cannot be made under the Protocols, but rather according to Rule 31.16, UKCPR. It may be made by a potential party against another potential party (or against a non-party, cf part 2.9 below) if such an application is necessary to investigate a potential claim, if the documents are not forthcoming from the opponent, provided that the requested documents, or classes of documents, would be disclosed under standard disclosure rules and their disclosure at this early stage is expected to help settle the case fairly without litigation and save costs.

³ *United Medical Supply Co. v. United States*, 77 Fed. Cl. 257, 259 (2007).

⁴ Cf eg, *Webb Resolutions Ltd v. Waller Needham & Green (a firm)*, [2012] EWHC 3529 (Ch).

- 16 Another possible pre-action application may be brought to search and inspect property under Rule 25.5, UKCPR. It may be brought against a potential party to the action or against a non-party. In the application it must be shown that the property is, or may become, the subject-matter of the proceedings, or that it is relevant to the issues that will arise in the course of the proceedings. A pre-action order will be made only if the matter is urgent, or if it is otherwise desirable to do so in the interests of justice. For example, if physical injury was caused by a machine, that machine should be inspected before it is repaired or removed.
- 17 In Germany, the court may order, in response to an application made in independent proceedings, that witnesses will be examined, or that an expert will prepare a report, provided that the opponent consents, or provided that there is concern that evidence may be lost or that it will become difficult to use it (§485(1), German Code of Civil Procedure, GCCP). In principle, discovery of documents will not be ordered. Only if there is concern that evidence may be lost, or that its use will become more difficult, the court may consider the physical inspection of such evidence.⁵
- 18 In particular, if a legal dispute is not yet pending, a potential party may request that an expert will prepare a written report, if that party has a legitimate interest in establishing the state of a person or the state or value of an object; the cause of personal injury, property damage, or material defect; or the effort required to remedy a personal injury, property damage or material defect. Such a legitimate interest is assumed if the establishment of these facts may serve to avoid a legal dispute (§485(2), GCCP). The application to the court must, among others, name the witnesses or designate the other evidence that may admissibly be taken pursuant to §485 (§487, GCCP). In addition, there are numerous substantive law rules, such as §259, that enable a party to receive information in appropriate cases, before initiating proceedings.⁶
- 19 Pre-filing search and inspection orders may be obtained also in Japan, under its 'evidence preservation system' (Articles 234-242, Japanese Code of Civil Procedure, JCCP). When a litigant or potential litigant may find it difficult to use the evidence if they have to wait for a formal examination of evidence, he may apply to the court under the evidence preservation procedure, even before filing a suit. The original ground for using this procedure was the fear that a prospective witness was about to die from an incurable disease. In such a case the judges, the court clerk, and the lawyers go to the hospital and record that person's testimony in advance.
- 20 In practice, the evidence preservation procedure has been used also as a means of access to evidence. This procedure provides a litigant, or potential litigant, with the right to search documents and computer data without prior notice (and in that respect operates

⁵ Case 11 OH 6/18 (11. Zivilkammer LG Aachen, Germany), Decision of 16 January 2019 [BeckRS 2019 1295].

⁶ For a full list, cf, Rosenberg/Schwab/Gottwald, *Zivilprozessrecht* (Beck, 2018), §110 II.1, 659.

as a search order). The most typical examples are medical malpractice cases and cases of infringement of intellectual property. The plaintiff or potential plaintiff, who is a patient or her bereaved family member, usually files an application for the preservation of evidence against the hospital or the doctor on the grounds that the medical records may be falsified later on. This gives the requesting party access to evidence in the possession of hospitals and doctors. The original evidence cannot be seized, but a copy of the evidence is taken and kept with the court that issued the order.

- 21 There is also a procedure of a 'Bar association Inquiry', provided in the Attorney Act (Art. 23). A lawyer may petition his local bar association and request it to send an inquiry in the name of the bar association to the entity or organization, designated by the lawyer, from which evidence is sought (inquiries may not be addressed to individuals). The local bar association is not obliged to send the inquiry and it may reject the request if it finds it inappropriate. This procedure is not limited to court proceedings, but is frequently used to prepare for litigation and also to gather information and evidence after the litigation has begun. The organization that receives the inquiry is legally obliged to respond, but there is no sanction for the violation.
- 22 Judicial records and materials filed in court, whether civil or criminal, are accessible to anyone who seek access, with some exceptions (Art. 91.1, JCCP; Art. 47, Japanese Code of Criminal Procedure). This is to ensure the principle of open court guaranteed by the Constitution (Article 82 of the Constitution of Japan). Therefore, not only the parties to the civil litigation or the related persons, but also anyone, such as newspaper reporters, weekly magazine reporters, TV reporters, can view the judicial records. However, a party may request the court to restrict access to the judicial records if it is necessary to protect privacy or trade secrets (JCCP 92). In addition, anyone can only view the record of the case, and copies of the record can only be taken by the parties and those who prove their interest in the case (JCCP 91.3). By contrast, in criminal cases, anyone can view the judicial records only after the case is closed. In addition, even after the conclusion of the case, the public prosecutor's office or the court can decide to restrict the access to the court records (Japanese Code of Criminal Procedure 53.1).
- 23 In Israel, before filing proceedings, the court may appoint a person in charge of seizing evidence (including documents, objects, and electronic and information stored in electronic or digital media) for the purpose of searching, photographing, copying or seizing evidence held by, or under the control, of another person, if the court has been persuaded that this person, or someone else on his behalf, may conceal the evidence, or change or eliminate it, making it substantially harder to conduct the proceedings or discover the truth (Rules 95(c) and 123, ICPR). The court may order any person to allow the appointed person to enter premises in the former's possession. The person requesting the pre-filing order must file proceedings within seven days, unless the court has provided a different term in its order.

- 24 In Argentina a potential party may apply to the court that it should order the other party to present evidence if this is necessary for enabling it to state its claim as precisely as possible (Art. 323, Argentine National Civil and Commercial Procedural Code, ANCCPC). Such evidence may include, for example, a sworn statement regarding the other potential party's legal status, the exhibition of movable goods, the appointment of a guardian or a curator for the trial. The court's order will expire, unless the proceedings are initiated within thirty days (Article 323, ANCCPC). Pretrial evidence may also be requested if there are justified reasons to fear that it may be impossible or very difficult to produce the evidence at a later stage (Article 326, ANCCPC).

2.2 Discovery Planning and Initial Disclosure

- 25 In the US, initial disclosure becomes mandatory at the outset of the proceedings (Rule 26(a), FRCP). Within 30 days after that conference, the rules direct each party to provide initial disclosure regarding the following:
- (i) the details of each individual who is likely to have discoverable information, that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
 - (ii) a copy, or a description by category and location, of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody or control, that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
 - (iii) a computation of each category of damages claimed by the disclosing party, who must also make available for inspection and copying the documents and other evidentiary material (unless privileged) on which the computation is based, including materials bearing on the nature and extent of the injuries suffered; and
 - (iv) make available for copying and inspection any insurance agreement under which an insurance business may be liable to satisfy all or party of a possible judgment in the action, or to indemnify or reimburse for payments made to satisfy the judgment (Rules 26(a)(1)(A), 34, FRCP).
- 26 It has been pertinently noted that this rule represents a retrenchment from the original 1993 initial disclosure rule because it requires disclosure only of materials on which the disclosing party intends to rely.⁷ From the beginning, initial disclosure has been highly

⁷ R Marcus, 'Of Babies and Bathwater: The Prospects for Procedural Progress' (1993) 59 Brooklyn L. Rev. 761, 805-812.

controversial.⁸ Many reports indicate that the benefits of initial disclosure have been modest. American lawyers say that they do not get what the rule says they should get, with particular reference to the materials concerning the computation of damages. The initial disclosure has so far not replaced the discovery process, detailed below, that lawyers tailor to the given case.

- 27 In England, a lawyer will rarely have all the relevant evidence prior to initiating proceedings. During that period, he has to gather sufficient evidence to make a general judgment about the causes of action, remedies and the strength of the case. If possible, he should make use of the other party's obligations under the pre-action protocols (cf part 2.1 above). He must also keep in mind that money spent on evidence that is not really needed may not be recoverable even if the case is won.⁹
- 28 In Israel, under the reformed CPR of 2018 (that came into effect on 1 January 2021), the parties are required to hold a preliminary conference within 30 days following the submission of the last statement of pleadings (Rule 35, ICPR). In that meeting they are expected to delineate the disputed issues and examine the possibility of solving their differences by turning to Alternative Dispute Resolution (ADR). At the preliminary conference the parties are required to conduct themselves with mutual disclosure and full transparency between them (Rule 34, ICPR). However, at this early stage, before having had the opportunity to examine the evidence that will become accessible only at a later stage, the parties can hardly be expected to conduct themselves with full transparency.
- 29 In Germany, Japan and Argentina, there is no automatic mandatory disclosure and no general duty of a party, or a non-party, to provide the other party with information or documents, upon which it has not itself relied.
- 30 In Germany, it is up to the parties to put forward the issues and the relevant evidence. The court does not itself identify the materials that it will use as a basis for its decision. However, it has the duty to inform and advise the parties (§139, GCCP).¹⁰ This is due to the principle of free disposition (*Dispositionsgrundsatz*)¹¹ and the principle of party presentation (*Beibringungsgrundsatz*)¹² that apply in civil proceedings. It is the parties' responsibility to submit all the relevant facts that are necessary to subsume the facts

⁸ R Marcus, 'Looking Backward' to 1938' (2014) 162 U. Pa. L. Rev. 1691, 1710-16. For a debate on the utility of initial disclosure in American litigation, see 'Point/Counterpoint: Rethinking Mandatory Disclosure', (2016) 100 Judicature 14. Two US district courts - the District of Arizona and the Northern District of Illinois - did a multiyear pilot project on expanding initial discovery. In 2022, the Federal Judicial Center produced a report (nearly 200 pages long) detailing the mixed reaction to this pilot project. See E Lee and J Cantone, Mandatory Initial Discovery Pilot (MIDP) Final Report (FJC October 2022).

⁹ S Blake, *A Practical Approach to Effective Litigation* (8th edn, Oxford University Press, 2015), para 51.

¹⁰ Fritsche, in *Münchener Kommentar ZPO* (6th edn, 2020), §139 GCCP, para 19, 20.

¹¹ Jaspersen, in *Beck Online Kommentar ZPO* (46th edn, 1 September 2022), §251 GCCP, para 1-10.

¹² Bacher, in *Beck Online Kommentar ZPO* (46th edn, 1 September 2022), §284 GCCP, para 34-35.

under the relevant cause of action. The court may not seek to investigate the facts itself. In some cases, the court may exceptionally take evidence of its own motion but it must do so carefully, taking account of the presentations made by the parties. This will be the case if the parties' submitted facts raise suspicion.¹³ The court has to draw the parties' attention to its concerns regarding any items that it is going to take into account *ex officio* (*von Amts wegen*) (§139(3), GCCP). In non-contentious proceedings and in specific types of family matters, the law of evidence under the GCCP does not apply. Instead, the court itself, of its own motion, must establish the facts relevant to the decision and collect the evidence it considers appropriate. In such cases, it is not bound by applications for evidence submitted by the parties (§26, Act on Proceedings in Family Matters and Non-Contentious Proceedings, FamFG).¹⁴

- 31 In Japan, too, the parties are responsible for submitting the evidence necessary to substantiate their case (Chapter 4, Evidence, Arts. 179ff., JCCP). However, prior judicial approval is required. The court may hear the witnesses and the parties themselves, provided however that such witnesses are limited to those requested by a party (Art. 187, JCCP). There are also no rules prohibiting the reliance on witnesses or documents that have not been disclosed in advance to the other party.
- 32 In Argentina, at the initiation of the proceedings (that is, upon submission of the statement of claim and the statement of defence, respectively) parties are required to present the evidence that they have in their possession and petition the court to incorporate that evidence in the court files. In addition, they should 'offer' the rest of the evidence, in the sense that they have to identify the means of proof that are not in the party's possession. At this initial stage parties may request the court to appoint official experts, to express their opinion on the technical or scientific points; to order the opposing party or a non-party to provide information held by them, like documents or registries; personally inspect a place; provide a list the witnesses for the future hearing, etc. In principle, if they do not present the evidence in their possession or offer the rest at the beginning of the proceedings, they will not be able to do so in the future. Such evidence will be inadmissible, except in situations in which new facts have occurred or new (or newly known) evidence has been found following the initiation of the proceedings.

2.3 Document Production and Inspection

- 33 Document production, including electronically stored information, is the main source of discovery in all jurisdictions due to the fact that, unlike witnesses, 'documents don't forget'. However, legal systems differ in the tools available to parties to obtain discovery.

¹³ Case I ZR 197/07 (BGH, Germany) Decision 22 April 2010 [NJW 2011 778].

¹⁴ Keidel/Sternal Kommentar FamFG, 20th ed., 2020, FamFG § 26. Keidel and Sternal, in *Kommentar FamFG* (20th edn, 2020), §26 FamFG.

- 34 In the US, since 1970, the Federal Rules do not require judicial approval of discovery demands for documents. Any party may serve a request to produce documents or electronically stored information on any other party in the action. The rules prescribe no limit on the number of such requests. The document request must ‘describe with reasonable particularity each item or category of items to be inspected’ (Rule 34(b)(1)(A), FRCP). This certainly does not require that the requesting party know what items the other side has that fall within the defined categories, or even know that there are any such items. It has been pertinently noted that American ‘discovery’ is aptly named; it permits a party to obtain production of materials it did not know existed. As noted by Trocker, ‘[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’.¹⁵ That approach is starkly different from the conventional civil law treatments of motions seeking court orders requiring production of specific identified documents. For example, in an employment discrimination action, a plaintiff may demand production of ‘all communications by defendant employer or any of its employees with any person concerning plaintiff’. Even though many of these communications would be unknown to plaintiff’s lawyer, they could be used in depositions of plaintiff’s supervisors and other witnesses (cf para 2.4 below).
- 35 The requested materials must be within the ‘possession, custody, or control’ of the party on whom it is served (Rule 34(a)(1), FRCP). If the party served is a corporation, this definition would include materials that are not under the company’s direct control.¹⁶ The ‘control’ concept may extend to materials under the control of former employees.¹⁷ The party served with a request, must, within 30 days, serve a written response. The responding party may object to any item or category in the request and, in such a case, it needs to ‘state with specificity the grounds for objecting, including the reasons’ (Rule 34(b)(2)(B), FRCP). It must also state whether any responsive materials are being withheld on the basis of that objection (Rule 34(b)(2)(C), FRCP). In case of disputes concerning requests or objections, the parties must meet and confer in good faith in an attempt to resolve them before raising the matter in the court (Rule 37(a)(1), FRCP).
- 36 The responding party must also collect together the materials it has agreed to provide through discovery. In compiling these materials, it must either ‘produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request’ (Rule 34(b)(2)(E)(i), FRCP). This requirement

¹⁵ N Trocker, ‘Transnational Litigation, Access to Evidence, and U.S. Discovery: Learning from American ‘Exceptionalism’?’ in R Stürner and M Kawano (ed), *Current Topics in International Litigation* (2009) 146, 155. 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.

¹⁶ See, eg, *Tomlinson v. El Paso Co.*, 245 FRD 474 (D.Colo. 2007), in which the defendant employer controlled electronic pension records maintained by a company that administered its pension plan, because the law required the employer to supervise the plan.

¹⁷ See, eg, *In re Auction House Antitrust Litigation*, 196 FRD 444 (SDNY 2000), in which the defendant was found to have control of information possessed by former CEO because he was required, under his termination agreement, to provide information to the defendant.

was introduced into the rules to prevent parties from ‘hiding’ highly relevant documents among a mass of unimportant materials. By producing documents, the responding party is certifying that the production provides the items the producing party has agreed to produce (Rule 26(g)(1), FRCP). It has to be kept in mind that a document request seeks what it asks for, not *everything*. By providing what are supposed to be responsive materials, the responding party is essentially warranting that their materials actually are responsive. Nonetheless, there have been reports of ‘dump truck’ discovery responses, in which the responding party delivered a huge amount of material, most of which was irrelevant, to confuse or distract, or at least to burden, the other party.¹⁸ One illustration of the problem of over-production is that Rule 34(b)(2)(E)(i) commands that documents must be produced ‘as they are kept in the usual course of business.’ This requirement was added in 1980. The Committee Note explaining it said:

The Committee is advised that, “It is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring significance.” Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association (1977) 22.

Dump truck production is an alternative method of obscuring the truly important materials - by producing lots of immaterial items.

- 37 In England, once proceedings have been issued, the parties have duty to disclose and permit inspection of certain documents. Formal disclosure is usually the first directions order that the parties to an action must comply with. The formal provisions for disclosure are contained in Rule 31, UKCPR. In most cases, an order for disclosure will be defined and made, also with respect to its time-limit, after the parties have filed their disclosure, or electronic disclosure, questionnaire, according to the forms set out in Practice Directions 13A and 31B, or – in the case of fast track or multi-track cases – after the parties have filed their directions questionnaire. This means that, in most cases, the further evidence that a party may receive, will be defined shortly after the statements of case have been submitted.¹⁹ The parties may agree in writing, or the court may direct, that disclosure or inspection or both shall take place in stages (Rule 31.13, UKCPR). This will happen, for example, if the trial is split, with the issue of liability being decided ahead of the quantum of damages that will need to be paid, if the court holds the defendant liable.

- 38 In Israel, the parties are obliged to exchange disclosure affidavits, comprising the list of the documents that are relevant to the disputed issues, that are, or previously were, held by, or in the control, of the party, within 30 days following the submission of the last formal written statement of pleadings (Rule 57, ICPR). If the document is no longer

¹⁸ For a general discussion of responses to discovery, see C Wright, A Miller and R Marcus, *8 Federal Practice and Procedure* (3rd edn, 2010) Sec 2113.

¹⁹ S Blake (n 9) para 55.

held by that party, or in its control, the pertinent circumstances must be provided. The parties are allowed to inspect and make copies of each other's documents within 30 days, following the date of reciprocal exchange of the lists provided in the discovery (Rule 58, CPR). Different Civil Procedure Rules apply in the family courts. This was the situation also before the reform. Following the reform, new rules were enacted – The Civil Procedure Rules in the Court for Family Affairs, 5781-2020. The regular disclosure rules do not apply. Parties are required to submit, together with their statements of pleadings, those documents upon which they rely. No other disclosure is mandated by the rules. None the less, the Supreme Court held that the rules that provide the family court with more discretion and flexibility to conduct the cases were not meant to prevent disclosure.²⁰ In cases in which it is suspected that a spouse has used non-party accounts to hide transfers of money from the other spouse, the court, after being convinced that disclosure is necessary, will order the non-party to disclose those pertinent documents.²¹

- 39 In Germany, it is only the court that, at its discretion, may order a party, or a non-party, to produce and make accessible to the requesting party documents or other objects in their possession (§142, GCCP). If the party, who has to discharge the burden of proof, contends that a necessary document is in the opposing party's possession, that party may file an application requesting the court to order the other party to produce that document (§421, GCCP). To that end, the requesting party must designate the record or document; designate the facts the record or document is intended to prove; designate, as completely as possible, the contents of the record or document; cite the circumstances that substantiate its allegation that the record or document is in the opponent's possession; and designate the grounds on which the opponent has an obligation to produce the record or document (§424, GCCP). If the court considers that the record or document may contribute significantly to the substantiation of the case, the court will order the opponent to produce the record or document if the opponent admits that it is in his possession, or if the opponent fails to react to the application.
- 40 It is noteworthy that, on 1 July 2022, Germany amended its Implementing Act of The Hague Evidence Convention. Previously, due to Germany's Article 23 declaration, foreign courts could not obtain legal assistance in Germany for pre-trial discovery. Its new §14, provides that requests for mutual legal assistance on pre-trial discovery of documents shall be executed if: (a) the documents to be produced are specified in detail; the documents to be produced are of direct and clearly identifiable importance for the respective proceedings and their outcome; the documents to be produced are in the possession of a party involved in the proceedings; the request does not violate fundamental principles of German law; and the requirements, contained in the EU Regulation 2016/679 on the protection of individuals with regard to the processing of

²⁰ *Plonit v. Plonit*, CA 4738/13, Nevo e-database (3 September 2013).

²¹ *Plonit v. Plonit*, HCJ 6863/15, Nevo e-database (18 October 2015).

personal data, are met.²² The German insistence that the party seeking production identify a specific document and provide a detailed explanation why it is necessary ('direct and clearly identifiable importance') is at the opposite end of a spectrum from the US approach, which provides for a true 'discovery' since the requester need not know what exists.

- 41 In Japan, Article 156, JCCP requires the parties to submit their factual contentions and evidence to support those facts at an appropriate time, in accordance with the status of progress in the litigation. In particular, the presiding judge may specify a time frame for presenting evidence on a specific matter, after hearing the opinions of the parties (Art. 156-2). Article 156 has to be read in conjunction with Article 165, included in the section on proceedings for arranging issues and evidence and with Article 178, included in the Chapter on the preparatory proceedings by an authorized judge.²³
- 42 The production of documents is provided in detail in Part II, Chapter IV, Section 5, JCCP. The court will examine whether the application meets the requirements set forth in Article 220, JCCP. In principle, all document holders are unconditionally obliged to produce the document, unless there are justified grounds, specified expressly in the JCCP, for refusing to do so (Art. 220(iv), JCCP). Such justifications for refusal apply if the document contains matters that may result in criminal prosecution or conviction of the document holder or his relatives; if the documents contain matters that may harm the reputation of the holder or his relatives; the document contains confidential information concerning the duties of public officials, the disclosure of which may harm the public interest; the document contains secrets obtained in the course of one's duties as a professional as a doctor, lawyer or a religious clergyman; the document contains technical or professional secrets; the document was prepared exclusively for the internal use of the organization or the individual in possession of the document.
- 43 A party may petition the court for an order to submit a document (Art. 221, JCCP). In that petition, the party has to provide the details of the document, its content, the person in possession of that document, the facts to be proved by the document, and the cause of the obligation to submit the document. If it is extremely difficult for the petitioner to provide these details, that party may ask the court to order the person in

²² Cf R Wagner, 'Neuigkeiten zum internationalen Zivilverfahrensrecht Zustellung, Beweisaufnahme und pre-trial discovery of documents' (2022) EuZW 733, 735-736. This development followed decisions of US and UK courts, ordering discovery under national rules rather than applying for international legal assistance under The Hague Evidence Convention, declared optional in the *Aérospatiale v. US Dist. Ct. for S. Dist. Of Iowa*, 482 US 522 (1987) and the similar decisions of the European Court of Justice in *Case Lippens et al.* C-170/11 (ECLI:EU:C:2012:540) and in *ProRail* Case C-332/11 (ECLI:EU:C:2013:87), regarding the optional application of the Regulation on cooperation between the courts of Member States in the taking of evidence in civil or commercial matters. 1206/2001 of 28 May 2001 (EU). In view of the consequences, whereby the foreign court could impose sanction on a party that would not obey the court's pre-trial discovery order, this amendment became necessary. The effect in practice of this amendment remains to be seen.

²³ C F Goodman, *Justice and Civil Procedure in Japan* (Oceana 2004), 333-347.

possession to clarify those details (Art. 222, JCCP). The court may, at its discretion, order the person in possession of the document to submit it to the court (Art. 223, JCCP). The same procedures apply to real evidence other than documentary evidence (Art. 232, JCCP). The petition for a production order of documents or other goods can be filed at any time after the proceedings have begun until the end of the hearing. However, if it has been intentionally or grossly negligently delayed and may cause a delay in the whole procedure, the petition may be dismissed (JCCP Art. 157).

- 44 In Argentina, the representing lawyer may request directly private entities, without the need for a prior application to the court, to have relevant documents in their possession sent directly to the court (Art. 333, Argentine National Civil and Commercial Procedural Code, ANCCPC), however there is no obligation to comply with such a request. Once the case has been brought, the ANCCPC does not allow any more documents to be added, unless the documents originated at a later date or, if they originated earlier, that the party did not have prior knowledge of them (Art. 334, ANCCPC). To gain access to evidence in the possession of the other party, a party has to request the court to order its production during the proceedings (Art. 388, ANCCPC); or to order non-parties to produce information available on their records (Arts. 396f., ANCCPC); or appoint an expert to determine facts or scientific knowledge (Arts. 457f., ANCCPC); or directly recognize a place or state of affairs (Arts. 479-480, ANCCPC).²⁴

2.4 Electronic Disclosure

- 45 Since the beginning of the twenty first century, discovery of electronically stored information has become central to American litigation. In the US, this surge in digital area has produced an e-discovery industry. 'The worldwide e-discovery market surpassed \$10 billion during 2015'.²⁵ In 2015, an American writer forecast that there would be \$75 billion such devices worldwide by 2020, a 'defining moment in technology history'.²⁶ The upside was described by a plaintiff lawyer in 2006: 'What I've found is that when you've got the emails, people remember lots and lots of things'.²⁷ An American federal judge observed: 'E-Discovery is pervasive. It's like understanding civil procedure. You're not going to be a civil litigator without understanding the rules of civil procedure. Similarly, you're no longer going to be able to conduct litigation of any complexity without understanding EDiscovery'.
- 46 However, an immense effort may be involved in unearthing all digital material within the control of a company. Often, employees use their own computers and accessory storage

²⁴ E Oteiza and R Berizonce, *Civil procedure in Argentina* (2021), 170-179.

²⁵ Silverstein, 'E-Discovery Market Hits \$10B' (February 2016) LegalTech News.

²⁶ Post, 'Discovering the Internet of Things' (1 January 2015) LegalTech News.

²⁷ Geier, 'A Defense Win in 'Enron Country' (23 January 2006) Nat.L.J.

devices, a situation that has become much more common since the beginning of the COVID pandemic. In 2017 it was noted that:

allowing employees to use personal devices for business purposes leads to expanded discovery obligations. Employers may also be held responsible for failure to sufficiently preserve information where employee-owned devices containing business communications, including text messages, are lost or unavailable.²⁸

Consequently, one focus of current document discovery is on determining which ‘custodians’ of data must search their electronic files in an effort to produce such information.²⁹

- 47 In 2006, the Federal Rules regarding discovery were amended to address e-discovery. They now authorize a document request for ‘electronically stored information’, including ‘data or data compilations’.³⁰ The amended rule also permits the requesting party to specify the form in which it wants digital data produced.³¹ Regardless of whether such a request was made, the rule requires the responding party to state the form it intends to use before producing the information.³² In any case, the responding party is required to produce ‘in a reasonably usable form or forms’.³³ Because of the burden involved in locating and producing such materials, document requests are the most frequent focus of objections, in which it is argued that the requests are not ‘proportional’ to the needs of the case.³⁴ Due to the particular problem of ‘backup tapes’, the rules prescribe that a responding party may report that it did not search ‘sources’ of digital data that it identified as ‘not reasonably accessible because of undue burden or cost’, yet the requesting party may ask the court to order production.³⁵
- 48 In England, Practice Direction 31B contains guidance for all e-disclosure. Rule 31.4 contains a broad definition of document that extends to electronic documents. The purpose of PD 31B is to encourage and assist the parties to reach agreement regarding the disclosure of e-documents in a proportionate and cost-effective manner. It provides (6(4)) that ‘electronic documents should generally be made available for inspection in a form which allows the party receiving the documents the same ability to access, search, review and display the documents as the party giving disclosure’. The parties and their legal representatives must, before the first case management conference, discuss the

²⁸ C Fox and J Stratford, ‘Drafting BYOD [Bring Your Own Device] Policies’ (Fall 2017) *Today’s General Counsel*, at 16.

²⁹ See Electronic Discovery Reference Model (defining a custodian as a ‘person having administrative control of a document or electronic file; for example, the data custodian of an email is the owner of the mailbox that contains the message’).

³⁰ Rule 34(a)(1)(A), FRCP.

³¹ Rule 34(b)(2)(C), FRCP.

³² Rule 34(b)(D), FRCP.

³³ Rule 34(b)(2)(E)(iii), FRCP.

³⁴ Rule 26(b)(1), FRCP.

³⁵ Rule 26(b)(2)(B), FRCP.

use of technology in the management of electronic documents. Where used, keyword searches should be agreed as far as possible.³⁶

- 49 PD 31B provides (10-13) guidance for the completion of the Electronic Documents Questionnaire (EDQ), which will be completed together with the List of Documents where electronic disclosure is undertaken. The purpose of the EDQ is to enable the parties to investigate, categorize and agree the nature of electronically held documents that the parties must potentially disclose.
- 50 The potential extent of e-disclosure can be immense, and therefore the parties must take care to agree upon its extent to ensure that it is reasonable and proportionate (20-24). The considerations involved include the accessibility of the documents on computer systems, servers, back-up systems and other electronic devices or media; the likelihood of locating relevant data; the cost of recovering electronic documents; the cost of disclosing and providing inspection of any relevant electronic documents; the likelihood that electronic documents will be materially altered in the course of recovery, disclosure or inspection; the availability of documents or contents of documents from other sources; and the significance of any document which is likely to be located during the search. In some cases, a staged approach may be appropriate, with disclosure initially being given of limited categories of documents, which may be extended or limited later depending on the results initially obtained. A party requesting specific disclosure of electronic documents which are not reasonably accessible must demonstrate that the relevance and materiality justify the cost and burden of retrieving and producing them. If the parties are unable to reach an appropriate agreement regarding the disclosure of electronic documents, they should seek directions from the court at the earliest practical date (17).
- 51 In Israel, the CPR 2021 do not contain any rules regarding electronic discovery, the problems involved in e-discovery have hardly been discussed in court decisions, and there it attracted only little attention in legal literature.³⁷ In one case, the plaintiff mentioned in his disclosure affidavit that he has ca. 30 million documents, from which he made ca. 5 million documents available to the defendants. The defendants argued that, even though the documents were supposedly classified according to categories, the classification was problematic and inaccurate. Furthermore, they argued that, assuming that it would take them two minutes to inspect and study each document, they would still 19 years to inspect them all. In their opinion, the plaintiff did not fulfil his duty to disclose, but rather committed document dumping.³⁸ Therefore, they requested the court to order the plaintiff to classify all documents properly and make them available

³⁶ *Digicel (St. Lucia) Ltd. v. Cable and Wireless plc*, [2008] EWHC 2522 (Ch); *Abela v. Hammonds Suddards (a firm)*, [2008] EWHC 3153 (Ch).

³⁷ Cf I Amit, *Privileges and Protected Interests – Disclosure and Inspection Proceedings in Civil and Criminal Law* (Nevo 2021) (in Hebrew), 113-126.

³⁸ *Irving Picard v. Hebrew University of Jerusalem*, Civil Case (District Court, Tel-Aviv) 18909-12-15, Nevo e-database (12 December 2019).

in a manner that will enable them to detect and orient themselves in the documents; mark clearly the documents that are relevant to proving the claim; provide a list of the relevant documents alone, indicating in detail the documents that are relevant to each defendant separately.

- 52 The Court held that accepting the defendants' demands would impose an unacceptable burden on the plaintiff. Instead, the Court accepted the plaintiff's declaration that there will be no additional documents beyond those disclosed; that, when the defendant submits his evidence in court, he will have to present the information that is relevant to each defendant and also provide information regarding the source of each document presented in Court during the hearings. In addition, the Court ordered the plaintiff's attorney to hold a meeting in which he will respond to questions on behalf of the defendants regarding the mode of operation of the computerized system that the plaintiff used, and how a search should be carried in it. The Court called upon the parties to cooperate in finding solutions to the problems. The problem with the Court's decision is that it frustrates the main purpose of disclosure, namely to enable the defendants to prepare their case on the basis of the documents discovered. As aforementioned,³⁹ a document request seeks what it asks for, not *everything*.
- 53 In Germany, the application of §142, GCCP, under which the court orders the production of documents, was extended to electronic documents by the insertion of §§371a, 371b, concerning the evidentiary value of electronic documents and of scanned public records or documents. The rules concerning the evidentiary value of private records and documents shall be applied *mutatis mutandis* to private electronic documents bearing a qualified electronic signature. Likewise, the rules concerning the evidentiary value of public records and documents shall be applied *mutatis mutandis* to electronic documents created, in accordance with the requirements as to form (public electronic documents), by a public authority within the purview of its official responsibilities, or by a person or entity vested with public trust within the sphere of business assigned to him or it. Thus, eg, in the case of a traffic accident, the court may order the production of important electronic information, held by the car manufacturer, regarding the vehicle.⁴⁰
- 54 In Japan, Article 170(2) read together with Article 231, JCCP, extend the application of the rule regarding court orders concerning the production of documents also to audiotapes, videotapes and other objects prepared for the purpose of indicating information, other than documents, such as electronic evidence. However, when filing an application to produce a document or an object to the court, the parties must specifically convince the court that the document or the object exists. Consequently, the new technologies have a relatively small impact on access to evidence to compare with

³⁹ Para 2.3 above.

⁴⁰ Musielak, Voit and Stadler, in *Zivilprozessordnung: ZPO* (19th edn, 2022), §142 GCCP, para 2.

United States. Also, for similar reasons, AI techniques are rarely used in the context of access to evidence, at least in the present situation.⁴¹

- 55 In Argentina, even though there is no specific rule regarding electronic evidence, there has been no problem to recognize the possibility to produce this kind of evidence, applying the existing rules by analogy. The typical forms of evidence explicitly recognized by the code of civil procedure are documents ('prueba documental'), witnesses ('prueba testimonial'), admission ('prueba confessional'), expert reports or expert testimony ('prueba pericial'), third party reports ('prueba informativa') and judicial recognition ('reconocimiento judicial'). Yet, procedural law admits any other means of evidence ('generic evidence'), limited only by diffuse and infrequently applied standards, such as the need to avoid affecting 'moral values' or the 'personal liberty of the litigants or third parties' (Art. 378, ANCCPC), or basic rights.
- 56 Electronic evidence is usually presented by the parties as generic evidence. To present, admit, produce and evaluate this generic type of evidence, the parties and courts must apply, by analogy, the rules provided for the most similar type of evidence. For example, rules regarding 'traditional' documents will be applied to electronic documents. When necessary, other analogous means of evidence, like judicial recognition or expert court-appointed witnesses will apply, for example to download, preserve and disclose the counterparty's network servers or to prove the manipulation of electronic records.

2.5 Pre-Trial Depositions

- 57 Besides document production, the main focus of American discovery is on depositions. The great majority of witness testimony used in American courts is taken by deposition. They may be taken of a party or a witness. The person deposed (deponent) appears before a stenographer authorized to administer oaths and gives sworn testimony in response to questions by the attorneys from both sides of the case. In their examination and cross-examination the attorneys may put forward any relevant question, as long as it does not seek privileged information. The testimony is transcribed, signed and sworn in. Oral depositions are regarded as very effective vehicles because they permit the questioner to follow up on answers given by the witness and new lines of inquiry may be pursued as new facts are revealed. Often depositions follow document discovery because the documents can be used effectively to refresh the recollection of the witness.
- 58 There is no rule against a lawyer talking to a witness about potential testimony before the deposition (even though such preparation would depend upon his cooperation, since a subpoena may not be used to compel a witness to participate in such a preparation session). This preparation activity is recognized in the bar, and called

⁴¹ K Miki, National Report for Japan (2022).

‘woodshedding the witness’.⁴² The importance of preparing the witness in advance derives from the fact that during the deposition the lawyer representing the witness is limited in the ability to interfere with the procedure itself. The lawyer may object, but an objection ‘must be stated concisely in a nonargumentative and nonsuggestive manner’ (Rule 30(c)(2), FRCP). The lawyer may instruct the witness not to answer a question, but ‘only when necessary to preserve a privilege, to enforce a limitation ordered (in advance) by the court, or to present a motion (seeking protection against abusive questioning)’ (Rule 30(c)(2), FRCP). Otherwise, the objection is noted on the record and the deposition continues (Rule 30(c)(2), FRCP).

- 59 Upon the request of the witness, he will get 30 days to review and correct the transcript after it is prepared (Rule 30(e)(1), FRCP). The witness can change answers based on this review, even regarding matters of importance and sometimes reversing the answer given originally. Both the original answer and the revised answer then become part of the transcript of the deposition (Rule 30(e)(2), FRCP). The original answer will remain available as ‘impeachment’ material for the other side.⁴³
- 60 A party may take up to ten depositions without an agreement by the other party or a court order (Rule 30(a)(1), FRCP). A deposition is limited to ‘1 day of 7 hours’ absent court order or agreement to the contrary (Rule 30(d)(1), FRCP). Notice of the deposition must be given to all other parties to the action (Rule 30(b)(1), FRCP). The other parties’ lawyers can attend and ask the witness questions. If the witness is unavailable to testify at trial, the deposition may be presented as evidence at trial (Rule 32(a)(4), FRCP). The noticing party may use video recording in order to provide more effective trial evidence (Rule 30(b)(3)(A), FRCP).
- 61 A party opposing a corporation or other entity (eg, governmental agency, LLC, etc.) could face a difficult problem identifying the correct individual to notice for deposition, since the person identified may plead lack of knowledge. To overcome this problem, the FRCP provide that a party could serve a notice on an organization, and ‘describe with reasonable particularity the matters for examination’ (Rule 30(b)(6), FRCP). Except for such organizational depositions there is no requirement to identify in advance the topics for examination. The organization is then required to designate a person or persons to address the listed matters and is also required to prepare the person to provide all information available to the organization, not only the information personally known to the individual witness.⁴⁴

⁴² Cf eg, Maloney, ‘Preparing the Expert Witness for Deposition’ (February/March 2017) *Today’s*, 48; Berman, ‘Reinventing Witness Preparation’ (Summer 2015) 41 *Litigation* 20; Schaeffer, ‘When Your Client Testifies’ (July 2011) *Trial Magazine*, 23.

⁴³ C Wright, A Miller and R Marcus (n 18) Sec 2118.

⁴⁴ Regarding the problems arising in such cases, see C Wright, A Miller and R Marcus (n 18) Sec 2103.

- 62 In principle, from the perspective of the witness and the lawyer representing the witness in-person depositions are intrinsically preferable. For the interrogating lawyer, the problem of showing exhibits to the witness could be challenging if they are in different places. The FRCP allow remote depositions to be held by agreement or court order (Rule 30(b)(4), FRCP). By May 2020 it was reported that 'because of COVID, 100% of depositions are being conducted remotely'.⁴⁵ It remains to be seen if this development is reversible.
- 63 In Israel, the reformed ICPR 2021 introduced a preliminary conference (Rules 34-35, ICPR), as well as another pre-trial meeting in which the parties must examine the possibility of settling the case by ADR, with the help of a lawyer, judge or registrar, appointed by the President of that Court to conduct that meeting, in which information will be provided to the parties regarding the advantages of settlement by ADR (Rule 37). Rule 34, ICPR provides that the preliminary conference aims at getting the parties prepared well for the court proceedings. To that end, the parties have to clarify the disputed issues, while making reciprocal disclosure and behaving in full transparency among themselves, in a manner that will enable them to be prepared properly for the proceedings. They must also examine the possibility of settling the dispute by ADR.
- 64 Rule 35(a), ICPR stipulates the detailed obligations that each party must discharge. Within 30 days following the submission of the last statement of pleadings, the parties must hold the preliminary conference in which they have to delineate the issues disputed and strive to limit their scope and number; examine the possibility of settling the disputes by ADR; to the extent that they concluded that conducting the case in court cannot be avoided, they must, in the least, examine the possibility to agree upon the measures that need to be taken to reduce the scope of the court proceedings and make them more effective, including the possibility of obtaining in advance a professional opinion on a particular matter or appointing an expert agreed upon by the parties. Rule 35(b), ICPR obliges the parties to allow each other to inspect the essential documents and to answer questions the answers to which are necessary to clarify the disputed issues and reduce their number and scope, while acting in utmost transparency.
- 65 The obligation to answer such questions put forward by the other party, made the Israel Bar Association describe the preliminary conference as the equivalent of the American Rule 30, Federal Rules of Civil Procedure ('Depositions Upon Oral Examinations').⁴⁶ This statement is misleading. The preliminary conference takes place exclusively between the parties, attendance of witnesses cannot be compelled by subpoena, testimonies are not taken by oath and, due to the timetable provided in the ICPR, the preliminary conference

⁴⁵ S Russel-Kraft, 'Depositions Go Virtual During Pandemic; May Remain that Way' (May 22 2020) Bloomberg Law News; See also R Marcus, 'Covid-19 and American Civil Litigation', in B Krans and A Nylund (eds), *Civil Courts Coping With Covid-19* (2021) 195, 199-200 (discussing remote depositions).

⁴⁶ Israel Bar Association, *The Civil Procedure Reform Manual*, 16-17, available at https://www.israelbar.org.il/magazine/civil_procedure_reform_2021/16/

is conducted before the parties have had a chance to inspect the documents held by, or are in control of, the other party. It may also be wondered how, in such circumstances, the parties can be expected to act in utmost transparency.

- 66 Rule 36, ICPR, provides that, at the end of the preliminary conference, and no later than 20 days prior to the date set for the first pre-trial session the parties must submit a report to the court regarding the preliminary conference, to which they have to attach the documents disclosed at that meeting. If they cannot agree upon a joint report, each party must submit its own report. Rule 38, ICPR, prescribes the court's duty at the first pre-trial session, to examine whether the parties have acted as prescribed in Rules 34-36. To the extent that a party has not conducted itself properly, the court may impose costs to be paid to the other party, or to the state, at a rate that the court will determine at its discretion, taking account of the party's conduct and its good faith, including the information that it failed to disclose to the other party, its inadequate activity in that conference, as compared with the complexity of the case, or its insincerity or if that party did not act as expected from a fair litigant. These sanctions, imposed by the court *ex post*, can hardly contribute to an amicable settlement between the parties. They are more likely to promote a blame game, whereby each party will strive to demonstrate to the court that the other party behaved in bad faith.
- 67 In practice, it seems that the newly introduced preliminary conference has not yielded satisfactory results. Likewise, the meeting between the parties, conducted by a lawyer appointed to explain the advantages of settling the case by ADR, seems redundant, in view of the fact that the possibility of settlement by ADR is nowadays widely known, and that, in any case, at the pre-trial session, the court too has to explore with the parties the possibility of settling the case by ADR (Rule 63(17), ICPR).
- 68 None of the other countries surveyed has a procedure that resembles the American pre-trial depositions. The parties and the witnesses must appear in court and give testimony at trial.

2.6 Interrogatories

- 69 Interrogatories consist of written questions to which written answers have to be provided by the other party and signed under oath. The answers are usually composed with the help of the answering party's attorney. The questions are not limited to information within the respondent's personal knowledge. Answering the questions may require the responding party to search records that are under the respondent's direct control. In particular, they are suited to discover organizational data stored in the corporate records. Interrogatories are relatively inexpensive means of obtaining information since they only require the drafting of the appropriate questions. They may cover a large variety of topics, with follow-up sub-questions. However, answering them may require the requested party to invest substantial time and money in providing the answers.

- 70 In the United States, the number of questions was originally unlimited. In 1993 the federal rules were amended to provide that a party may serve ‘no more than 25 written interrogatories, including all discrete subparts’ (Rule 33(a)(1), FRCP).
- 71 In England, the rules regarding interrogatories are provided in Part 18, UKCPR, entitled ‘Obtaining further information’ and in PD 18 – ‘Further information’. Before applying to the court for an order under Part 18, the party seeking clarification or information must first serve on the requested party a written request that is confined to matters which are reasonably necessary and proportionate to enable the requesting party to prepare his own case or to understand the case that he has to meet. If the responding party objects to answering, he must provide the reasons for the objection. If the respondent does not comply with the written request the requesting party may then apply to the court that it should order the other party to respond. The court will consider if the requests are reasonably necessary and proportionate to enable the requesting party to prepare his case or understand the other party’s case.
- 72 In Israel, the reformed ICPR 2021 contain the following rules: in claims for damages for physical injury the plaintiff must serve the defendant, together with the statement of claim, an affidavit containing answers to a list of questions provided in Annex 1 to the CPR, insofar as those are relevant to the specific case. No later than 30 days following the submission of the last statement of pleadings, a party may send the other party no more than 25 interrogatories, including all subparts, that are both relevant to the case and admissible in an oral cross-examination. The responding party may provide a pertinent document that contains the requested information instead of an answer. The response must be provided within 30 days following the delivery of the interrogatories. In a money claim in the District Court, the value of which exceeds 2.5 million NIS (ca. USD 725,000), in a claim for physical injury and in a claim arising from a traffic accident that have been submitted in the District Court, the party may submit 50 interrogatories, including all subparts.
- 73 In Germany, there is no procedure such as interrogatories. It is the duty of the parties to provide the evidence substantiating their case. The court may order *ex officio* (*von Amts wegen*) a party to testify (§448, GCCP), a possibility that does not exist for evidence by witness testimony (regarding non-parties cf part 2.9 below). If the court does not order a party to testify of its own motion, the party who bears the burden of proof, may apply to the court to issue an order for evidence to be taken, and will be up to the court to accept or dismiss that application (§§358, 358a, GCCP). It will only be possible to put the necessary questions to that party during the trial.
- 74 In Japan, the 1996 revision of the Code of Civil Procedure created a system similar to the interrogatories modelled on the US system. Article 163, JCCP provides for the post-filing inquiry procedure.⁴⁷ It allows a party to inquire of its adversary answers to matters

⁴⁷ Cf in detail, C F Goodman, *Justice and Civil Procedure in Japan* (Oceana, 2004), 262-266.

required to prove his case. The inquiry must be made in writing and contain specific questions as well as the reason why the inquiry is necessary (Article 84, JCCP). Inquiries are limited to matters needed to prepare the case or substantiating proof. Inquiries may not be general or imprecise but must be specific and particularized and not seek privileged information. They may not insult or embarrass the opposing party. It must be possible to provide the answers by expending reasonable time and money. In practice, this evidence-gathering procedure is rarely used at present, because there is no way to ensure its effectiveness and there are no sanctions in case of violation.

- 75 In Argentina there is no procedure such as interrogatories.

2.7 Physical or Mental Examinations

- 76 In lawsuits involving questions about the mental or physical condition of a person involved in the events underlying the case, a medical examination may be a necessary part of the evidence.
- 77 In the US this is the only form of discovery that requires a prior court order that orders the person to ‘submit to a physical or mental examination (including blood group) by a suitably licensed or certified examiner’ (Rule 35(a)(1), FRCP). This form of discovery is strictly limited to parties or persons under the custody or the legal control of parties (Rule 35(a), FRCP). The order will be made only if the party’s condition is ‘in controversy’ and if there is ‘good cause’ for granting the request (Rule 35(a)(2)). Good cause means more than relevance. The requesting party must show why this information is necessary and cannot be obtained in a different manner. There must be some basis for believing that the party is suffering from some relevant physical or mental disability. The court may refuse to order the examination if it poses a risk of pain or physical harm to the person to be examined. In its landmark case construing the meaning of ‘in controversy’ and ‘good cause’ the US Supreme Court held that the requirements of Rule 35:

are not met by mere conclusionary allegations of the pleadings – nor by mere relevance to the case – but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination. Obviously, what may be good cause for one type of examination may not be so for another. The ability of the movant to obtain the desired information by other means is also relevant.⁴⁸

⁴⁸ *Schlagenhauf v. Holder*, 379 US 104 (1964). *In casu*, the Court noted that ‘nothing in the pleadings or affidavit would afford a basis for a belief that *Schlagenhauf* was suffering from a mental or neurological illness warranting wide-ranging neurological examinations. Nor is there anything stated justifying the broad internal medicine examination. The only specific allegation made in support of the four

- 78 Such orders are commonplace when plaintiffs claim personal injury. In these cases, the plaintiff will likely agree at the outset to an examination by a doctor chosen by the defendant, given the high likelihood that court would order an examination on motion if agreement were not forthcoming. Other sorts of claims of injury by plaintiffs do not so readily support orders to submit to an examination. Rule 35(b) provides that the person or party examined must be given, upon request, a copy of the medical exam. However, when such a request is made, the opposing party may request, and is entitled to receive, from the party against whom the examination order was issued a copy of all earlier or later medical examinations of the same condition, to the extent that the requested party can obtain them. Further, by requesting and obtaining the examiner's report, the party examined waives any privilege it may have in that action or any other action involving the same controversy, concerning testimony about all examinations of the same condition.
- 79 In England, the CPR include a Pre-Action Protocol for Personal Injury Claims (PI Protocol). The Pre-Action Protocol does not apply to traffic accidents, to a low value personal injury involving employers' liability or public liability, clinical disputes, disease and illness claims or personal injury claims below the small claims limit in road traffic accidents. The Protocol sets out the conduct that the court would normally expect prospective parties to follow prior to commencement of proceedings. The PI Protocol suggests that a medical expert should be selected by agreement of both parties. Joint selection under the Protocol is effected by the claimant (usually) or the defendant drawing a list of suggested joint experts. If no objections are raised within 14 days by the respondent, then one of these experts may be approached to perform a medical examination of the claimant and thereby become the agreed expert. The fees will be paid by the claimant. Once a jointly selected report has been prepared, it will be sent to the claimant. If he decides to rely on it, he has to disclose it to the defendant. The agreement by the defendant to a particular medical expert does not entitle him to see the report unless the claimant discloses it. Therefore, a joint report prepared pursuant to the Protocol is not a joint report in the sense of Rule 35, UKCPR. However, the parties may alternatively agree to a joint instruction of a medical expert Pursuant to Rule 35, UKCPR.
- 80 Both parties can ask the expert written questions on relevant issues, with answers being sent to both parties. In a case that came before the Court of Appeal,⁴⁹ the claimant had selected a medical expert from the list of experts pursuant to the PI Protocol, and the defendant had not objected to any of those listed. Since no settlement could be reached, the claimant initiated proceedings, however served a report from a different expert. The Court of Appeal held that the first agreed expert's report must be disclosed before permission would be given to the claimant to present the report of the other expert.

examinations ordered was that they "eyes and vision" of *Schlagenhauf* were impaired'. Since the case had to be remanded to the District Court because of the other examinations ordered, the Court held that it would be appropriate for the District Judge to reconsider also this order.

⁴⁹ *Edwards-Tubbs v. JD Wetherspoon Plc*, [2011] EWCA Civ 136.

‘Expert shopping is undesirable and, wherever possible, the court will use its powers to prevent it’. If a defendant has agreed to the joint expert, but then wishes to instruct his own expert witness in any subsequent proceedings, he will not be entitled to rely on that report unless the claimant agrees that he may do so; or the court so directs; or the claimant’s expert report has been amended and the claimant is not prepared to disclose the original report. If the parties do not agree on the identity of a jointly selected expert, then the parties may instruct experts of their own choice. If proceedings are brought subsequently, the court will decide if either party has acted unreasonably and, if so, consider whether costs penalties should be imposed.

- 81 In addition, in 2015 a Code of Best Practice on Rehabilitation (known as the Rehabilitation Code) was incorporated into the PI Pre-Action Protocol (§4). The code was introduced in view of the understanding that people who suffered a serious physical injury should be treated early on to enable their recovery to the extent possible. The Code provides for an Independent Needs Assessment (INA), either by a treating physician or surgeon or an agency that is suitably qualified and experienced in such matters, which is independent of both the plaintiff’s solicitor’s firm and the insurers. The assessment is carried out on a joint instruction basis and the report should cover the plaintiff’s injuries and present condition; the plaintiff’s domestic circumstances; the injuries for which intervention or rehabilitation is suggested; and the type of intervention needed, its cost and its likely benefit. The report does not deal with diagnosis, causation, or long-term care requirements. It covers only the immediate needs. The report is disclosed to the parties and each can raise questions. Even though it is produced outside the litigation process, it has of course an impact on the proceedings in such cases.
- 82 In Israel, if a party intends to rely upon the opinion of a medical expert, it must submit that opinion as an annex to its statement of pleadings (Rules 15(a)(2), 87(a), ICPR). However, the court may exempt the party from submitting the opinion, or postpone the submission to a later date (Rule 87(d), ICPR). If the plaintiff submits a medical expert opinion, the defendant may require that the plaintiff will submit, without delay, to a medical examination by an expert on behalf of the defendant (Rule 87(b), ICPR). If the plaintiff wishes to contest a medical opinion submitted by the defendant together with the statement of defence, it must submit a counter-opinion within 60 days following the date that the delivery of the defendant’s medical opinion (Rule 87(c), ICPR). The court may, at any point in time, appoint an expert on its behalf (Rule 88(a), ICPR). The expert, appointed by the court may require that the plaintiff will submit to an examination to be carried out by himself (Rule 90, ICPR). Following such an appointment by the court, there will be no examination of the experts on behalf of the parties, unless a party notifies the court that it wishes to carry out such an examination, in which case the court may restrict the scope and manner of that examination, taking account of the opinion of the expert appointed by the court (Rule 88(c), ICPR). A party that wishes to contest the opinion made by the medical expert, must submit a counter-opinion no later than 60 days from the date of delivery of that opinion (Rule 87(c), ICPR).

- 83 Rule 93, ICPR, stipulates that, if a party did not submit an opinion made by a medical expert together with his statement of pleadings, without an exemption by the court, will not be able to submit the testimony of a medical expert and will not be able to prove a matter of medical expertise, unless it is a counter-opinion, or if the court considered that he should be allowed to do so, on exceptional grounds. Rule 90, ICPR, provides that an expert appointed by the court may require a party to submit to a medical examination that he will carry out.
- 84 In claims seeking redress for physical injury, the plaintiff must also submit, with its statement of claim, a waiver of medical confidentiality, made according to Form #1, Annex 1, CPR (Rule 15(a)(3), ICPR). This form prescribes the waiver with respect to a very wide variety of conditions that the plaintiff may have suffered from and treatments, both physical and mental, that the plaintiff may have received. It allows the defendant to demand from any medical institution, including medical doctors, welfare agencies and rehabilitation institutes, the Ministry of Defence, Israel Defence Forces (IDF), the Institute for Social Security, mental healthcare clinics and the Israel Prison Service, copies of any medical records, without exception, regarding the plaintiff's physical and mental health condition, past and present. Attempts by plaintiffs to limit the scope of the waiver have failed.⁵⁰ The courts have regularly held that a person who brings proceedings exposes himself thereby to full disclosure. Thus, eg, in a claim demanding dental treatment, the National Labor Court did not allow the plaintiff to restrict her waiver, holding that also with respect to dental medical care, the defendant must be allowed to study all aspects of the plaintiff's medical condition, including her mental condition.⁵¹
- 85 In Germany, expert testimony is regulated in §§402-414, GCCP. There are no special sections regarding physical and mental examination. Medical examinations are ordered by the judge either upon request of a party or, if deemed necessary, by the court. The medical examination is performed by a medical expert witness appointed by the court. The expert witness prepares a report and submits it to the court. The court will then submit a copy to the parties. The report itself can be used as evidence during trial.
- 86 The parties may submit medical expert opinions on their behalf. In one case,⁵² the plaintiff suffered a femoral neck fracture in his own home. The insurer-defendant submitted to the court two expert opinions, the first from an orthopaedic expert opinion

⁵⁰ Cf Y Amit, *Evidentiary Privileges and Protected Interests* (Nevo, 2021) (in Hebrew), 427ff., with further references. The author, a Supreme Court justice, considers that, even though in most cases the plaintiff must waive all of his medical confidentiality, nonetheless there may be cases in which the court should allow him to restrict the waiver. Thus, eg, if the claim is due to an insignificant orthopaedic injury, he should not be forced to disclose psychological treatments that he had received many years beforehand.

⁵¹ *Clalit Health Services – Dental Clinic Sh.L.H. v. Gabay*, Appeal (National Labor Court) 26828-09-13, Nevo e-database (24 December 2013).

⁵² Case 8 U 1139/21 (OLG Nuremberg, Germany), Decision of 9 August 2021 (2021) [BeckRS 2021 22636].

and another from a trauma surgery expert. According to the expert opinions, the degree of disability caused by the accident was only 21% and, since a claim to a lifelong pension required a 50% degree of disability, the defendant denied the obligation to pay. The Regional Court declined to obtain an expert report, as requested by the plaintiff, and dismissed the lawsuit. The appeal to the Higher Regional Court (*Oberlandesgericht*) was successful. The appellate court held that the right to be heard requires the consideration of substantial applications for evidence and is infringed if the failure to collect evidence is based on an anticipated assessment of the factual evidence. In this case, on the basis of the expert opinions submitted by the defendant the court became convinced that there was no point in appointing an expert. However, the court has no expertise in these matters, and therefore it will rarely be possible for it to answer the concerns and objections of the parties without consulting an expert. The Appellate Court remanded the case to the Regional Court, instructing it to appoint a court expert, who must be informed by the court in its decision to appoint the expert of the resulting standard of proof, as well as of the contractual conditions relevant to the concept of disability and its extent.

- 87 In another case,⁵³ the Supreme Court held that the use of a medical expert report (*in casu*, a report regarding the mental condition of a person) as a basis for a decision requires that the court has given the parties the opportunity to comment. According to established case law, this presupposes that the person concerned is not only in possession of the written expert opinion before the decision is taken, but also had had sufficient time to take note of its content in good time before the hearing date. Providing the information to the guardian *ad litem* can at best ensure a necessary minimum degree of legal hearing if the guardianship court has decided that the person concerned should not be provided with the full written report for fear that the disclosure will damage his health or seriously endanger it, however the guardian must provide the person concerned with a short report. *In casu*, it could not be inferred from the files that the health of the person concerned would be damaged or endangered by the disclosure of the report. There was also no indication that she was provided with the short report. Therefore, she had no opportunity to comment on the short report during the hearing.
- 88 In Japan, there are no special provisions regarding physical and mental examination in court proceedings and no explicit system regulating such either at the request of the parties or at the court's initiative. However, when the medical examination of a person's body or mind is required in civil proceedings, the parties may request the court to order the inspection and the court may issue an order directing the person to undergo such inspection (Art. 232, JCCP).⁵⁴ The JCCP provides rules for courts concerning the appointment of experts when necessary (Art. 233, JCCP). The examination of a person's

⁵³ Case XII ZB 587/20 (BGH, Germany) Decision of 12 May 2021 [BeckRS 2021 17162]; [NJW 2021 2734].

⁵⁴ Inspection is a legal technical term used in continental law systems such as Japan and Germany, and is a method of the examination of material evidence. It is the state of the person's body or mind that is deemed to be a kind of material in its broader sense – cf K Miki, Chapter 4.

body or mind is just such a case. The inspection is conducted only at the request of the parties and not at the *ex officio* initiative of the court in Japan. Even though the Japanese law is characterized essentially as a civilian legal system, after WWII, under the strong influence of US system, the autonomy of the parties, similar to the common law system, was introduced.⁵⁵

- 89 In Argentina, there are no general provisions in ANCCPC allowing to subject the other party to a physical or mental examination. However, as a matter of principle, it is acknowledged that the ‘means of proof’, or types of evidence, are not exhaustive. Therefore, any type of evidence is admissible, as long as it does not affect constitutional rights or guarantees. The production of evidence, which is not explicitly provided for in the ANCCPC, is governed by the rules of the most analogous type of evidence. Therefore, the court will apply a proportionality test before ordering a party to undergo a physical or mental examination. In some cases, the proportionality test has been done by legislation, as is the case of DNA tests needed to establish filiation. Those were allowed by legislation since the invasion of the body is minimal; the proof is absolute; there is no similar procedure that guarantees these results; and the ascertainment is required for the protection of a fundamental right, namely a person’s identity.⁵⁶

2.8 Expert Testimony

- 90 Witnesses can give evidence on what they saw. They cannot give opinion evidence. It often happens, however, that there is need to establish, on the basis of the hard evidence that exists, what must have happened. Expert opinion can fill this gap. An expert can give an opinion on an issue that is within his field of expertise, and can state what the available evidence is likely to indicate.
- 91 In the United States, the ‘battle of the experts’ is a commonplace event in trials. Expert witnesses are hired by the parties (or their lawyers) and often become part of the litigation ‘team’ for the party. The general rules regarding discovery do not apply to expert opinions.

Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial (Rule 26(b)(3)(D), FRCP).

Such discovery will only be allowed ‘on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other

⁵⁵ K Miki, *Ibid.*

⁵⁶ It is noteworthy that the Israeli legislature adopted a nuanced approach to DNA tests in filiation cases, realizing that, next to the child’s identity, there may be other interests deserving protection – cf T Einhorn, *Private International Law in Israel* (3rd edn, 2022), para 1391-1405.

means' (Rule 26(b)(3)(D)(ii), FRCP). This will be the case if one party has retained all the available authorities in that field of expertise.

- 92 However, because of their considerable role in trials, opposing parties must receive information about their proposed testimony in order to prepare to cross-examine these expert witnesses. To that end, a witness 'retained or specially employed to provide expert testimony in the case, or whose duties as the party's employee regularly involve giving expert testimony' must provide the other party with a written report, prepared and signed by the witness, containing a complete statement of all opinions the witness will express and the basis and reasons for them; the facts or data considered by the witness in forming them; any exhibits that will be used to summarize or support them; the witness's qualifications, including a list of all publications authored in the previous 10 years; a list of all other cases in which, during the previous 4 years, the witness's testified as an expert at trial or by deposition; and a statement of the compensation to be paid for the study and testimony in the case (Rule 26(a)(2)(B), FRCP). The report is usually produced toward the end of the discovery period. After the report is provided, the opposing party may take the oral deposition of the expert witness (Rule 26(b)(4)(A), FRCP). It was hoped that the report requirement would result with many litigants forgoing expert depositions, but that has not been the result.⁵⁷ Instead, often the deposition was largely occupied with the role of the lawyer in producing the report, resulting in an amendment to the rules, providing that work product protection extend to draft expert report and to communications between the hiring attorney and the expert witness (Rule 26(g), FRCP).
- 93 The Federal Rules of Evidence provide also for court-appointed expert witnesses (Rule 706). On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act. The court must inform the expert of his duties. The expert must advise the parties of any findings he makes; he may be deposed by any party; he may be called to testify by the court or any party; and he may be cross-examined by any party, including the party that called the expert. This rule does not limit a party in calling its own experts. In the first instance, the judge determines whether a witness is qualified as an expert, but the weight to be

⁵⁷ The 1993 amendment to Rule 23(b)(4), which authorized a pre-trial deposition of all testifying expert witnesses, also required that these depositions not be held until the report required under Rule 26(a)(2) had been provided. The Committee Note to that amendment expressed the hope that the new disclosure requirement might 'eliminate the need for some such depositions or at least reduce the length of the depositions'. But that did not happen. Instead, in 2010 Rules 26(a)(2) and 26(b)(4)(a) were amended because, as the 2010 Committee Note said, 'routine discovery' via expert depositions had increased discovery costs.

given to the evidence is generally a matter for the jury. It is the jury that will decide the expert's credibility.⁵⁸

- 94 In England, the rules for the use of expert evidence during litigation are provided in Part 35, UKCPR, Experts and Assessors, and PD 35 Experts and Assessors. Expert evidence requires the court's prior permission (Rule 35.4, UKCPR). When a party applies for permission to use expert evidence it must provide an estimate of the costs of the proposed expert evidence and identify the field in which expert evidence is required and the issues which the expert evidence will address and, where practicable, the name of the proposed expert. If permission is granted, the court may specify the issues to be addressed and may limit the amount of expenses and fees potentially recoverable (Rule 35.4, UKCPR). An expert may seek directions from the court (Rule 35.14, UKCPR). Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue will be given by a single joint expert. If the parties cannot agree who should be the single joint expert, the court may select the expert from a list prepared or identified by the parties, or direct that the expert will be selected in such manner as the court may direct (Rule 35.7, UKCPR). In that case, any party may give instructions to the expert, with a copy of the instructions sent to the other parties (Rule 35.8 UKCPR).
- 95 At the pre-action stage, parties are encouraged to cooperate and seek to agree how to use an expert and who to use. However, the final decision will be taken by the plaintiff. There is no certainty that the court will allow the recovery of the fees of retaining the services of an expert at the pre-action stage.
- 96 The expert has an overriding duty to the court. At the end of his report, the expert must include a statement that he understands and has complied with his duty to the court. The weight to be attached to the expert's evidence is determined by the court. The court is not required to accept the expert's evidence over the evidence of an eyewitnesses.⁵⁹ If the expert, for which the court's permission has been obtained, has proved to be unfavourable, the party may find it difficult to obtain the court's permission to appoint another expert. In one case, the court made such an appointment conditional on the disclosure of the first expert's report.⁶⁰ In another case, the court considered that the fact that the report was unfavourable is not good reason to seek permission to appoint an alternative expert.⁶¹
- 97 In Israel, the plaintiff must submit a medical expert opinion together with the statement of claim, if he wishes to rely upon it during the trial (Rule 15(a)(2), ICPR). Regarding other

⁵⁸ L L Teply and R U Whitten, *Civil Procedure* (4th edn, 2009) 944.

⁵⁹ *Armstrong & O'Connor v. First York*, [2005] EWCA Civ 277.

⁶⁰ *Ricky Edwards-Tubb v. J.D. Wetherspoon Plc*, [2011] EWCA Civ 136; *Odera v. Ball*, [2012] EWHC 1790 (TCC).

⁶¹ *Guntrip v. Cheney Coaches Ltd.*, [2012] EWCA 392.

types of expert opinions, the plaintiff may, but is not required to submit an expert opinion in matters other than medicine together with his statement of claim (Rule 15(b), ICPR). A party may submit an expert opinion in matters other than medicine no later than 90 days before the hearing (Rule 87(e), ICPR). The defendant may submit an expert opinion, on its behalf, no later than 30 days prior to the hearing, or at another date ordered by the court (Rule 87(f), ICPR).

- 98 One advantage of the common law systems is the right of each party to seek an expert opinion that will support its case. The parties can then cross-examine each other's experts, thus enabling the court to reach an informed decision. The default rule in the ICPR is problematic especially in cases of medical negligence. Whereas, thanks to the very broad waiver of medical confidentiality, the defendant gains immediate access to all of the plaintiff's medical information, past and present, the plaintiff has to submit an expert opinion (which may be very costly) before the disclosure and inspection of the relevant documents has taken place. A party that submits an expert opinion must ensure that the expert will be available for cross-examination at the hearing (Rule 87(h), ICPR). The parties are not allowed to submit supplementary expert opinions, without the court's prior permission (Rule 87(i), ICPR). The court may, at any point in time, appoint an expert on its behalf (Rule 88(a), ICPR). The expert appointed by the court receives a copy of the statements of pleadings and instructed by the judge regarding the questions that he is expected to answer. However, he does not receive a copy of the parties' expert opinion.
- 99 Before the reform, the court could appoint its own expert, however in principle the practice was that the court would make such an appointment only after the plaintiff's expert had been cross-examined.⁶² Furthermore, in so far as the parties did not agree to the appointment of the additional expert by the court, the latter's opinion had no evidentiary precedence over the parties' experts.⁶³ The reformed ICPR introduced substantial changes.
- 100 Under the reformed rules, following the appointment of an expert by the court, there will be no examination of the experts on behalf of the parties, unless a party notifies the court that it wishes to carry out such an examination, in which case the court may restrict the scope and manner of that examination, taking account of the opinion of the expert appointed by the court (Rule 88(c), ICPR). If the parties consent to the appointment of an expert by the court, then their consent is regarded as a procedural arrangement, whereby they have agreed not to submit expert opinions on their behalf, and, if they had already submitted expert opinions, those would not be admitted as evidence (Rule 88(d), ICPR). The expert appointed by the court has to submit his opinion within 60 days (Rule 91(a), ICPR). The parties may apply for the court's permission to send the expert questions seeking clarification of his opinion (Rule 91(c), ICPR). A party may also cross-

⁶² U Goren, *Issues in Civil Procedure* (12th edn, 2015) (in Hebrew) 440.

⁶³ *Hefziba v. Lehner*, CA 4218/90, Nevo e-database (31 December 1992).

examine the expert on behalf of the court, after notifying the court and the parties (Rule 91(d), ICPR).

- 101 By introducing these changes, the reform compromised an important advantage of the common law systems, namely the right of each party to seek an expert opinion that will support its case. The parties could then cross-examine each other's experts, thus enabling the court to reach an informed decision. In principle, the court was expected to appoint an expert only if, following the cross-examination, it could not decide in case. Under the reformed rules, courts appoint experts as soon as there is a gap between the party-appointed experts. Since the expert appointed by the court does not receive the party-appointed expert opinions, he does not take account of, or and relate to, their opinions. In practice, the courts regularly prefer the opinions of the court-appointed experts.
- 102 In Germany, the provisions regarding expert testimony are set in §§402-414, GCCP. The rules regarding witnesses in general apply also to expert witnesses unless specific rules apply (§402, GCCP). The court selects the expert (§404, GCCP). To the extent that experts have been officially designated for a specific field of expertise, the court will select other persons only if special circumstances apply (§404(2), GCCP). The court may ask the parties to propose an expert (§404(3), GCCP). If the parties reach agreement in this matter, the court will comply with their agreement (§404(4), GCCP). The expert must be neutral and independent and his function is to assist the court by providing him with the knowledge that the judge lacks in forming his decision in matters that require expertise.⁶⁴ If the expert was appointed without the parties' consent, a party may seek to have the expert recused on the same grounds that a party is entitled to challenge a judge (§406, GCCP), namely if it appears that the expert is not neutral. It is up to the court to accept or reject the party's application, however a dismissal may be appealed (§406(5), GCCP).
- 103 The court directs the expert regarding his activities, their nature and scope (§404a(1), GCCP). Where the facts of a case are disputed, the court shall determine the facts on which the expert is to base his report (§404a(3), GCCP). The instructions to the expert are communicated to the parties (§404a(5), GCCP). If the expert has doubts regarding the content and scope of his task, he should seek the court's clarification without delay (§407a, GCCP). Even though in principle court-appointed experts will testify orally in court, in practice the courts regularly order that the report will be submitted in writing following §411, GCCP, since this allows the expert more time to express his opinion comprehensively.⁶⁵ The court may still order the expert to explain his opinion in court (§411(3), GCCP). In these cases, the rules governing the taking of evidence in general apply (§414, GCCP). The judge examines the expert first and the parties may examine him afterwards. However, since leading questions are not allowed in German civil

⁶⁴ Zimmermann, in *Münchener Kommentar ZPO* (6th edn, 2020), §402 GCCP, para 2,7.

⁶⁵ Zimmermann, in *Münchener Kommentar ZPO* (6th edn, 2020) §411 GCCP, para 2-3.

litigation, this examination does not resemble the cross-examination in US civil cases.⁶⁶ If the court is not satisfied with the expert's opinion it may order the expert to write a new opinion or appoint a new expert (§412, GCCP). Under §286, the court has discretion whether to follow the opinion of the court-appointed expert. The court must provide the reasons for following, or not following, the expert opinion. In practice, courts usually follow an expert's opinion.

- 104 The parties may submit expert opinions on their behalf.⁶⁷ These are considered as that party's qualified submissions, not as expert opinions proper. Therefore, a party may not demand that the private expert will be given the opportunity to explain his report at the hearing, or put questions to a private expert. A party may only be assisted by the private expert, who may attend the proceedings in court, in formulating his questions to the court expert. However, the court may not ignore a private expert report submitted by a party, the results of which contradict the findings of the court-appointed expert.⁶⁸ If the parties submitted private opinions of competent experts on questions of specific expertise that contradict each other in essential points, the court, that does not have its own expertise, may not, without obtaining the opinion of a court expert, give precedence to one private opinion over the other.⁶⁹ Also, the court expert, who receives the whole file of the court proceedings, including the parties' private expert reports, may not simply ignore the private expert reports, but must deal with them.⁷⁰ The court must clarify any discrepancies between private expert reports and court-appointed expert reports.⁷¹
- 105 In Japan, expert testimony is regulated in Articles 212-218, JCCP. In practice, since the 1948 amendment act that brought a thorough change from evidence-gathering *ex officio* by the court to party-led proceedings, an application for expert testimony must be filed by either party or both parties with the court (Art 180-1, JCCP). Art. 180-1, JCCP is the general provision that applies to all types of evidence. The court may not initiate *ex officio* the appointment of an expert. However, the selection of the experts is done by the court (Art. 213, JCCP), that may, but is not obliged to, take account of the parties' wishes in this respect. The expert selected by the court is considered to be neutral and independent. Similar to the situation obtaining in Germany, the parties may also submit private expert opinion letters on their behalf, however those are treated as ordinary documentary evidence. When there are differences of opinion among experts regarding the disputed issues, as is often the case in medical practice claims, the court usually

⁶⁶ S Timmerbeil, 'The Role of Expert Witnesses in German and US Civil Litigation' (2013) 9 Annual Survey of International & Comparative Law 163, 175, with further references.

⁶⁷ Zimmermann (n 64) para 9.

⁶⁸ Case IV ZR 190/08 (BGH, Germany) Decision of 12 January 2011 (NJW-RR 2011) 609; [BeckRS 2011 2152].

⁶⁹ Case VI ZR 192/92 (BGH, Germany) Decision of 8 June 1993 [NJW 1993 2382].

⁷⁰ Case VII ZR 97/08 (BGH, Germany) Decision of 27 January 2010 [BeckRS 2010 04928]; Case VII ZR 36/15 (BGH, Germany) Decision of 17 May 2017 [NJW 2017 3661].

⁷¹ Carpenter, in *Münchener Kommentar ZPO* (6th edn, 2020), §412 GCCP, para 5, with further references.

selects three experts with different views. This method gives the court a clue as to which opinion prevails.

- 106 The court determines the manner in which the expert opinions are submitted to the court, whether in writing, orally, or in both ways (Art. 215-1, JCCP). In practice, either (a) only written opinions are required, or (b) the written opinions are submitted first and are followed by a court hearing. The reason for requiring written opinions is due to the fact that it is usually difficult to understand highly technical contents without writing. During the hearing, the expert is first asked to narrate his opinion. Questions from the court and the parties follow (Art. 215.2-1, JCCP). First in turn are the presiding judge's questions, followed by the questions of the party that requested the expert's appointment, and finally the questions of the opposing party (Art. 215.2-2, JCCP). However, depending on the circumstances, the court can change this order (Art. 215.2-3, JCCP). Since the experts are selected by the court, the terms 'direct examination' and 'cross examination' are not used. However, the experts may be exposed to aggressive questioning by the parties' attorneys, similar to the practice of cross-examination of witnesses in common law systems.
- 107 Some local district courts have devised a variety of approaches to the handling of the oral examination of experts. For example, the Tokyo District Court has adopted the so-called 'conference style' format, whereby three experts who had previously submitted written opinions are all present in the court at the same time, with the presiding judge acting as a moderator, putting questions to the three experts in order, followed by questions of the parties' attorneys. If necessary, the court may have the three experts discuss with each other the issue in front of the judges, as well as the parties and their attorneys.
- 108 When a decisive legal issue arises, with respect to which there is no guidance in the courts' case law, the parties usually try to persuade the court in favour of their interpretation by submitting private expert opinion letters. Since the judge has legal knowledge (*iura novit curia*), the judge has no need to seek expert help in deciding which of them to adopt. Nonetheless, in large economic cases, sometimes more than ten expert opinion letters, written by law professors, are submitted to the court by the parties. Such cases are sometimes called by mass media the "battles of private expert opinion letters". Private expert opinion letters may also be submitted if a party wants the court to deviate from the established precedents, or considers the logic of existing case law to be flawed.
- 109 In Argentina, each party must submit, together with its statement of pleadings, the documentary evidence and also propose all other evidence that the parties want to use at trial. The latter include also expert evidence. The interested party must also propose the points upon which expertise is needed (*puntos de pericia*) and the field of knowledge and specialization that would serve the evidentiary purpose (Art. 333, ANCCPC). The experts are appointed by the court. They are selected from a list of pre-accredited

professionals who have applied for inclusion on the list and are referred to as ‘official experts’.⁷² The parties may propose to the court the names of the experts they wish the court to appoint. If they propose experts with similar specialization, the court may appoint just the one of these experts who has the most suitable expertise. The official experts’ impartiality is derived from the codes of professional conduct set by the organizations that control the issuing of certifications and licenses. Official experts may be recused on the same grounds as judges, that is if they seem not to act impartially.

- 110 The expert report is disclosed immediately to the parties, who may present observations and also request additional explanations. The judge may summon the expert to a special hearing or may order that additional information will be provided in writing. The court may also decide that the expert’s report must be supplemented if it is deemed insufficient, or may even order that an additional report has to be prepared, following the re-examination of the materials or records by the same expert or by a new one.
- 111 The parties may avail themselves of private experts, however those are not designated as official. They may attend the proceedings and formulate pertinent observations. They may submit their own report to the court under the same general rules that apply to the official experts. In practice, courts take account of the private reports, even though they are not obliged to do so. However, because of the impartiality that official experts seem to offer, their expert opinions are regularly preferred by the Argentine court. Hence the importance of providing as much technical information in the original pleadings, and filing together with the statement of claim a document containing a report made by the private expert retained by the party. This way, the official expert will have access to the party’s arguments at the outset.

2.9 Obtaining Evidence from Non-Parties

- 112 In the US, the American subpoena rule permits lawyers, admitted to practice in the court in which action is pending, to issue a subpoena commanding a non-party to provide document discovery comparable to that demanded of parties to the action (Rule 45(a)(1)(A)(iii), FRCP – request to ‘produce designated documents, electronically stored information or tangible things’). No prior court authorization is required. The subpoena may be used to compel attendance of witnesses at depositions (Rule 45(a)(1)(B), FRCP). The subpoena rule also directs attorneys issuing subpoenas to avoid undue burden and expense for non-parties called upon to respond (Rule 45(d)(1), FRCP). The issuing party must give notice to the other parties to the action before serving the non-party (Rule

⁷² D Baron, ‘Argentina: Official Expert, Not Expert Witness’ (27 September 2017), <https://www.linkedin.com/pulse/argentina-official-expert-witness-daniel-baron/>
The account is based on the Code of Procedure of the City of Buenos Aires, however according to the author similar codes apply across the 24 jurisdictions of Argentina.

45(a)(4), FRCP). Rule 45(e), FRCP provides that the failure to obey a subpoena 'without adequate excuse' may be a contempt of the court from which the subpoena was issued.

113 In England, the court has the power to order a non-party to produce documents before trial under Supreme Court Act 1981, s. 34 and under the County Courts Act 1984, s. 53. An application can be made at any time after the statement of claim has been issued (Rule 31.17, UKCPR). The order must specify the documents to be disclosed, and may require the respondent to say what has happened to documents that he no longer has. Normally, the relevant non-party is entitled to the costs it incurs in complying with the order (Rule 46.1, UKCPR).

114 An order will be made only if the following conditions are fulfilled (Rule 31.17, UKCPR):⁷³

The documents for which disclosure is sought must be likely to support the applicant's case, or adversely affect the case of one of the other parties to the proceedings. This means that the documents must be specifically identified and directly relevant to the issues in the case;

Disclosure must be necessary in order to dispose fairly of the case or to save costs. The court will not make an order if it does not have sufficient information.

115 In Israel, discovery and inspection are only intended to provide reciprocal disclosure of documents that are held by, or under the control, of each party. To gain access to a document possessed by a non-party, the party seeking access has to apply to the court to issue a subpoena ordering that person to appear in court and produce the document (Rule 69, ICPR). Disclosure from non-parties will nonetheless be allowed if a party can prove that the other party and the non-party colluded to conceal documents and evidence.⁷⁴ Another exception applies in the case that the non-party is controlled by a party to the proceedings.⁷⁵ A special rule applies in the case that a potential plaintiff needs to inspect documents in order to decide the feasibility of submitting an application to the court that it would approve a derivative action. In such cases, §198A, Companies Law, 5759-1999, allows that person to apply to the court, prior to submitting the application to confirm the derivative action, or following its submission, to order the company to disclose documents that are relevant to the proceedings of confirming a derivative action. The court may make such an order if it has been convinced that the

⁷³ S Blake (n 9) para 22.107-22.108, with further references.

⁷⁴ *Gozlan v. Compagnie Parisienne de Participation*, CA 174/88, Nevo e-database (14 April 1988), in which the court ordered the disclosure of bank records of a non-party that colluded with the defendant.

⁷⁵ *Rosh Kash Trade 88 Ltd. v. Rochvitz Israel (Sivan)*, Application for Permission to Appeal 7264/95, Nevo e-database (27 March 1996). In this case, the non-parties were companies controlled by the defendants. In the case of sister companies, the court should apply extra caution before ordering disclosure, and only make such an order if the relevant documents are of deep relevance to the case. In particular, trade secrets of the sister companies deserve protection – *Maabarot Properties – Agricultural Cooperative Society Ltd. v. Motivan Ltd.*, Application for Permission to Appeal 8571/16, Nevo e-database (19 January 2017).

applicant has provided a *prima facie* evidential basis that the preconditions for approving the derivative action have been fulfilled.⁷⁶

- 116 In Germany a non-party may be obliged to deliver evidence. If the non-party is a witness, he is obliged to appear (§380, GCCP) and to provide testimony under oath (§391, GCCP). The court may order a non-party to submit documents or visual evidence for inspection (§142(2), §144(2), GCCP), unless the obligation to submit the document is unreasonable, for example because it would cost too much money or effort or time, or if the non-party has a right to refuse to testify, for example on grounds of privacy. A party who has the burden of proof, but is not in the possession of the evidence that would support his position, may apply to the court to issue an order to a non-party. In such cases, the court may order a non-party to submit documents or visual evidence for an inspection, unless the obligation to submit the evidence is unreasonable or the non-party has a right to refuse to testify.
- 117 In Japan the production of documents is provided in detail in Section 5, JCCP. All document holders are unconditionally obliged to produce the document (Art. 220, JCCP), unless there are justified grounds, specified expressly in the JCCP, for refusing to do so (Art. 220(iv), JCCP).⁷⁷
- 118 In Argentina the court may order a non-party to disclose documents that are in its possession and custody (Art. 36, 387-389, ANCCPC). The non-party may only object to such a request if disclosure may cause harm to it.

3 PRESERVATION OF EVIDENCE

- 119 An overview of the different challenges linked to digitization should be the final part of this chapter. Some of them will be addressed more specifically in the following chapters. It is important to differentiate ‘transitory’ shortcomings with more ‘permanent’ ones. These challenges, of course, need to be referred to the goals or aims pursued by this process of digitization of justice. The preservation of evidence is critical to any judicial process seeking to establish the truth. The approaches to the duty to preserve in the surveyed countries is provided below.
- 120 In the US, in which document discovery plays such a central role, it is not surprising that there are legal rules regarding how information is to be preserved and produced in civil disputes. In a case, after learning that the defendant (*in casu*, the United States) ‘violated its duty not once or twice, but repeatedly, over many years, and in sundry ways, leading to the destruction of many admittedly relevant documents. Most disturbingly, some of

⁷⁶ Cf *Bank HaPoolim Ltd. v. Nesher*, Application for Permission to Appeal 6122/14, Nevo e-database (6 May 2015).

⁷⁷ Cf part 2.3 above.

these documents were destroyed even after the court conducted its first spoliation hearing', the court noted that:

aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than spoliation of evidence. Our adversarial process is designed to tolerate human failings – erring judges can be reversed, uncooperative counsel can be shepherded, and recalcitrant witnesses compelled to testify. But, when critical documents go missing, judges and litigants alike descend into a world of *ad hocery* and half measures – and our civil system suffers.⁷⁸

- 121 Some obligations to preserve are not tied to litigation. Various regulatory agencies may require that records be kept about certain events.
- 122 The duty to preserve evidence, that has developed as a common law matter in the US, extends far beyond those regulatory requirements and include all potential evidence relevant to a prospective litigation. The arrival of the digital age contributed substantially to the expansion of the potential duty to preserve. In principle, the duty extends only to materials within a prospective party's 'possession, custody or control', those things that it may be required to produce in response to a document request.⁷⁹ It has, however, been pertinently noted that this too can be a slippery concept.⁸⁰ Consider, for example, the ubiquitous video camera or cell phone. It may often capture images of events at the centre of litigation. Is everyone with 'possession, custody, or control' of one of them required to preserve all it captures forever?
- 123 However, there are also bad actors who try to destroy the best evidence of their wrongdoing. Leaving their victims without remedy would be unjust. That injustice gave rise to the 'adverse inference'. When a litigant failed to preserve evidence that appeared important to its case, the trier of fact (in the US, the jury) could infer the evidence would be harmful to its case. The judge might instruct the jury that was a valid, or perhaps a required, conclusion from evidence of failure to retain evidence. To some (largely the defence side), such an instruction became a 'nuclear weapon' in litigation.
- 124 In view of this development the rule concerning sanctions for failure to preserve data was amended in 2018 (Rule 37(e), FRCP). The rule restricts the duty to preserve to the

⁷⁸ *United Medical Supply Company, Inc. v. The United States*, 77 Fed. Cl. 257, 259 (Court of Federal Claims 2007).

⁷⁹ Rule 34(a)(1), FRCP.

⁸⁰ See 8B, C Wright, A Miller and R Marcus (n 18) Sec 2210 (noting that the 'control' concept is 'often highly fact specific' and exploring examples of the challenges this standard has presented).

period when a claim is reasonably foreseeable. It suffices that litigation is reasonably anticipated, which covers a period prior to the initiation of court proceedings.⁸¹

- 125 Once the duty to disclose has been triggered, the party must take ‘reasonable steps’ to preserve the evidence. If the lost information can be recovered, the party may not be subjected to sanctions. The court may impose certain severe sanctions only upon finding that the party acted with the intent to deprive another party of using the information in the litigation. In that case, the sanctions include a presumption that the lost information was unfavourable to the party; the judge may instruct the jury that it may or must presume the information was unfavourable to the party. Alternatively, the court may dismiss the action or enter a default judgment. To avoid the risk, many companies have adopted ‘document retention policies’, which direct how long various types of information should be retained and also direct that, once the appointed date arrives, the information should be discarded unless subject to a ‘litigation hold’.
- 126 In England, under the UKCPR, parties contemplating or involved in litigation before the courts of England and Wales have the duty to review (and, as necessary amend or suspend) any document retention policies so that no relevant documents are destroyed, deleted, overwritten, or updated, documents being defined very broadly as ‘anything in which information of any description is recorded’ (PD 31B, 7 ‘Preservation of Documents’; 13 ‘Preservation of Electronic Documents’). This definition extends also to photographs, videos and all types of electronic data and communications. As soon as litigation is anticipated, a prospective party to that litigation must inform all those who might hold any relevant documents under the control of that prospective party of their duty to preserve such documents.
- 127 If the court, or the other party, suspect that certain documents have been destroyed after litigation had already been anticipated, the Court may make intrusive orders with a view to investigating what a party may have done with relevant documents. Failure to preserve all potentially disclosable documents when litigation is anticipated may also give rise to sanctions – costs sanctions, the striking out of a party’s statement of

⁸¹ Before Rule 37(e) was amended in 2015, the courts were split on whether adverse inference instructions were so powerful that they could be used only when it was shown that the party that lost potential evidence did so in bad faith. For a review of the competing views in the courts, see William Lambert, ‘Keeping the Inference in the Adverse Inference Instruction: Ensuring the Instruction is an Effective Sanction in Electronic Discovery Cases’, 64 South Carolina L. Rev. 681 (2013) (describing the division among the lower courts about what level of culpability was required for this sanction). In 2015, Fed. R. 37(e) was amended to limit the use of adverse inference instructions to cases in which the party requesting the instruction could prove that the opposing party ‘acted with the intent to deprive another party of the information’s use in the litigation’. As the Committee Note accompanying the 2015 amendment made clear, the amended rule rejected cases that had authorized adverse inference instructions on a showing of negligence or ‘gross negligence’. The Committee Note warned that ‘the severe measures authorized by this subdivision’ should be employed with care even when a showing of bad faith had been made.

pleading, in whole or in part, or, alternatively, the court may draw adverse inferences as to the contents of those documents.⁸²

- 128 The type of sanctions to be applied have been summarized in a case of deliberate destruction of documents as follows:

The object of the rules as to discovery is to secure a fair trial of the action in accordance with the due process of the Court; and that accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules – even if such obedience amounts to contempt for or defiance of the court – if that object is ultimately secured by (for example) the late production of a document which has been withheld. But where a litigant’s conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled – indeed, I would hold bound – to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him . . . Accordingly, if a fair trial is still possible, or if (as here) the trial has concluded, the next question is how should the Court approach the issue of the deliberate destruction of documents and a deliberate void of evidence . . . It follows that if there is no evidence on a particular point, the Court can rely on the inferences drawn from the destruction of documents or the failure to call relevant witnesses to provide evidence which is otherwise absent . . . I return below to the inference which I consider that the Court should draw in the present case as a result of Ms He's deliberate deletion of her instant messaging app.⁸³

- 129 In Israel, regarding the intentional destruction of evidence to prevent its being used in litigation, §244, Penal Law, 5737-1977 ('Obstruction of justice'), 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' imprisonment; for this purpose, "judicial proceeding" includes a criminal investigation and the implementation of a direction by a Court.

This provision has not been applied to the destruction of evidence in civil case. It also does not answer the question if, and to what extent, there is a duty to preserve evidence.

⁸² *Logicrose v. Southend United Football Club (No 1)*, [1988] 1 WLR 1256. In that case, the plaintiffs' director was alleged to have deliberately suppressed a crucial document and for a time successfully concealed its existence from the Court. The court did not find the allegation proved but noted that if it had been, it might have given rise to a contempt sanction but should not lead to the action being struck out unless the failure rendered it impossible to conduct a fair trial.

⁸³ *E D & F Man Capital Markets Ltd v. Come Harvest Holdings Ltd. and others*, [2022] 229 (QBD).

This question has not been addressed in the case law or legal literature. Three statutes deserve special mention in this respect:

- 130 The Prescription Law, 5718-1958,⁸⁴ stipulates (§5) that the period of limitations is, with respect to all matters apart from real estate, five years. Regarding real estate, the period is 15 years, and, if the land has been registered with the Real Estate Registration Office – 25 years. Consequently, it is advisable to preserve documents for a period of at least seven years in matters other than real estate.
- 131 The Evidence Ordinance (New Version), 5731-1971, requires parties to submit original documents, or certified authenticated copies. In 2005 regulations were enacted to allow, under the conditions stipulated in those regulations, the submission of copies and scans of documents that had been eliminated.⁸⁹
- 132 The Archives Law, 5715-1955, regulates the obligations of public or governmental entities to preserve documents that they produce or accept. The Law regulates the preservation of a variety of documents in a plethora of fields, and the period of protection is between two years to eternity.
- 133 In addition, professional associations, such as the bar association, provide guidelines for their members, regarding the period of preservation. Thus, eg, the bar association instructs its members to keep the files containing documents until five years after the case had been definitively decided in court. In practice, many law offices keep the documents even longer periods, and regularly invite the concerned party to collect the documents before eliminating them.
- 134 In Germany the duty to preserve evidence was developed by the courts. In its landmark *Tupfer-Fall* ('swab case')⁸⁵ before the Federal Supreme Court, a surgeon left a swab in the surgical wound, which he removed and threw away in a subsequent operation that became necessary because of the patient's ongoing complaints. In the proceedings brought against the doctor by the patient, the quality and size of the swab were decisive for the proof of fault. Since the swab was no longer available and it was the plaintiff who had to discharge the onus of proof the trial court dismissed the claim. The Federal Supreme Court reversed, holding that during the second operation, the defendant should have expected that the plaintiff would be entitled to claim damages and therefore he had to ensure that the swab would be preserved as evidence. Having failed to do so, the missing evidence should operate to his detriment. Gaps in the evidence are to be counted against the party that does not bear the burden of proof if that party culpably caused the lack of clarity with respect to the evidence. The case was thus

⁸⁴ Even though the authorized translation used the term 'prescription', the Israeli Prescription Law is, in fact, a statute of limitations. It only bars a claim, without extinguishing it, and must be pleaded by the defendant at the first opportunity, or otherwise will be considered waived. Testimony Regulations (Photocopies), 5730-1969, as amended in 2005.

⁸⁵ Case VI ZR 72/54 (BGH, Germany) Decision of 16 April 1955 [BeckRS 1955 31197047].

remanded to the trial court. Subsequent decisions held that the consequences of intentional or negligent destruction or frustration of evidence may range from facilitation of the burden of proof that the plaintiff needs to discharge to a reversal of the burden of proof.⁸⁶

- 135 'Where a record or document has been removed or has been rendered unfit for use with the intention of preventing the opponent from using it, the allegations made by the opponent regarding the nature and the content of the record or document may be deemed to have been proven' (§444, GCCP). Frustration of evidence has been assumed, for example, in the following cases:⁸⁷ if one party makes it impossible to provide evidence by destroying a will; if a party refuses to allow the insurer's expert to inspect an accident vehicle without reason; if a party does not provide the address of an accident witness only known to her without good reason; if one party does not release the doctor from confidentiality although it was reasonable to require him to do so; if the doctor does not prepare the prescribed documentation about the clinical picture and the course of the disease; if the doctor does not provide an X-ray; if, in the case of a dispute about the contractual production of software, the customer does not present the original diskette; if a tax adviser refuses to return documents to his client in breach of contract; if the workshop does not keep a replaced defective part.
- 136 In Japan, the Code of Civil Procedure does not contain any provision regarding the duty to preserve evidence in anticipation of litigation. The code only prohibits a party who has received a document production order, issued by the court, from destroying the document to prevent it from being used (Art. 224(2)-(3), JCCP). If the responding party violates this provision, the court may deem the requesting party's allegation to be true as a sanction.
- 137 In Argentina, there is no general duty to preserve every record or potential evidence for a precise period of time. However, there are important areas in which such a duty is established. As a general rule, public records must be kept by the administration or the judiciary for ten years. Afterwards they may be destroyed except in some cases, for example records regarding crimes against humanity, judicial records regarding inheritance, etc. Also, a patient's medical records must be preserved for at least ten years, as provided in detail in Article 15, Ley 26.529 – 'Act on patient rights in their relation with health professionals and institutions'.
- 138 There are also areas, such as consumer protection (Arts. 4, 53, Consumer Protection Act ley 24.240) and environmental law (Access to Public Environmental Information Act, ley 25.831), that require parties to cooperate in the determination of facts, due to the need to provide a balance in cases of unequal access to information. That cooperation

⁸⁶ M Huber, 'Grundwissen – Zivilprozessrecht: Beweisvereitelung' (2020 JuS) 208.

⁸⁷ Cf Prütting, in *Münchener Kommentar ZPO* (6th edn, 2020), §286 GCCP ('free assessment of evidence'), para 83, 84, with further references.

includes a duty to preserve and give access to information that the opposing party may potentially require as evidence, however in these matters the standard of conduct is less explicit and precise, as it specifies neither the information that needs to be kept nor the duration of its preservation. In commercial law there is also an obligation to keep books and records for ten years. Any individual or company that carries out organized economic activity or is the owner of a commercial, industrial, agricultural or service establishment, that is every commercial organization or businessman, has the duty to preserve books, records and supporting documents for ten years (Art. 328, Argentine Civil Code). There are also particular fields in which substantive law imposes a duty to preserve information. Even though there is no mention of the purpose of such a duty, it is clear that one of its main goals is to be able to use these records and documents as potential evidence. Apart from these, there is no general procedural rule that imposes a duty on potential party, or a non-party, to preserve evidence.

- 139 There are no general consequences for failure to provide or preserve evidence, either in the legislation that prescribes these duties or in practice. Public officials who have failed in their duty to preserve public records for ten years may face disciplinary proceedings, or criminal proceedings if it can be proved that they wilfully destroyed those records.

4 ENFORCING DISCOVERY OBLIGATIONS

- 140 In the US there is a vigorous enforcement regime, compatible with the variety and intensity of discovery obligations. Responding parties are required to state any objections they have to discovery demands in written responses to those demands. The remedy for the requesting parties at that point is a motion to compel discovery. But, before applying to the court, they must first confer with the objecting party in an effort to avoid the need for court action (Rule 37(a)(1), FRCP). If that effort fails, they move for an order compelling discovery. If the court makes the order, the responding party is ordinarily granted a period of time to comply with the order. If the requested party does not comply, the requesting party may move for sanctions. The sanctions for non-compliance range across a spectrum of adverse consequences, ranging from a ruling that certain facts will be taken as established to dismissal or entry of default judgment (Rule 37(b), FRCP). The court must also order payment of the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was 'substantially justified or other circumstances make an award of expenses unjust'. There is one sanction that the court may apply without a motion made by the requesting party. The non-complying party may be forbidden to rely on the unidentified witness or undisclosed evidence (Rule 37(c)(1), FRCP). The court will permit use of such belatedly disclosed evidence only if the delay in making disclosure was 'harmless', or 'substantially justified'.
- 141 In England, the court has a general power to impose sanctions. The court will take into account whether the trial can still go ahead at the date planned. The following pertinent sanctions apply:

A party may not rely on documents that have not been disclosed without the permission of the court (Rule 31.21, UKCPR);

A party who fails to disclose an expert report cannot use it at trial or call the expert without the court's permission (Rule 35.13, UKCPR).

- 142 In addition to these sanctions, the court has a range of not mutually exclusive sanctions that it may apply. It will endeavour to fit the sanctions to the severity and the consequences of the breach. An order to pay costs incurred as a result of the default may be linked to some other sanction. The sanction that the whole or part of the case may be struck out (Rule 3.4, UKCPR and PD 3A) will only be imposed if a lesser sanction is not appropriate. Many sanctions are imposed in two stages, the first stage providing the non-complying party with an extended period to comply and, if it fails to do so, a punishment prescribed by the court in its decision will follow.⁸⁸
- 143 In Israel, in the reformed CPR, the proportionality principle, and its corresponding sanctions for 'abuse of the legal process', have become one of the cornerstones of civil proceedings, embodied in Rule 4, ICPR ('abuse of the legal process'). In principle, courts may enter judgment against a party who fails to comply with a court order for production of evidence. The plaintiff's case may be dismissed, or default judgment may be entered against defendant on such grounds. In practice, however, these sanctions are very rarely imposed. Mostly, the court will allow the party to amend this failure and pay costs. However, if the court is convinced that the defaulting party acted out of malice or contempt, the court may impose the said sanction.⁸⁹
- 144 In Germany, if a party fails to comply with an order to produce a record or a document, or if the court becomes convinced that he has not carefully researched the whereabouts of the record or document, a copy of the record or document produced by the party opposing party may be deemed proper evidence. Where no copy of the record or document has been produced, the allegations by the opposing party regarding the nature and content of the record or document may be assumed to be proven (§427, GCCP).
- 145 In Japan, if the party ordered by the court to produce documents and/or goods does not comply with the order, the court may deem the other party's allegations to be true. If the person ordered to produce documents and/or goods is a non-party, the court may order the third party to pay a non-penal fine of not more than 200,000 yen. If the presentation of evidence has been delayed, either intentionally or by gross negligence,

⁸⁸ S Blake (n 9) para 17.49, with further references.

⁸⁹ *Bank Leumi Le-Israel Ltd. v. Emanuel Timber Import-Export Trading Ltd.*, Civil Appeal (Supreme Court) 6528/99, Nevo e-database (13 June 2002).

and as a consequence the proceedings would be delayed, their presentation by the party that caused the delay may be refused by the court (Art. 157, JCCP).

- 146 In Argentina, Art. 388, ANCCPC, provides that if a party fails to comply with an order to produce a document or a record that is in its possession, even though its existence and content are manifestly plausible, the party's refusal to present it will establish a presumption against that party. The same consequence (adverse influence) is generally cited in judicial reasoning in matters requiring the parties' special collaboration, such as consumer protection and environmental protection, labour law and fundamental rights litigation, in which evidence that should have been kept is not disclosed following a judicial order requiring their disclosure. Aside from that, parties are not subjected to criminal prosecution or economic fines. Only if they acted recklessly or maliciously, such conduct may result with fines, next to adverse inferences.
- 147 The obligation of non-parties to provide information regarding the content of a record or file is more heavily sanctioned with economic fines, *astreintes* (progressive economic sanctions to encourage respect for court orders) or may even face criminal liability for disobedience (Art. 239, Criminal Code). In practice, these sanctions are not regularly imposed.

5 CONCLUSIONS

a) Pre-Litigation Discovery

- 148 Lawyers in all legal systems are required to do their utmost to gather evidence needed to assess whether or not to initiate proceedings in court. At present, the civil procedure rules of most legal systems do not provide a potential party with the means to compel the other party to provide him with evidence. Yet, all countries have adopted legislation on freedom of information held by government and municipal, or local, departments, agencies, public libraries and archives.
- 149 With respect to other pre-filing evidence-gathering techniques all countries, but the US, provide measures that will enable parties to obtain evidence with respect to which there is concern that it may be lost, or that its use will become more difficult, unless immediate action is taken to obtain it. In the US, even though potential parties cannot request the court to make an order for discovery, or inspection, at the pre-filing stage, there are strict rules regarding how information must be preserved and produced in civil disputes. In England, in addition, there are Pre-Action Protocols, backed by sanctions for noncompliance, that require the parties to cooperate in exchanging information early on in order to help them assess the strength of their case as well as its value, and enable them to resolve the case without litigation.

b) Discovery Planning and Initial Disclosure

- 150 A major difference concerns the time at which evidence is gathered. In the United States, the United Kingdom and Israel the parties are required to invest major efforts, time and money, in gathering evidence that it is not readily available to them at an early stage of the proceedings.
- 151 By contrast, in Germany and Japan, unless exceptional circumstances apply, the disputed issues and the burden of proof are clarified in an oral hearing in court before moving to the next step in which the parties may apply to the court to order the production and inspection of evidence in the possession of the other party or non-parties, the appearance of witnesses, etc. In these countries it is mostly the parties' responsibility to apply to the court that it will summon witnesses and order the production of documents according to their autonomous discretion, and the court will do so *ex officio* only in exceptional situations.
- 152 In Argentina the procedure is only to an extent driven by the parties, who have to stimulate the court through proposal of action, however the case management is in the hands of the court. The evidence-gathering process is inquisitorial, in the sense that the court plays a major role *ex officio* to complete or integrate the evidence provided by the parties.

c) Document Production and Inspection

- 153 Document production, including electronically stored information, is the main source of discovery in all jurisdictions due to the fact that, unlike witnesses, 'documents don't forget'. However, legal systems differ in the tools available to parties to obtain discovery, as well as in the magnitude and scope of the discovery, or disclosure, allowed.
- 154 In the US and in Israel, discovery does not require prior judicial order. In all other countries a disclosure order is necessary.
- 155 In the US, England and Israel the request for documents extends to any document that is relevant, and the requesting party need not specify the details of the documents or their contents. Another difference concerns the type of discovery. In England and Israel parties are required to disclose also evidence that will operate to their detriment. In the US, since 1993, parties are only required to disclose materials that they intend to rely upon.
- 156 By contrast, in Germany, Japan and Argentina the party requesting disclosure must designate the document or record; the facts the record or document is intended to prove; designate, as completely as possible, the contents of the record or document; cite the circumstances that substantiate its allegation that the record or document is in the opponent's possession; and designate the grounds on which the opponent has an obligation to produce the record or document.

d) Electronic Disclosure

157 Since the beginning of the twenty first century, discovery of electronically stored information has become central to litigation. Their immense volume has prompted the adoption of special legislation in the US, England and Germany. In Israel, Japan and Argentina there are no special rules regarding such disclosure.

e) Pre-Trial Depositions

158 The great majority of witness testimony used in American courts is taken by deposition. They may be taken of a party or a witness. The person deposed (deponent) appears before a stenographer authorized to administer oaths and gives sworn testimony in response to questions by the attorneys from both sides of the case. In their examination and cross-examination, the attorneys may put forward any relevant question, as long as it is not privileged. The testimony is transcribed, signed and sworn in.

159 Oral depositions are regarded as very effective vehicles because they permit the questioner to follow up on answers given by the witness and new lines of inquiry may be pursued as new facts are revealed.

160 Pre-trial depositions that are, next to document production, the main focus of American discovery, do not exist in any other legal system.

f) Interrogatories

161 Interrogatories consist of written questions to which written answers have to be provided by the other party and signed under oath. The answers are usually composed with the help of the answering party's attorney. The questions are not limited to information within the respondent's personal knowledge. Answering the questions may require the responding party to search records that are under the respondent's direct control. In particular, they are suited to discover organizational data stored in the corporate records.

162 Interrogatories are relatively inexpensive means of obtaining information. However, answering them may require the requested party to invest substantial time and money in providing the answers. In view of the cost involved, the number of interrogatories allowed has been restricted in the US and in Israel. In England they are confined to matters which are reasonably necessary and proportionate to enable the requesting party to prepare his own case or to understand the case that he has to meet.

163 In Germany and Argentina there is no such procedure.

164 In Japan, interrogatories modelled on the US system were introduced in the Japanese Code of Civil Procedure in 1996. In practice, this evidence-gathering procedure is rarely

used, because there is no way to ensure its effectiveness and there are no sanctions in case of violation.

g) Physical or Mental Examinations

- 165 In lawsuits involving questions about the mental or physical condition of a person involved in the events underlying the case, a medical examination may be a necessary part of the evidence.
- 166 In the US, England and Israel, the examinations are made by a party-appointed medical expert upon a party's demand, which in the US requires a prior court order.
- 167 In Germany, in Japan and in Argentina there are no special legal provisions regarding physical and mental examinations. Medical examinations are ordered by the judge upon request of a party. The medical examination is performed by a medical expert witness appointed by the court. In Germany and Argentina, but not in Japan, such examinations, if deemed necessary, may be ordered by the court *ex officio*.

h) Expert Testimony

- 168 Witnesses can give evidence on what they saw. They cannot give opinion evidence. It often happens, however, that there is need to establish, on the basis of the hard evidence that exists, what must have happened. Expert opinion can fill this gap. An expert can give an opinion on an issue that is within his field of expertise, and can state what the available evidence is likely to indicate. Therefore, expert testimony is used and relied upon in all legal systems. The legal systems differ in their reliance upon party-appointed experts as compared with court-appointed experts.
- 169 At one end of this spectrum stands the United States with its reliance on party-appointed witnesses and their aggressive cross-examination by the parties, a system that used to exist also in England and in Israel, but has been substantially moderated in the reforms of their CPR.
- 170 In the countries following the civilian legal systems, the court selects the experts, however in Japan only upon the application of one party or both. Aggressive interrogation of the experts is known only in Japan.
- 171 In Germany and in Japan party-appointed opinions are allowed but are qualified as party submissions, not expert opinions proper. In Germany, if they contradict each other in essential points, the court may not, without obtaining the opinion of a court expert who receives the whole file including these opinions, give precedence to one private opinion over the other. The court must clarify any discrepancies between private expert reports and court-appointed expert reports and provide the reasons for following, or not following, the expert opinion. In Japan the court will usually appoint three experts of

differing opinions and, through their interrogation by the court and the parties, decide which opinion shall prevail.

172 In Argentina, the experts are selected by the court from a list of pre-accredited professionals who have applied for inclusion on the list and are referred to as 'official experts'. The parties submit private expert reports and, in practice, courts take account of the private reports. However, because of the impartiality that official experts seem to offer, their expert opinions are regularly preferred by the Argentine court.

i) Obtaining Evidence from Non-Parties

173 All legal systems provide tools to obtain evidence from non-parties, but there are substantial differences regarding the circumstances and scope of such evidence gathering.

174 At one end of the spectrum stand the US, in which no prior court order is necessary. The American subpoena rule permits lawyers, admitted to practice in the court in which action is pending, to issue a subpoena commanding a non-party to provide document discovery comparable to that demanded of parties to the action.

175 In England a court order must first be obtained for documents specified by the applicant. The order will be given if the documents are likely to support the applicant's case, or adversely affect the case of one of the other parties, and their disclosure is necessary in order to dispose fairly of the case or to save costs.

176 In Germany, Japan and Argentina, the court may order, at its discretion (or, in Germany, upon a party's application), a non-party to submit documents or visual evidence for inspection. The third party must comply unless it has justified reasons not to do so.

177 In Israel, discovery and inspection are only intended to provide reciprocal disclosure of documents that are held by, or under the control, of each party. Obtaining evidence from non-parties is allowed only in exceptional cases.

j) Preservation of Evidence

178 The preservation of evidence is critical to any judicial process seeking to establish the truth. Legal systems differ substantially regarding its period and scope. At one end of the spectrum, one finds the US and Germany, in which the duty to preserve is triggered when litigation is anticipated. At the other end of the spectrum one finds Israel, Japan and Argentina, in which there is no general duty to preserve every record or potential evidence for a precise period of time. However, there are important areas in which such a duty is established.

k) Enforcing Discovery Obligations

- 179 In all countries there are sanctions for failure to comply with discovery obligations, ranging across a spectrum of adverse consequences, such as a ruling that certain facts will be taken as established, not allowing the defaulting party to rely on undisclosed evidence, reversal of the burden of proof, and, in appropriate cases, dismissal of claim or entry of default judgment, in addition to payment of reasonable expenses. In practice courts endeavour to fit the sanctions to the severity and consequences of the breach. Financial sanctions are also available for non-complying non-parties.

ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
ANCCPC	Argentine National Civil and Commercial Procedural Code
Art	Article/Articles
BGH	Bundesgerichtshof (Federal Court of Justice) [Germany]
cf	confer (compare)
ch	chapter
edn	edition/editions
ed	editor/editors
etc	et cetera
eg	exempli gratia (for example)
EDQ	Electronic Documents Questionnaire
ESI	Electronically Stored Information
EU	European Union
EUR	Euro
FamFG	Act on Proceedings in Family Matters and Non-Contentious Proceedings (Germany)
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GCCP	Code of Civil Procedure (Germany)
ibid	ibidem (in the same place)
ICPR	Civil Procedure Regulations 2021 (Israel)
IDF	Israel Defence Forces
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
PD	Practice Direction
PDPACP	Pre-Action Conduct and Protocols
PI Protocol	Pre-Action Protocol for Personal Injury Claims
Sec	Section/Sections
supp	supplement/supplements
trans/tr	translated, translation/translator
UK	United Kingdom
UKCPR	Civil Procedure Rules 1998 (UK)
US / USA	United States of America
USD	United States Dollar

USFRCP

v

vol

Federal Rules of Civil Procedure (US)

versus

volume/volumes

LEGISLATION

Act on Proceedings in Family Matters and Non-Contentious Proceedings (Germany).

Alternative Dispute Resolution (Israel).

Civil Procedure Regulations 2021 (Israel).

Civil Procedure Rules 1998 (UK).

Code of Civil Procedure (Japan).

Code of Criminal Procedure (Japan).

Federal Rules of Civil Procedure (US).

Federal Rules of Evidence (US).

National Civil and Commercial Procedure Code (Argentina).

Pre-Action Conduct and Protocols (UK).

Pre-Action Protocol for Personal Injury Claims (UK).

Testimony Regulations (Photocopies), 5730-1969.

Zivilprozessordnung (Code of Civil Procedure) (Germany).

CASES

- Abela v. Hammonds Suddards (a firm), [2008] EWHC 3153 (Ch).
- Armstrong & O'Connor v. First York, [2005] EWCA Civ 277.
- Bank HaPoalim Ltd. v. Nesher, Application for Permission to Appeal 6122/14, Nevo e-database (6 May 2015).
- Bank Leumi Le-Israel Ltd. v. Emanuel Timber Import-Export Trading Ltd., Civil Appeal (Supreme Court) 6528/99, Nevo e-database (13 June 2002).
- Case 11 OH 6/18 (11. Zivilkammer LG Aachen, Germany), Decision of 16 January 2019 [BeckRS 2019 1295].
- Case 8 U 1139/21 (OLG Nuremberg, Germany), Decision of 9 August 2021 (2021) [BeckRS 2021 22636].
- Case I ZR 197/07 (BGH, Germany) Decision 22 April 2010 [NJW 2011 778].
- Case IV ZR 190/08 (BGH, Germany) Decision of 12 January 2011 (NJW-RR 2011) 609; [BeckRS 2011 2152].
- Case VI ZR 192/92 (BGH, Germany) Decision of 8 June 1993 [NJW 1993 2382].
- Case VI ZR 72/54 (BGH, Germany) Decision of 16 April 1955 [BeckRS 1955 31197047].
- Case VII ZR 36/15 (BGH, Germany) Decision of 17 May 2017 [NJW 2017 3661].
- Case VII ZR 97/08 (BGH, Germany) Decision of 27 January 2010 [BeckRS 2010 04928].
- Case XII ZB 587/20 (BGH, Germany) Decision of 12 May 2021 [BeckRS 2021 17162]; [NJW 2021 2734].
- Clalit Health Services – Dental Clinic Sh.L.H. v. Gabay, Appeal (National Labor Court) 26828-09-13, Nevo e-database (24 December 2013).
- Digicel (St. Lucia) Ltd. v. Cable and Wireless plc, [2008] EWHC 2522 (Ch).
- E D & F Man Capital Markets Ltd v. Come Harvest Holdings Ltd. and others, [2022] 229 (QBD).
- Edwards-Tubbs v. JD Wetherspoon Plc, [2011] EWCA Civ 136.
- Gozlan v. Compagnie Parisienne de Participation, CA 174/88, Nevo e-database (14 April 1988).
- Guntrip v. Cheney Coaches Ltd., [2012] EWCA 392.
- Hefziba v. Lehner, CA 4218/90, Nevo e-database (31 December 1992).
- In re Auction House Antitrust Litigation, 196 FRD 444 (SDNY 2000).

Irving Picard v. Hebrew University of Jerusalem, Civil Case (District Court, Tel-Aviv) 18909-12-15, Nevo e-database (12 December 2019).

Lippens et al. C-170/11 (ECLI:EU:C:2012:540).

Logicrose v. Southend United Football Club (No 1), [1988] 1 WLR 1256.

Maabarot Properties – Agricultural Cooperative Society Ltd. v. Motivan Ltd., Application for Permission to Appeal 8571/16, Nevo e-database (19 January 2017).

Odera v. Ball, [2012] EWHC 1790 (TCC).

Plonit v. Ploni, CA 4738/13, Nevo e-database (3 September 2013).

Plonit v. Plonit, HCJ 6863/15, Nevo e-database (18 October 2015).

ProRail Case C-332/11 (ECLI:EU:C:2013:87).

Ricky Edwards-Tubb v. J.D. Wetherspoon Plc, [2011] EWCA Civ 136.

Rosh Kash Trade 88 Ltd. v. Rochvitz Isael (Sivan), Application for Permission to Appeal 7264/95, Nevo e-database (27 March 1996).

Schlagenhauf v. Holder, 379 US 104 (1964).

the Aérospatiale v. US Dist. Ct. for S. Dist. Of Iowa, 482 US 522 (1987).

Tomlinson v. El Paso Co., 245 FRD 474 (D.Colo. 2007).

United Medical Supply Company, Inc. v. United States, 77 Fed. Cl. 257, 259 (2007).

Webb Resolutions Ltd v. Waller Needham & Green (a firm), [2012] EWHC 3529 (Ch).

BIBLIOGRAPHY

- Bacher, in *Beck Online Kommentar ZPO* (46th edn, 1 September 2022), §284 GCCP.
- Berman, 'Reinventing Witness Preparation' (Summer 2015) 41 *Litigation* 20.
- C F Goodman, *Justice and Civil Procedure in Japan* (Oceana 2004).
- C Fox and J Stratford, 'Drafting BYOD [Bring Your Own Device] Policies' (Fall 2017) *Today's General Counsel*, at 16.
- C Wright, A Miller and R Marcus, *8 Federal Practice and Procedure* (3rd edn, 2010).
- Carpenter, in *Münchener Kommentar ZPO* (6th edn, 2020), §412 GCCP.
- D Baron, 'Argentina: Official Expert, Not Expert Witness' (27 September 2017), <https://www.linkedin.com/pulse/argentina-official-expert-witness-daniel-baron/>
- E Oteiza and R Berizonce, *Civil procedure in Argentina* (2021).
- Fritsche, in *Münchener Kommentar ZPO* (6th edn, 2020), §139 GCCP.
- Geier, 'A Defense Win in 'Enron Country' (23 January 2006) *Nat.L.J.*
- I Amit, *Privileges and Protected Interests – Disclosure and Inspection Proceedings in Civil and Criminal Law* (Nevo 2021) (in Hebrew).
- Israel Bar Association, *The Civil Procedure Reform Manual*, available at https://www.israelbar.org.il/magazine/civil_procedure_reform_2021/16/
- Jaspersen, in *Beck Online Kommentar ZPO* (46th edn, 1 September 2022), §251 GCCP.
- K Miki, National Report for Japan (2022).
- Keidel and Sternal, in *Kommentar FamFG* (20th edn, 2020), §26 FamFG.
- L L Teply and R U Whitten, *Civil Procedure* (4th edn, 2009).
- M Huber, 'Grundwissen – Zivilprozessrecht: Beweisvereitelung' (2020 *JuS*).
- Maloney, 'Preparing the Expert Witness for Deposition' (February/March 2017) *Today's*.
- Musielak, Voit and Stadler, in *Zivilprozessordnung: ZPO* (19th edn, 2022), §142 GCCP.
- N Trocker, 'Transnational Litigation, Access to Evidence, and U.S. Discovery: Learning from American 'Exceptionalism'?' in R Stürner and M Kawano (ed), *Current Topics in International Litigation* (2009).
- Post, 'Discovering the Internet of Things' (1 January 2015) *LegalTech News*.
- Prütting, in *Münchener Kommentar ZPO* (6th edn, 2020), §286 GCCP.
- R Marcus, 'Covid-19 and American Civil Litigation', in B Krans and A Nylund (eds), *Civil Courts Coping With Covid-19* (2021).

- R Marcus, 'Looking Backward' to 1938' (2014) 162 U. Pa. L. Rev. 1691.
- R Marcus, 'Of Babies and Bathwater: The Prospects for Procedural Progress' (1993) 59 Brooklyn L. Rev. 761.
- R Marcus, 'Reflections from an Outlier: An American Reaction to the EU Rules on Evidence' (2021) 11 International Journal of Procedural Law 106.
- R Wagner, 'Neuigkeiten zum internationalen Zivilverfahrensrecht Zustellung, Beweisaufnahme und pre-trial discovery of documents' (2022) EuZW 733.
- Rosenberg/Schwab/Gottwald, *Zivilprozessrecht* (Beck, 2018), §110II.1.
- S Blake, *A Practical Approach to Effective Litigation* (8th edn, Oxford University Press, 2015).
- S Russel-Kraft, 'Depositions Go Virtual During Pandemic; May Remain that Way' (May 22 2020) Bloomberg Law News
- S Timmerbeil, 'The Role of Expert Witnesses in German and US Civil Litigation' (2013) 9 Annual Survey of International & Comparative Law 163.
- Schaeffer, 'When Your Client Testifies' (July 2011) Trial Magazine.
- See E Lee and J Cantone, Mandatory Initial Discovery Pilot (MIDP) Final Report (FJC October 2022).
- Silverstein, 'E-Discovery Market Hits \$10B' (February 2016) LegalTech News.
- T Einhorn, *Private International Law in Israel* (3rd edn, 2022).
- U Goren, *Issues in Civil Procedure* (12th edn, 2015) (in Hebrew).
- Zimmermann, in *Münchener Kommentar ZPO* (6th edn, 2020) §411 GCCP.
- Zimmermann, in *Münchener Kommentar ZPO* (6th edn, 2020), §402 GCCP.