TAKING DISCOVERY IN THE EUROPEAN UNION

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Abstract

To foster international cooperation for taking evidence abroad in the new European Space of justice, the Regulation 1206/2001 has open two different ways. But is it not clear enough which is the treatment given to discovery, because it is not a method for obtaining evidence overseas, rather, a procedure put in place to search for the relevant material evidence which will allow the parties to access any information deemed necessary in proving the facts in a case (see above). It should be mentioned Tedesco Case, which never reached the ECJ as the proceedings which gave rise to the prejudicial question had ended (AUTO 27th September 2007). Nevertheless, the Advocate General made a statement in her conclusions: the refusal (by the authority of a member State) of the taking of evidence requested by the European authority was not thought to be justified.

Key words: Means of instruction, evidence, proof, takiing of evidence abroad, judicial cooperation, international cooperation, European Space of justice, discovery

Introduction

The lack of clarity surrounding the concepts used when referring to international aid available for obtaining evidence is related to the different views of the process (structure, phases, intervention of the judge, the parties etc.) present in the various legal systems and above all in the ideas of *common* or *civil law*. This can be noted in the case of *discovery*, characteristic of the former. In this sense discovery is not a measure or an act of instruction, rather it has to do with disclosure, which means to expose, reveal information, elements, data etc. For this reason, obtaining (or producing) evidence abroad through the discovery procedure cannot be confused as the latter involves the disclosure of data, elements etc. which were not known until the beginning of the investigation.

The Aim Of Discovery

Discovery is not proof or evidence in itself. It is rather a procedure put in place to attempt to ascertain the material evidence and information deemed necessary to the plaintiff in the preparation of a lawsuit. It does not imply the discovery of evidence (understood in the procedural sense), but rather items, documents or any other type of support that can be used as evidence in the proceedings. It constitutes the search for material evidence rather than taking evidence, as laid out in civil law systems.

Discovery can also be used to obtain the testimony of a person who will not be attending the trial[1]. It is worth noting here the differences in the practice of discovery in the British and North American legal systems. In the former, discovery can only be requested when the interested party specifies the material to be examined and shows the relevance this material may have in the case[2]. Moreover it is important to point out the difference between: "discovery of indirect material" and "proof or direct material", those materials which are to prove or disprove the facts in issue[3].

Furthermore, although discovery takes place at the beginning of a trial, before proceedings really begin, the differences between legal systems can be vast, and situations of *lis pendens*, for example, may occur, depending on when discovery is requested, (after presentation of the plea but before trial), at the discretion of one legal system or another. Notwithstanding, discovery is compulsory and begins "after pleadings have been exchanged"[4].

So, discovery occurs before the trial (for this reason it is referred to as pre-trial discovery), and among its many functions is that of avoiding surprises during the trial when a lawyer from either side asks the other for certain ends. This is important in that it denotes the way in which a trial develops ("*one day in the court*"), and the capacity of each side to convince the court, which holds great sway in these legal systems. All material evidence must be well prepared before a trial begins, if

not, at the time of the trial, the lawyer can or will lose the case[5]. If new elements (proof, events, etc.) are discovered later on, in the eyes of the court the trial will be lost[6].

It is also important to understand the difference between the request for discovery and that of "production of documents". In the first case, what is being requested are documents already in the hands of the defendant, whereas in the second, the plaintiff is authorized to request testimony from the accused (that they "produce" evidence, from which the term "production of documents" stems)[7]. Please note also that in linguistic terms and, above all, in the English language, different terms exist to refer to the different ideas, namely *gathering evidence* and *discovery*[8].

One of the main differences between *discovery* and other means of instruction (confession etc.) is that the first is an authentic line of investigation, through which not only is proof obtained but also any other information necessary for opening up further inquiries if relevant. At the same time, the option of obtaining all kinds of material evidence is more realistic during the discovery phase than during the actual trial. This can lead to situations in which certain pieces of material evidence collected during the discovery phase will not be accepted as proof during the trial9.

Finally, England and Ireland are two of the common law countries where discovery is better developed, or where more power is given to the procedure[10]. However, on understanding the differences between the North American and British legal systems regarding discovery it is worth examining whether there are any clear disadvantages in accepting this practice in Europe between the Member States, on the one hand and, on the other, whether discovery really is an unknown procedure in civil law[11].

Does discovery exist in civil law systems?

The main difference between the rules of procedural law in common and civil law systems lies not only in the amplitude of the so-called pre-trial phase but also in the faculties which correspond both to the parties and to the judicial authority in the application of discovery (whether for investigation or discovery) in finding material evidence[12]. Besides this, not all jurisdictions belonging to civil law have the same characteristics -a fact repeatedly highlighted by those authors who deal with comparative procedural law-; neither do those belonging to common law, although similarities between the two systems can exist in some instances.

On the other hand, in civil law systems, there is no need to apply discovery, given that proceedings tend to be written rather than oral, and therefore there is no tacit or strategic advantage to be gained from applying the element of surprise[13]. Thirdly, although a phase similar to that of pre-trial (beginning with the allegations or pleading) does exist in civil law systems, the investigative powers offered to the parties are minimal when compared to those corresponding to the parties in common law systems. This attribution of greater powers to investigate and look for material evidence offered to the parties under the concept of common law could be related to the fact that the judge has less power to conduct the trial, at least in the preliminary hearings[14].

Notwithstanding, the doctrine states that, although in both the French and the German legal systems, mechanisms and records exist which are similar or which perform the same function as the American pre-trial discovery, the techniques present in these legal systems for finding the truth (discovering material evidence) are not comparable to those laid out in American law[15]. Furthermore, the possible advantages to companies of the rules regulating the discovery procedure in the USA have been pointed out, among others the possibility for "*discovery shopping*" (see below)[16].

In German law, although the judge is not responsible for providing evidence, in accordance with the dispositive principle of the parties over the trial (*Verhandlungsmaxime*), since 1933 a series of provisions have been included in the Civil Process Code of 1877 (*Zivilprocessordnung*), stipulating that the parties must make complete and truthful statements on the facts of a trial[17]. Furthermore in 2002 an important reform was brought into power, to allow for the production of documents through an autonomous process. (art. 142 *ZPO*)[18].

It has been noted however that there is no real correlation between this procedure and the Anglo-Saxon discovery procedure, in that it is not probing in character[19]. In Austria, discovery is to be applied only so as to allow each party to bring to the trial the material evidence they deem relevant in defending their own arguments. Neither in Belgian law can we find a process comparable to discovery as seen in Britain.

Finally, Italian law stipulates the possibility to "*produrre la prova*" (produce the evidence) in article 184 of the CPC (Codice di Procedura Civile, or Code of Civil Procedure)[20]. Numerous reforms

have been proposed, following those put in place in France (with the introduction of the *de rèfèrè* procedure), proposed by the Vaccarela Commission[21]. Such modifications are related to the summary judgement (*provvedimento sommario*) at corporate level, which allows the parties (or their lawyers) to develop an articulate pre-trial agenda (*istruttoria pre-giuduziale*) relating to the upcoming trial[22].

The practice of discovery in Regulation 1206/2001 and in the Hague Evidence Convention of 1970

The controversial article 23 of the Hague Evidence Convention of 1970

Investigations into the existence of material evidence to prove the facts alleged by the parties in a case brought to light abuses in the system which led the British delegation to propose-late in the negotiation of the Convention- the possibility of making a reservation in Article 23 of the Hague Evidence Convention (HEC), 1970, whereby: *"A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries"*[23].

The main doubts brought to light by the application of this article refer to its genesis, and to its different interpretations, depending whether it is seen from an American or a European standpoint. For these reasons it can be said that the article has raised much controversy, frustrating to some extent the expectations of the States involved[24]. In principle, the objective of the reservation was to avoid having to execute overseas warrants through the discovery procedure, when attempting to attain information in the pre-trial phase of a hearing, or when dealing with information which had not been indicated in the warrant[25].

Another objective of the reservation was that of limiting the discovery requests coming from the USA, who also formed part of the HEC of 1970, due, precisely, to the different interpretations at play in their jurisdictions. Moreover, it was put in place in an attempt to avoid the so-called "fishing expeditions", or the obtaining of evidence without concern for an individual's fundamental rights or guarantees, not only relating to the trial but also more generally speaking[26].

In particular, this reservation highlights the difficulties mentioned in the House of Lords sentence in the Westinghouse case (In re "Westinghouse Electronic Corporation Uranium Contract Litigation") laid down in 1978, and debated in the meetings of the special commission responsible for supervising the application of the afore-mentioned Convention[27]. In this case the response of the British High Court to the petition for an American Letter of Request was that this was not applicable to its execution.

The fact that the State addressed executes the afore-mentioned reservation provided in article 23 of the HEC of 1970 does not necessarily mean that a request cannot be processed – through the Convention – for evidence to be obtained. This process can take place even before the procedure begins, in the so-called pre-trial phase.

By contrast, the text of the HEC of 1970 clearly indicates that the execution of procedures for obtaining evidence will be employed to bring the evidence obtained overseas into the proceedings which have already been initiated or will be initiated in the future by the State of execution. This is worth bearing in mind when analysing which aspects actually were to be exempt from the pre-trial discovery of documents, according to the proposal of the British delegation, as even for those States who have carried out the reservation, the documents may not have been totally excluded[28].

It is necessary here to clarify the possible reach, as well as the limitations, which can come up when applying the discovery procedure overseas, that is to say when one of the States, members of the HEC of 1970, makes a request to another, regardless of whether or not they have made the reservation set out in article 23. To this end, the Westinghouse Electronic Corp. case is interesting for a number of reasons when trying to answer this question (although the Letter of Request was not granted via conventional methods), as are the observations made by the doctrine when relating the overseas discovery procedure with international competition[29].

Initially, it may appear that the practice of discovery overseas means accepting that one State gets to exercise its judicial function on another State's territory, a practice which would go against their "judicial sovereignty", constituting a classic limit to the realization of evidence overseas, and which is covered by article 12 of the HEC of 1970[30]. This condition for enabling the execution of a Letter of Request is related to the traditional vision that the rules of procedure have an obvious public character and, for this reason, the obtaining of evidence constitutes above all a task for the judicial authorities.

Furthermore the taking of evidence overseas may go against national interests, or endanger national security, especially when dealing with issues of interest for the State. However these are not valid reasons to impede the practice of discovery overseas according to the HEC of 1970. Quite the contrary, the Report on the work of the special commission on the operation of the Convention of 18 march 1970 on the taking of evidence abroad in civil and commercial matters (prepared by the Permanent Bureau, at its meeting in June 1978), explains that the use of the reservation must be limited to those cases where the Letter of Request lacks sufficient explanations, leading to the impossibility of identifying the documents called upon to be obtained or examined[31].

Relating to the second question, many academic writers have considered that the possibility of using the discovery procedure must not be limited to those legal systems where it is already in place, as the excesses which have taken place in the use of this procedure are due to other reasons. In other words, the question of whether or not the use of discovery is excessive does not derive from its workings (given that cases do exist where its implementation is necessary in clearing up the facts), rather in an abuse of the exercise of jurisdiction. Thus one could draw the line at the use of discovery overseas if the competence of the State authorities is exorbitant, when a case has minimum contact with the Forum.

The treatment of discovery in EC Regulation 1206/2001

There is doubt over whether discovery can be considered an instructional activity, given that it is not a method for obtaining evidence overseas, rather, a procedure put in place to search for the relevant material evidence which will allow the parties to access any information deemed necessary in proving the facts in a case (see above). Besides, the expression "*tout acte d'instruction*" taken from French law, cannot be interpreted to also include discovery (the investigation or discovery of material evidence), as the concept of discovery as such is alien to this legal system[32].

There are certain academic writers who consider that discovery is indeed included in EC Regulation 1206/2001, although not expressly mentioned as it is not considered to be useful. This is because the United States is not a member of the EC. The relevance of this statement is that the main difficulties in the use of discovery stem from the differences in its perception from the viewpoints of the Member States (and in particular Great Britain) on the one hand and the United States on the other[33]. In a somewhat more nuanced fashion, and on carrying out a full interpretation of the entire Community law, discovery is not considered to include instructional activities. Its aim is also not to give evidence; rather it is exploratory, or related to the actual search for sources of evidence[34].

Along these lines the Advocate General made a statement in her conclusions presented on 18th July 2007 in the Tedesco case, which never reached the ECJ as the proceedings which gave rise to the prejudicial question had ended (AUTO 27th September 2007). In particular, the refusal (on the part of the relevant British authorities) of the taking of evidence requested by the *Tribunale civile di Genova* was not thought to be justified. The requested order for a description of goods was not considered to be covered by EC Regulation 1206/2001.

On the other hand it is important to point out, as mentioned in article 1, 2. of the EC Regulation ("*evidence which is not intended for use in judicial proceedings, commenced or contemplated*") the distinction between two situations. In the first instance, an order to produce documents is inadmissible if the documents whose discovery is sought lead only to the identification of items which are capable of serving as evidence but which do not in themselves serve an evidential function in the proceedings (a so-called "train of enquiry" — the inadmissible search for material which may be relevant as evidence)[35].

Secondly, an order to produce documents which are discovered only upon execution of the order is admissible, if such documents are specified or described with sufficient precision and are directly linked to the subject-matter of the dispute. In particular the order of the Italian court serves the purpose of discovery of that evidence[36].

Finally, other ways to impede the request for discovery overseas exist, such as in those cases where the overseas decision is not to be recognised as the use of the discovery procedure has been abusive.

Conclusion

Although there is no direct reference to discovery in the Regulation 1206/2001, it cannot be denied that the concept falls within its material scope. This is because the Regulation not only

includes the obtaining of evidence overseas pertaining to trials which have already been initiated, but also those contemplated, and as shown *supra*, discovery takes place in the pre-trial phase.

[1] In fact when it first originated, this practice was mainly used to avoid loss or disappearance of evidence, in an historic context where the distance between the litigants and the administrators of justice was wide on the one hand and, on the other, the amount of time which passed between the trial and the moment when the events took place was large. See, RAGLAND, G., *Discovery before trial*, Callaghan and Company, Chicago, 1932, pp. 13 onwards.

[2] For this reason, the British delegation opposed the use of *discovery* in its wider sense, bringing into play article 23 of the Hague Evidence Convention of 1970. For more details, GERBER, D.J., «Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States", *AJCL*, 1986, vol. 34, pp. 781 onwards.

[3] See, COLLINS, L., "The Hague Evidence…", *loc. cit*., p. 298.

[4] See, CAMPBELL, D, *Serving…*, *op. cit*., 1998, p. 458.

[5] In other words, if the plaintiff does not manage to prove that which is requested, they lose the case. If there is insufficient proof, this fact is not overlooked, rather the trial is lost immediately. Please see, MURPHY, P., *Evidence and Advocacy*, 5ª ed., 1998, pp. 1-23.

[6] Along these lines, one principle governing evidence in English law is that "a party cannot be caught out during the trial". For more details please see, D. CAMPBELL, *Serving…*, *op. cit.*, p. 459.

7 Please refer to, Levine, J.B., *Discovery…*, *op. cit.*, pp. 44-48.

[8] For more details see, COLLINS, L., "The Hague Evidence…", *loc. cit.*, p. 338.

[9] In any case, the discovery procedure does not constitute merely a set of rules which regulate it, rather it is covered by its own individualised scientific and legal terminology, the *Law of Discovery*, being independent from, and not to be confused with, *Law of Evidence.* Please see, SIMPSON, R. WM., *Civil Discovery and depositions, Trial Practice Library*, 2nd ed., Wiley Law Publications, New York, 1996.

[10] See, CAHILL, E., *Discovery in Ireland*, Sweet and Maxwell, Dublin, 1996.

[11] For a detailed study of the differences and similarities between the practice in the USA and Britain please see, LEVINE, J.B., *Discovery. A Comparison between English and American Civil Discovery Law with Reform Proposals*, Clarendon Press, Oxford, 1982; CLARK, D.S., "Chapter 16. Civil Procedure", *Introduction to the law of the United States*, Edited by D.S. Clark and T. Ansay, Kluwer, 2002, pp. 374 onwards. This author indicates that it may appear surprising that the system in place in the USA has more in common with the Germanic tribes than with that which exists at present in Germany (documentary and written).

[12] In fact one of the main doubts surrounding the reform of article 142 of the German *ZPO* which entered into force on 1st January 2001 (*Bundesgesetzblatt*, 2001, I, 40, pp. 1887 onwards), was fear of conceding excessive power to the judge, similar to the American procedure of *discovery of documents*. Please refer to, DI FAZZIO, G., "La riforma dell'esibizione di documenti nel processo civile tedesco", *RTDPC*, 2006, p. 154.

[13] The doctrine states: "*discovery is less necessary because there is little, if any, tactical or strategic advantage to be gained from the element of surprise*" (véase, MERRYMAN, J.H., *The civil law…*, *op. cit.*, p. 113).

[14] In the doctrine, G. HAZARD addresses the differences in the roles played by the judge and the parties in the presentation of evidence (please see "Discovery and the rule of the judge in civil law jurisdictions", *NDLR*, 1993, pp. 1019 onwards). Please see also; GLASSER, C., "Civil procedure and lawyers. The adversary System and the Decline of the orality Principle", *MLR*, 1993, pp. 307-324.

[15] Please refer to, VON MEHREN, A./ RUSELL GORDLEY, J., *The civil law System*, Little, Brown and Co., Boston and Toronto, 1977, p. 1158.

[16] Article 1782 of the United States Code allows all American courts to adjudicate all proceedings or existing instructional techniques in American procedural law at the request of a foreign judicial authority, including discovery. Please see, LEGUM, B., «Discovery in aid of foreign proceedings provided by United States Courts», *RDAI*, 1998, núm. 7, pp. 747 onwards.

[17] However it is not considered similar to discovery. For more details, NADELMAN, K.H., «De la preuve en Droit allemand», *Bulletin de la Société de législation comparé*, vol. 68, 1939, pp. 173 onwards.

[18] The revised article 142 of the ZPO states that the showing of documents is a procedural duty. For more details, DI FAZZIO, G., "La riforma dell'esibizione di documenti nel processo civile tedesco", *RTDPC*, 2006, pp. 143 onwards.

[19] *Ibid.*, p. 154.

[20] Please refer to, COMOGLIO, L. P., "Istance istruttorie e poteri del giudice ex art. 184 CPC", *Riv. Dir. Proc.*, 1999, pp. 989 onwards.

[21] See, among others, CECCHELLA, C., "Il rèfèrè italiano nella riforma della società", *Riv. Dir. Proc.*, 2003, pp. 1130 onwards.

[22] Please see, RICHI, E. F., "Verso un nuovo processo civile?", *Riv. Dir. Proc.*, 2003, pp. 221-223.

[23] And in particular, the Spanish government carried out the following reservation*: "Spain does not accept the Letters of Request deriving from the pre-trial discovery of documents procedure, as recognised in common law countries"*.

[24] Thus the sense of this disposition may be interpreted differently depending on whether it is analysed from an American or a European perspective, due to the different interpretation of proceedings present in each of these jurisdictions. There is a detailed analysis of this idea in COLLINS, L., "The Hague Evidence…", *loc. cit.*, pp. 289 onwards; y GERBER, D.J., «Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States", *AJCL*, 1986, vol. 34, pp. 781 onwards.

[25] The doctrine states that the objective of the reservation was to limit the cited discovery orders used in gaining documentary evidence in the pre-trial phase, and to avoid executing decisions based on discovery with a general character. (Please refer to NAISH, J./THOMAS, R., "United Kingdom", *The Comparative Law Yearbook of International Business*, Special Issue, 1998, p. 462).

[26] See, EDWARD, D.M., "Taking of Evidence abroad in civil or commercial matters", *ICLQ*, 1969, vol. 18, p. 650.

[27] The decision is published in *WLR*, 1978, vol. 81 and also appears in I*nternational Legal Materials*, 1978, vol. 38.

[28] See, SCHORE, L./SMITH, H., "Making applicants take evidence properly: challenges to letters of request", *ICL*, 1998, pp. 41 onwards.

[29] For an overview of this matter please see, OXMAN, B.H., "The choice between direct discovery and other means of obtaining evidence abroad: the impact of the Hague Evidence Convention", *University of Miami Law Review*, 1983, vol. 37, pp. 733 onwards.

[30] In the Westinghouse Elec. Corp. case the argument of sovereignity is used to prevent the execution of the discovery order. Please see, COLLINS, L.,"The Hague Evidence…", *loc. cit.*, p. 347.

[31] Please refer to, *Report on the work of the special commission on the operation of the Convention of 18 march 1970 on the taking of evidence abroad in civil and commercial matters*, June 12-15, 1978 (prepared by Permanent Bureau), *International Legal Materials*, 1978, vol. 17, p. 1428.

[32] Please see, COLLINS, L., "The Hague Evidence…", *loc. cit.*, p. 303.

[33] Please refer to, LEBEAU, D./NIBOYET, M.L., "Regards croisés du processualiste et de l'internationaliste sur le Règlement CE, du 28 mai 2001, relatif á l'obtention des preuves civiles á l'étranger", *Gaz. Pal.*, Jan-Feb 2003, p. 225.

[34] Therefore, discovery is not consdered to include: the procedural investigations, which lack a clearly specified objective; the inquiries for proof, which do not have a previous definition of the *thema provandum;* the investigative activity which, rather than as a control supporting a situation which has actually already been defined and before the possibility of linking legal consequences to it, serves to find facts or information relevant in defining the object of contention. (véase, TROCKER, N. , "Note sul Regolamento…", *loc. cit*., p. 680).

[35] In such cases, the evidence is used merely indirectly. Accordingly, the condition, as stated in article 1, 2. of the EC regulation "for use in judicial proceedings" is not satisfied. (Please see Opinions of the Advocate General, as quoted above; marg. 72).

[36] Particularly, the request of the Italian court is admissible, in that the requested evidence is intended to be used to allow the plaintiff to prove the existence of a patent infringement as such, the extent thereof and, accordingly, to quantify his damages claim. (*ibid.*, margs. 73-74).