CHAPTER I

THE ROLE OF DISCOVERY IN THE U.S. LEGAL SYSTEM

"Discovery" in the context of U.S. trial practice refers to the process by which parties to a legal proceeding gain access to facts which may directly or indirectly support their claims or defenses. In the United States, there are five basic forms of discovery: depositions, interrogatories, requests for production of documents (or permission to inspect), physical and mental examinations, and requests for admission. Discovery is not the process by which the court discovers the facts; discovery is the process by which the parties discover the facts which are then presented to the court by the parties. The adversarial process is intended to ensure that the relevant facts are brought to the attention of the court. The identity of the person responsible for collecting the facts is a fundamental difference between adversarial and inquisitorial systems of justice common in most foreign jurisdictions. This difference explains much of the hostility by foreign jurisdictions to U.S. discovery requests.

The increase in the amount of litigation in the United States involving foreign parties has increased the frequency of the need to collect evidence located outside the United States. Antitrust law is one particular field which has experienced such increase. In cases involving parties or witnesses outside the United States, the collection of evidence located abroad becomes imperative in the adjudication of the case. This publication is designed to assist those involved in U.S. litigation in understanding the legal and practical parameters of collecting evidence located in a foreign jurisdiction.[1]

One recurring theme in this publication is the general hostility of foreign courts to U.S.-style discovery. There are two primary sources of this hostility. The first is that most civil law countries use an inquisitorial system of justice characterized by an active judge. In such systems, the judge questions the witnesses and decides which documents to request. The gathering of the evidence is perceived as a sovereign function best left to an active judge. In contrast, the U.S. judicial system is characterized by a neutral judge and an active bar. It rests on the assumption that justice is achieved through the presentation of the facts before a passive judge or

1. For a summary of discovery in domestic antitrust cases, *see* ABA SECTION OF ANTITRUST LAW, ANTITRUST DISCOVERY HANDBOOK (3d ed. 2013).

jury by opposing parties.[2] Access to all relevant facts (even inadmissible ones) therefore becomes an essential element in achieving this result. Discovery is the means by which each party involved in litigation may obtain the evidence necessary to resolve its dispute. The discovery rules codified in state and federal civil procedure law achieve this objective by providing for the right to petition the court to compel discovery and granting the court the right to do so. Leaving aside the debate over the better system—adversarial or inquisitive[3]—it is fair to observe that civil law systems are wary of granting lawyers the responsibility of collecting evidence.[4]

The second source of hostility of foreign jurisdictions to U.S. discovery requests is the perceived expansive scope of U.S. discovery. As discussed in Chapter II, the scope of discovery in U.S. civil proceedings is broad. Parties involved in litigation in the United States can obtain discovery of any nonprivileged matter that is relevant to the claim or defense of any party.[5] A discovery request will generally be denied only if it is unduly burdensome or irrelevant or encroaches on a privilege.[6] It is left largely to the discretion of the trial court to determine whether the grounds for denying a discovery request are present. Moreover, it is

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2. *See* E. Allan Lind, John Thibaut & Laurens Walker, *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129 (1973).
3. For a discussion of the debate, *see* J.A. Jolowicz, *Adversarial and Inquisatorial Models of Civil Procedure*, 52 INT'L & COMP. L.Q. 281 (2003); Gerald Walpin, *America's Adversarial and Jury Systems: More Likely to Do Justice*, 26 HARV. J.L. & PUB. POL'Y 175 (2003); Francesco Parisi, *Rent-Seeking Through Litigation: Adversarial and Inquisitorial Systems Compared*, 22 INT'L REV. L. & ECON. 193 (2002); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).
4. *See* Rolf Trittmann & Mario Leitzen, *Haagerbeweisübereinkommen undpretrial discovery: Die zivilprozessuale Sachverhaltsermittlung unter Berücksichtigung der jeweiligen Zivilprozessrechtsreformen im Verhältnis zwischen den USA und Deutschland*, 23 IPRAX 7 (2003); Kevin McDonald & Christoph Wetzler, *Discover the Opportunities–US Discovery im Prozess*, 48 RECHT DER INTERNATIONALEN WIRTSCHAFT 212 (2002); Martin J. Reufels, *Pretrial Discovery Maßnahmen in Deutschland: Neuauflage des deutschamerikanischen Justizkonflikts?*, 45 RECHT DER INTERNATIONALEN WIRTSCHAFT 667 (1999).
5. FED. R. CIV. P. 26(b).
6. Hickman v. Taylor, 329 U.S. 495, 508 (1947).

unlikely that an appellate court will overturn the exercise of discretion by the trial court unless it amounts to gross abuse.[7] This broad scope, combined with the broad latitude afforded by U.S. judges,[8] is perceived by foreign jurists as fostering "fishing expeditions" by U.S. lawyers eager to build a case and perhaps impose costs on their adversaries.[9] Whether this characterization is justified or accurate does not have to be answered here. The fact that the impression exists in foreign jurisdictions complicates the collection of evidence in foreign jurisdictions as discussed in several Chapters of this publication.

The objective of this publication is to address the legal rules that apply to collecting evidence located outside the United States. These methods may be divided into two general categories. First, as discussed in Chapters II, III, and IV, U.S. law imposes specific requirements and limitations on the discovery process when the evidence is located abroad. In addition, the United States is a signatory to important international conventions which may need to be observed. Second, litigants collecting evidence located abroad will have to consider the local law applicable where the evidence is located. Chapters V through XX provide a country-by-country analysis of local law requirements and limitations on the collection of evidence for use in U.S. civil proceedings.[10]

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7. Voegeli v. Lewis, 568 F.2d 89, 96 (8th Cir. 1977).
8. Herbert v. Lando, 441 U.S. 153, 183 (1979).
9. Brief of Amicus Curiae the Republic of France at 12, *Société Nationale Industrielle Aérospatiale v. United States Dist. Court* (U.S. Supreme Court No. 85-1695), *reprinted in* 25 I.L.M. 1526 (1986); Brief of Amicus Curiae the Government of the United Kingdom at 14, *Aérospatiale* (No. 85-1695), *reprinted in* 25 I.L.M. 1564 (1986); Brief of Amicus Curiae the Government of Switzerland at 10, *Aérospatiale* (No. 85-1695), *reprinted in* 25 I.L.M. 1554 (1986); Brief of Amicus Curiae the Federal Republic of Germany at 15, *Aérospatiale* (No. 85-1695), *reprinted in* 25 I.L.M. 1547-48 (1986).
10. This publication addresses the collection of evidence from abroad for use in civil litigation in the United States. There is a specific emphasis given to private antitrust cases. Antitrust cases brought by the antitrust agencies, as well as criminal cases in general, are not addressed in this publication.