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### Sumario

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*Este artículo analiza la tensión estructural entre el discovery/disclosure de tradición common law y la soberanía procesal de los Estados de civil law en el contexto del RGPD. A partir de una reconstrucción comparada de los modelos probatorios de los países (sistemas legales) del civil law, y anglosajón, se examina cómo los tribunales estadounidenses y británicos proyectan órdenes de discovery y disclosure sobre pruebas situadas en Europa, tratando con frecuencia el Convenio de La Haya de 1970 y, en la UE, el Reglamento (UE) 2020/1783 como canales meramente opcionales. Frente a ello, se estudian las respuestas del Derecho de los países (de los sistemas legales) del civil law, mediante blocking statutes y derecho de protección de datos, tomando como referencia la Loi de blocage francesa, el caso Christopher X y la funcionalidad del RGPD —en particular su art. 48— como loi de blocage sectorial en asuntos como Kashef v BNP Paribas. Se sostiene que la compatibilidad es solo parcial y se proponen las bases de un “civil-law friendly discovery” fundado en comity, proporcionalidad y cooperación judicial.*

### Abstract

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*This article examines the structural tension between common law discovery/disclosure and the procedural sovereignty of civil law States in the post-GDPR landscape. Building on a comparative reconstruction of evidentiary models of civil law countries (legal systems) and common law systems, it analyses how U.S. and English courts project discovery and disclosure orders extraterritorially, often treating the 1970 Hague Evidence Convention and, within the EU, Regulation (EU) 2020/1783 as optional channels. The study then explores responses from the law of civil law countries (legal systems) through blocking statutes and data protection law, focusing on the French Loi de blocage, the Christopher X judgment and the emerging role of the GDPR—particularly Article 48—as a sectoral loi de blocage in cases such as Kashef v BNP Paribas. It argues that compatibility is only partial and context-dependent, and outlines the conditions for a “civil-law friendly discovery” grounded in comity, proportionality, court-to-court cooperation and the fundamental-rights architecture of EU law.*

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**Palabras clave:** *Obtención transfronteriza de pruebas, Proceso civil internacional, Protección de datos, Convenio de La Haya de 1970, Leyes de bloqueo.*

**Keywords:** *Cross-border Evidence gathering, International civil procedure, Data protection, 1970 Hague Evidence Convention Blocking statutes*

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## 1. Introduction and research problem

A strand of the literature<sup>1</sup> has long suggested that the system of letters rogatory (in Spanish, *comisión rogatoria*) rests, in general terms, on comity and reciprocity between courts and tribunals of different States, aimed at facilitating the performance of their adjudicatory functions. State practice regarding the treatment of foreign rogatory letters has been considerably developed, in particular through (a) the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, (b) the Inter-American Convention on Letters Rogatory, and, within the European Union, (c) Regulation (EU) 2020/1783 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

Building on this, Buxbaum<sup>2</sup> argues that, beyond mere courtesy, there operates a principle of territoriality. A concept that could be understood as a sort of “procedural sovereignty”. By virtue of this principle, States retain control over the taking of evidence on their own territory. Put differently, States are not permitted to unilaterally take or obtain evidence abroad on their own account and at their own risk. Dodge<sup>3</sup> maintains that this historic friction between States and the conduct of procedural activity abroad has been addressed—at least in part—by the aforementioned instruments of international cooperation. In doctrinal terms<sup>4</sup>, these treaties are best understood as international agreements that organise the taking of evidence abroad in a manner that respects the legal orders concerned and channels requests through the local courts. This design seeks to prevent infringements of the procedural sovereignty of the States involved.

The central tension arises from the concept and mechanisms of access to evidence in the two major legal traditions, common law and civil law. In continental Europe, Chiovenda<sup>5</sup> conceptualised evidence as a procedural mechanism fully administered by the judge—not by the parties—and as a cornerstone of the inquisitorial role of the continental judge, whose task is to ascertain the truth rather than simply to decide which party argues its case more effectively. As a result, the common law notions of discovery and disclosure are largely unknown in continental Europe<sup>6</sup>. Under these procedural devices, characteristic of the common law tradition, lawyers may compel one another to disclose documents before trial in a pre-trial phase, with the judge playing essentially a supervisory or testimonial role.

The traditional reluctance of continental European systems to depart from judicial control of evidence-taking and the primacy of the *lex fori* stands in tension with the practical advantages of

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<sup>1</sup>PENGELLEY, «A compelling situation: Enforcing American letters rogatory in Ontario», *Canadian Bar Review*, vol. 31, n.º 2, 2006, pp. 346 - 348.

<sup>2</sup>BUXBAUM, «Territory, territoriality, and the resolution of jurisdictional conflict», *American Journal of Comparative Law*, vol. 51, 2003, pp. 671–672.

<sup>3</sup>DODGE, «International Comity in the Fourth Restatement of Foreign Relations Law», in STEPHAN/CLEVELAND (eds.), *The Restatement and Beyond: The Past, Present, and Future of U.S. Foreign Relations Law*, Oxford University Press, 2020, pp. 2-3 y 8.

<sup>4</sup>OXMAN, «The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention», *University of Miami Law Review*, vol. 37, n.º 4, 1983, pp. 733 ss.

<sup>5</sup>CHIOVENDA, *Principii di diritto processuale civile*, 3.<sup>a</sup> ed., 1928.

<sup>6</sup>HAZARD, «Discovery and the role of the judge in civil law jurisdictions», *Notre Dame Law Review*, vol. 73, 1998, pp. 1017–1028.

common law discovery and disclosure in facilitating evidentiary exchange and pre-trial settlement<sup>7</sup>. This friction becomes particularly acute in cross-border disputes involving electronically stored documents, information and personal data, where international soft-law and practice-oriented frameworks emphasise comity, proportionality and the need to accommodate data-protection constraints.<sup>8</sup>

In practice, common law courts have routinely entertained applications that, in effect, require parties located in continental Europe to identify, collect and produce documents and data for proceedings in the common law forum. In the United States, this occurs primarily through ordinary domestic discovery under the Federal Rules of Civil Procedure, and in England and Wales through disclosure under the Civil Procedure Rules. Alongside these domestic mechanisms, both systems also provide distinct routes to assist foreign proceedings—most notably 28 U.S.C. § 1782 in the United States and the Evidence (Proceedings in Other Jurisdictions) Act 1975 in the United Kingdom—through which evidence located domestically may be obtained for use abroad<sup>9</sup>. This places the affected party in the dilemma of either (a) breaching its own domestic law, which will often restrict the large-scale disclosure of confidential data, or (b) disobeying the foreign court order and incurring disciplinary liability or severe procedural consequences in the common law proceedings<sup>10</sup>. In practice, common law courts tend to treat recourse to the international mechanisms of the Organisation of American States (OAS) or the Hague Conference on Private International Law (HCCH) as optional<sup>11</sup>, given that they have at their disposal domestic tools such as discovery and disclosure and the power to compel the European party to comply.

Against this background, the present article analyses the management and concept of evidence in comparative procedural law and, in light of that comparative analysis, addresses the following research question: To what extent is the use of discovery and disclosure orders issued by common law courts compatible with the principle of procedural sovereignty of civil law States and with the instruments of international judicial cooperation? The following sections first reconstruct the structural differences between civil law and common law models of evidence, and then examine how those differences play out when common law discovery or disclosure is projected onto continental European territory.

## 2. Comparative models of evidentiary management

### 2.1. The continental European (civil law) model

#### a. *Quasi-inquisitorial judicial control*

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<sup>7</sup>CHASE, «American “Exceptionalism” and Comparative Procedure», *The American Journal of Comparative Law*, vol. 50, n° 2, 2002, pp. 277 ss.

<sup>8</sup>THE SEDONA CONFERENCE, «The Sedona Conference practical in-house approaches for cross-discovery and data protection», *The Sedona Conference Journal*, vol. 17, 2016, pp. 403 - 409.

<sup>9</sup>CURRAN, «U.S. Discovery in a Transnational and Digital Age and the Increasing Need for Comparative Analysis», *Akron Law Review*, vol. 51, n° 3, 2017, pp. 857 ss.

<sup>10</sup>REYES, «The U.S. discovery–EU privacy directive conflict: Constructing a three-tiered compliance strategy», *Duke Journal of Comparative & International Law*, Vol. 19, n.º 2, 2009, p. 357 ss.

<sup>11</sup>CAYLOR, «Modernizing the Hague Evidence Convention: A proposed solution to cross-border discovery conflicts during civil and commercial litigation», *Boston University International Law Journal*, vol. 28, 2010, pp. 345–392.

Langbein<sup>12</sup>, in his classic study of German civil procedure—a paradigmatic civil law system—notes that the evidentiary regime is not based on common law-style discovery or disclosure, but is instead embedded in the trial itself, which comprises several hearings rather than a single trial event. Within this structure, the judge may, *ex officio*, pose questions to witnesses or request that the parties produce particular evidence if this is considered necessary to ascertain the truth. This logic is reflected today, for instance, in Spanish law, where the *Ley de Enjuiciamiento Civil (LEC)* structures ordinary proceedings into a written pleading phase, followed by a preliminary hearing and a trial (arts. 414–436). It is at the preliminary hearing that the judge addresses procedural issues and decides on the admissibility of the evidence proposed by the parties, which is then taken at the trial hearing. In a similar vein, the *Codi de procediment civil d'Andorra (CPC)* provides, for ordinary proceedings, a written phase (claim and defence), an *audiència prèvia* and an oral *judici*, expressly following this two-hearing scheme (arts. 240–244).

The comment of Rule 100 of *ALI/UNIDROIT Principles of European Civil Procedure* capture this approach, aligning with the aforementioned observation that, in the civil law tradition, the expansive American concept of discovery does not exist. Instead, the court rather than the parties holds primary authority over the gathering of facts, with Germany as a doctrinal example<sup>15</sup>. This structure is consistent with arts. 281–283 of the Spanish *LEC* and arts. 9–11 of the French *Code de procédure civile*, which place the burden of proof on the parties but grant the judge powers to order legally admissible investigative measures and to require documents from parties and third parties. Nevertheless, it should be pointed out that some civil law scholars, like Ureña Carazo<sup>14</sup>, criticize the use of *ex officio* judicial investigative powers in specific scenarios—such as the mere incompetence of counsel—insofar as it could undermine the principle of judicial impartiality

Contrary to the common law model, therefore, it falls to the European judge to “dig out the truth” through the management of the evidence proposed by the parties in the claim and defence respectively. Merryman<sup>15</sup> emphasise that the civil law system is predominantly written, and that the public hearing is fragmented into several strictly regulated hearings. Nylund<sup>16</sup> suggests that, with the increasing centrality of the “main hearing”, the modern European model is generally structured into (a) a preliminary pleadings phase (exchange of the claim and defense, together with the announcement of the evidence each party intends to request), followed by (b) a preliminary hearing, in which the parties raise relevant procedural issues and propose evidence—subject to the judge’s acceptance<sup>17</sup>—and (c) the trial hearing, where the evidence is actually

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<sup>12</sup>LANGBEIN, «The German advantage in civil procedure», *University of Chicago Law Review*, vol. 52, n° 4, 1985, pp. 823–866.

<sup>13</sup>MAXEINER, «Law-Made in Germany: Global Competitiveness of Civil Law Justice», *University of Baltimore Scholarwork*, 2012, pp. 1 – 9.

<sup>14</sup>UREÑA CARAZO, «La prueba de oficio en el proceso civil español. (El deber judicial de completitud de la prueba del artículo 429.1 LEC)», *Riedpa: Revista Internacional de Estudios de Derecho Procesal y Arbitraje*, vol. n° 3, 2014, pp. 3–41.

<sup>15</sup>MERRYMAN, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 3.<sup>a</sup> ed., 2007.

<sup>16</sup>NYLUND, «The structure of civil proceedings-convergence through the main hearing model», *Civil Procedure Review*, vol. 9, n° 2, 2018, pp. 13–28.

<sup>17</sup>It is worth noting that we can cite the Spanish Constitutional Court (STC 165/2001, 16.7.2001), which makes clear that the decision-making power regarding the relevance of any evidence proffered by the parties rests entirely within the judge's discretion.

taken, for example through witness examinations and expert testimony. This schema corresponds, in Spain, to the preliminary hearing regulated in arts. 414 et seq., of the Spanish *LEC* and, in Andorra, to arts. 130–171 and 240–244 of the *CPC*. Judicial control of legality is present throughout the whole procedure, and the oral “main hearing” concludes with counsels’ closing submissions—delivered in the presence of the judge—after the admitted evidence has been taken.

In this respect, the Council of Europe’s Recommendation No. R (84) 5 on the principles of civil procedure, already advocated that the number of hearings should not exceed two (a preliminary hearing and a hearing for the taking of evidence and the trial itself). This recommendation remains a reasonably accurate reflection of the prevailing European approach. As Jolowicz<sup>18</sup> clarifies, there is a fundamental distinction in continental systems between the source of the factual material and the control of the proceedings. The parties retain the primary burden of assertion (they must plead the facts), but the judge is not their prisoner; rather, the court maintains a managerial role, controlling the sequence of the evidence and possessing the power to order the clarification of obscure points or summon witnesses beyond those initially nominated by the parties. The judge may order additional evidence beyond that requested by the parties, refuse evidence requested by them and, more generally, manages the organisation and sequence of the evidence. The judge may order, *ex officio*, legally admissible investigative measures.

In the same vein, Zambrano<sup>19</sup> succinctly observes that “in civil law countries, there is no broad exchange of documents or disclosures and the process is wholly supervised by a judge”.<sup>20</sup> Thus, parties cannot compel one another to exchange documents prior to trial: document production in Spain, France and Andorra, for example, requires express judicial authorisation for each document to be produced or each piece of evidence to be taken, case by case. Without prejudging the desirability of this model, Zambrano points out the obvious: it constitutes a constraint for the parties, who depend on the court’s acceptance of their evidence at a first hearing that may take place months after proceedings are initiated. This can clearly hinder procedural agility and delay the administration of justice. In a similar sense, Suk<sup>21</sup> argues that the absence of discovery in European civil procedure, as in the French civil process, may make certain types of claims inherently more difficult to litigate, such as discrimination claims in the employment context, where the relevant evidence is typically in the hands of the employer and documentary access depends on judicial decisions on investigative measures.

At the intra-EU level, Regulation (EU) 2020/1783 may broadly be described as establishing a predominantly “court-to-court” system of cross-border evidence-taking. It provides, in essence, for (a) an indirect route, whereby a court in one Member State requests a court in another Member State to take evidence on its behalf; (b) a direct route, whereby a court may, subject to

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<sup>18</sup>JOLOWICZ, «Adversarial and Inquisitorial Models of Civil Procedure», *International and Comparative Law Quarterly*, vol. 52, n° 2, 2003, pp. 281 ss.

<sup>19</sup>ZAMBRANO, «Discovery as regulation», *Michigan Law Review*, vol. 119, 2020, p. 81.

<sup>20</sup>Notably, in accordance with the French Court of Cassation (Cour de cassation, Civ. 2e, 7.1.1999, n° 97-10.831), not even a court order could ‘replicate’ a massive discovery exercise, since the judge, when admitting proffered evidence, must rely on the criteria of relevance and necessity.

<sup>21</sup>SUK, «Procedural path dependence: Discrimination and the civil-criminal divide», *Washington University Law Review*, vol. 85, n° 5, 2007, pp. 1315–1375.

prior authorisation by the requested State, take evidence located in another Member State; and (c) residual channels involving diplomatic or consular agents under the conditions set by the Regulation and national law. The overall architecture is designed to structure cross-border evidence-taking through institutional cooperation, thereby reducing the risk that evidentiary activity abroad is perceived as a unilateral intrusion into the requested State's procedural sphere. In this context, some legal scholars<sup>22</sup> link this approach to the CJEU rulings in *Lippens* (C-170/11)<sup>23</sup> and *ProRail* (C-332/11)<sup>24</sup>. Although based on the superseded 2001 Evidence Regulation, these decisions remain highly relevant. They confirm that the Regulation is not the exclusive route for taking evidence across the EU. Rather, Member States can rely on alternative EU instruments like the Brussels I recast Regulation, or simply apply their own domestic procedural rules, which EU law does not preempt.

Biavati<sup>25</sup>, analysing the Italian case, highlights that civil law systems curtail the powers of the parties: they cannot conduct witness examinations in their offices, nor can they, in general, require anything from the other party or from third parties without express judicial intervention. In any event, Ormazábal Sánchez<sup>26</sup> notes that parties still have lawful means of investigation at their disposal, such as public registries. Furthermore, they can rely on certain civil law instruments that add nuance to the perception of the system as strictly 'quasi-inquisitorial.' Prime examples include the preservation of evidence (arts. 297 and 298 of the Spanish LEC), and preliminary proceedings (arts. 256 and 263 of the Spanish LEC). This identical pre-trial logic is found in arts 64 et seq. of the Andorran CPC, which expressly regulate "diligències preliminars" and "mesures d'assegurament de la prova" as mechanisms to investigate and secure evidentiary material prior to the main trial.

Beyond these 'pre-trial' tools,— the same court order that compels one party to produce a document for the other may likewise compel a third party to appear as a witness. In this context, interrogatories and documentary reviews are analysed and incorporated into the court file during the various hearings, after being obtained from the court<sup>27</sup>. If a party wishes to obtain a document, it requests it from the judge and, if the judge considers the request appropriate, the judge orders the other party to produce it; that party produces it to the judge, who then makes it available to the requesting party. In Spain, this logic is reflected in the fact that all evidentiary activity is, in principle, conducted in formal procedural acts—preliminary hearing and trial—under the direction of the court (arts. 414 et seq., 431 et seq. LEC) and that even the examination of parties and witnesses is closely regulated and cannot be "externalised".

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<sup>22</sup>SANTALÓ GORIS, «From the 2001 Evidence Regulation to its 2020 Recast: What does it remain and has it changed?», *Cuadernos de Derecho Transnacional*, vol. 17, 2025, p. 672.

<sup>23</sup>Maurice Robert Josse Marie Ghislain Lippens and Others v Hendrikus Cornelis Kortekaas and Others, C-170/11, EU:C:2012:540.

<sup>24</sup>ProRail BV v Xpedys NV and Others, C-332/11, EU:C:2013:87.

<sup>25</sup>BIAVATI, «Oral and written evidence in Italian civil procedure law», en *Orality and Writing in an Efficient Civil Process*, *Universitat de València*, 2008.

<sup>26</sup>ORMAZABAL SÁNCHEZ, «La investigación en el proceso civil: hacia una nueva ordenación de los mecanismos de averiguación de hechos y de obtención de fuentes de prueba.» *Revista de la asociación de profesores de derecho procesal de las universidades españolas*, vol. 1, 2020, 258-333.

<sup>27</sup>SUBRIN, «Discovery in global perspective: Are we nuts?», *DePaul Law Review*, vol. 52, nº 2, 2002, pp. 299–328.

In the case law of the European Court of Human Rights (ECtHR), the decisions in *Dombo Beheer B.V. v. Netherlands*<sup>28</sup> and *Nideröst-Huber v. Switzerland*<sup>29</sup> are particularly significant. On their basis, the concept of intra-procedural evidence in Europe—distinct from common law discovery—has been consolidated, governed by (a) the principle of equality of arms, in that all parties may propose evidence which the court may admit or refuse according to its pertinence, and (b) the principle of adversarial proceedings, under which each party may challenge both the admission and the probative value of evidence presented by the other side. Both principles are presented as core elements of classical European procedural law and are reflected in the ECtHR's own Guide on Article 6 (civil limb). That said, as Grossi<sup>30</sup> explains regarding the Italian context, the judge's evidentiary powers remain limited by the strict adherence to the *principio dispositivo* (party presentation). Therefore, "inquisitorial powers" are exceptional and are not intended to be exercised as a matter of routine to cure the parties' inactivity. In the author's experience, they are generally invoked in Spain only where the judge suspects that a party is concealing relevant information, thus verging on what is known as "procedural fraud" (*estafa procesal*).

b. *The continental law of evidence and means of proof*

Beyond these structural features, even the very notion of what counts as admissible evidence differs across the two systems. In continental law, the strict dual system developed by Carnelutti<sup>31</sup> prevails, distinguishing between (a) the source of evidence (objective facts that have occurred outside the proceedings) and (b) the means of evidence (the procedural form through which that source is presented to the judge so that it can be taken into account). Contemporary doctrine has refined this distinction. Clermont and Sherwin<sup>32</sup> argue that the civil law tradition treats fact-finding with a distinct epistemological rigor, implying that the judge evaluates evidence through a structured framework rather than as a mere probability exercise. Along similar lines, Stürner<sup>33</sup> stresses that decisions on admissibility are governed by "strict relevancy requirements" and the obligation to proffer "exactly specified means of evidence", thus filtering the material on levels of: (a) necessity (avoiding "excessively broad discovery") and (b) suitability to verify the factual allegation, preventing the waste of judicial resources. In contrast to the foregoing, Lluçh<sup>34</sup> notes that while the common law tradition shares foundational standards of proof—such as "beyond a reasonable doubt"—civil law systems grant judges relative freedom to weigh evidence based on sound judicial discretion. In my view, this inevitably creates divergences among civil law jurisdictions, thereby adding nuance to the narrative of a "unitary" international civil law evidentiary framework.

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<sup>28</sup>Dombo Beheer B.V. v. the Netherlands, no. 14448/88, Judgment of 27 October 1993, ECHR 1993-VIII.

<sup>29</sup>Nideröst-Huber v. Switzerland, no. 18990/91, Judgment of 18 February 1997, ECHR 1997-I.

<sup>30</sup>GROSSI, «A Comparative Analysis Between Italian Civil Proceedings and American Civil Proceedings Before Federal Courts», *Indiana International & Comparative Law Review*, vol. 20, n° 2, 2010, pp. 213 ss.

<sup>31</sup>CARNELUTTI, *Lezioni di diritto processuale civile*, vol. 2, 1947.

<sup>32</sup>CLERMONT/SHERWIN, «A Comparative View of Standards of Proofs», *American Journal of Comparative Law*, vol. 50, 2002, pp. 243 ss.

<sup>33</sup>STÜRNER, «The Principles of Transnational Civil Procedure: An Introduction to their basic Conceptions», *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, vol. 69, 2005, pp. 233–236.

<sup>34</sup>LLUCH, «La dosis de prueba: entre el "common law" y el "civil law"» *Doxa: Cuadernos de Filosofía del Derecho*, vol. 35, 2012, 173-200.

As comparative scholars<sup>55</sup> identify, the Civil Law tradition typically operates with a preferred, yet non exhaustive set of evidentiary means. They outline a classic core—witnesses, documents, experts, judicial inspection, and the examination of parties—as the distinct categories customarily admissible in continental proceedings, contrasting this structured approach with the broader, undifferentiated admissibility of the common law. This taxonomy is reproduced almost verbatim in art. 299 of the Spanish *LEC* which enumerates – in a non numerus clausus way - the means of proof in Spanish civil proceedings (examination of the parties, documentary evidence, expert evidence, judicial inspection, witness evidence and other means provided by law), as well as in the Andorran *CPC* chapters on “*mitjans de prova i pràctica de la prova*”, which contain a very similar catalogue. In other words, nothing that does not fit one of these recognised means of evidence will even be considered as evidence in European civil proceedings, unless it can be subsumed under one of these classic categories or under an open clause such as “other lawful means” where such a clause exists. As scholarship has reiterated<sup>56</sup>, the rule is a typified list of evidentiary means, over which *ex ante* admissibility control is exercised on the basis of relevance and necessity.

In this context, it is useful to recall Cases C-415/10 *Meister v. Speech Design Carrier Systems GmbH*<sup>57</sup> and C-104/10 *Kelly v. National University of Ireland, Dublin*<sup>58</sup> before the Court of Justice of the European Union (CJEU). These precedents reject the idea of “massive” discovery even when ordered by a court. In *Meister*, the CJEU held that EU anti-discrimination law does not confer on an unsuccessful job applicant an autonomous right of access to all information relating to the recruitment process (for instance, the complete files of other candidates), although the employer’s total refusal to provide any information may be taken into account as an element of proof. In *Kelly*, the Court maintained the same logic: an applicant for vocational training alleging discrimination may benefit from a reversal or easing of the burden of proof and from the use of *prima facie* evidence, but not from a general right to obtain full, non-anonymised copies of other candidates’ applications. In both decisions, the CJEU refers the matter back to the national court for a case-by-case assessment of relevance and proportionality. The overall message is clear: even in sensitive areas such as discrimination, the EU legal order does not embrace common law-style broad discovery, but retains a judge-led, limited and proportional approach to evidence.

Nevertheless, some civil law scholars<sup>59</sup> have noted a recent shift. Jurisdictions are moving toward frameworks that offer much broader access to evidentiary sources, even if these remain distinct from Anglo-American discovery. EU law is driving this transition, most notably through: (a) Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights; (b) Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014; and (c) Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers. In this same vein, viewing European law as a “unifying”

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<sup>55</sup>CHASE et al., «An Introduction and Overview», n CHASE/HERSHKOFF (eds.), *Civil Litigation in Comparative Context*, *NYU School of Law, Public Law Research Paper*, 2017, pp. 17 - 37-

<sup>56</sup>DAMASKA, «Free Proof and its Detractors», *The American Journal of Comparative Law*, vol. 43, 1995, p. 348.

<sup>57</sup>*Meister v. Speech Design Carrier Systems GmbH*, C-415/10, EU:C:2012:217

<sup>58</sup>*Kelly v. National University of Ireland, Dublin*, C-104/10, EU:C:2011:506 (2011).

<sup>59</sup>DE LUCCHI, «Eficiencia en el acceso a la información y fuentes de prueba en el proceso civil: tibias líneas convergentes EEUU/Europa» *Revista Ítalo-española de Derecho procesal*, vol. 1, 2023, pp. 23-52.

or “moderating” force upon the traditional civil law perspective, other scholars<sup>40</sup> posit that one of the objectives of the *European Rules of Civil Procedure* has been to devise a framework for a kind of “European-way discovery”—one that remains respectful of the European legal tradition while circumventing the issues inherent in the Anglo-American model.

## 2.2. Comparative models of evidentiary management

### a. *The United States Discovery model*

In sharp contrast to the quasi-inquisitorial European model, Anglo-American civil procedure is built on an adversarial system in which the initiative regarding evidence lies primarily with the parties, and the judge plays a more passive role, at least as regards the identification and initial request for evidence.<sup>41</sup> Unlike in the civil law model, parties need not announce all their evidence *ex ante* and request the judge to force the other party to produce it. Rather, the identification and gathering of material is channelled through pre-trial discovery (in the United States) or disclosure (in England and Wales).

The classical literature on the adversary system emphasises this division of roles. Landsman<sup>42</sup> portrays Anglo-American civil litigation as a contest between parties who investigate, select and compel one another to exchange evidence. Sward (1989) links the development of this adversarial model to an ideological preference for party autonomy, thereby restricting the role of the judge as “investigator” or “truth-seeker”. In the United States, under Rule 26(f) of the *Federal Rules of Civil Procedure* (FRCP), the parties must hold a discovery conference in which, after a “reasonable inquiry”, they discuss which information and documents they will exchange and how they will organise discovery. The result is set out in a joint discovery plan submitted to the court, which forms the basis for the scheduling order issued under Rule 16(b) FRCP. This early pre-trial phase is also subject to the proportionality principle in Rule 26(b)(1), which requires consideration of the importance of the issues in the action, the amount in controversy, the parties’ relative access to relevant information and their resources, so that only information that is reasonable and not excessively costly to obtain is requested.<sup>43</sup>

Although many discovery activities take place outside the physical presence of the judge, they are not truly “extra-judicial”. They are framed and temporally limited by the Rule 16 scheduling order, which gives the judge a supervisory role in addressing some of the structural problems of the adversarial model suggested by Shapiro<sup>44</sup>: (a) abusive or disproportionate discovery requests and (b) lack of cooperation or unjustified resistance by the responding party. Federal case law has fleshed out this “governed” dimension of discovery. In *Hickman v. Taylor*, 329 U.S. 495<sup>45</sup>, the

<sup>40</sup>GASCÓN INCHAUSTI, «Las European Rules of Civil Procedure:¿ Un punto de partida para la armonización del proceso civil?» *Cuadernos de Derecho Transnacional*, vol. 13, 2021, pp. 277-297.

<sup>41</sup>MCKENNA/WIGGINS, «Empirical research on civil discovery», *Boston College Law Review*, vol. 39, 1998, pp. 785–828.

<sup>42</sup>LANDSMAN, *The Adversary System*, 1984, pp. 4-5.

<sup>43</sup>GRIMM, «The state of discovery practice in civil cases: Must the rules be changed to reduce costs and burdens, or can significant improvements be achieved within the existing rules?», *The Sedona Conference Journal*, vol. 12, 2011, pp. 47–67

<sup>44</sup>SHAPIRO, «Some Problems of Discovery in an Adversary System», *Minnesota Law Review*, vol. 63, 1979, pp. 1055 ss.

<sup>45</sup>*Hickman v. Taylor*, 329 U.S. 495 (1947).

Supreme Court, in a case arising from the sinking of a tugboat on the Delaware River, established the famous “work product doctrine” and made clear that, although broad, discovery does not entitle one party to appropriate the intellectual work of opposing counsel, thereby setting qualitative limits on what may be demanded at the pre-trial stage. In *Seattle Times Co. v. Rhinehart*<sup>46</sup>, the Court upheld the constitutionality of a protective order prohibiting a newspaper from publicly disseminating information obtained in discovery in a defamation suit. The Court reasoned that discovery is a formal mechanism internal to the process and subject to the judge’s regulatory discretion, not a general channel for public access to information.

These precedents show that the U.S. adversarial model combines extraordinarily broad access to information with traditional judicial controls<sup>47</sup> designed to prevent abuse, disproportionate costs and collateral effects on privacy or freedom of expression. In this context, the judge may grant protective orders under Rule 26(c) FRCP where a discovery request is excessive or unduly compromises confidentiality<sup>48</sup>, and may also issue orders compelling discovery—granting a motion to compel under Rule 37(a) FRCP—. As Willoughby, Jones & Antine<sup>49</sup> details, non-compliance with such orders triggers the sanctions regime in Rule 37(b)–(d), which encompasses a range of measures: from costs and attorney’s fees to evidentiary and substantive sanctions such as deeming certain facts established against the infringer.

The severity of these consequences in the ordinary operation of discovery has been endorsed by the Supreme Court. In *National Hockey League v. Metropolitan Hockey Club, Inc.*<sup>50</sup> the Court upheld the dismissal of a claim as a sanction for repeated and wilful non-compliance with discovery orders issued by the district court. It emphasised that the harshest sanctions are sometimes necessary “to deter those who might be tempted to such conduct in the absence of such a deterrent”. This line of case law reinforces the idea that the Anglo-American evidentiary model is at once extremely broad in access to information and strongly disciplined through judicial case management and sanctions.

From the standpoint of civil law States, this combination of breadth and coercive power acquires particular significance when U.S. courts use discovery to reach documents and data located in Europe. It is precisely in that setting that questions of compatibility with procedural sovereignty and with instruments such as the Hague Evidence Convention and the GDPR become most acute.

#### b. *The English Disclosure model*

In the English model, the phase equivalent to U.S. discovery is known as disclosure and is framed by the *Civil Procedure Rules* 1998 (CPR), developed through Practice Directions (PD) and Pre-Action Protocols (PAPs) approved by the Master of the Rolls under the *Civil Procedure Act* 1997. Even before the claim form is issued, the *Practice Direction – Pre-Action Conduct and Protocols*

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<sup>46</sup>*Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

<sup>47</sup>SCHWARZER, «Managing civil litigation: The trial judge’s role», *Judicature*, vol. 61, n° 8, 1978, pp. 400–410.

<sup>48</sup>BENHAM, «Proportionality, Pretrial Confidentiality, and Discovery Sharing», *Washington and Lee Law Review*, 2014, vol. 71, n.º. 4, pp. 2181 - 2193

<sup>49</sup>WILLOUGHBY Jr./JONES/ANTINE, «Sanctions for E-Discovery Violations: By the Numbers», *Duke Law Journal*, vol. 60, 2010, pp. 790–861.

<sup>50</sup>*National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

(PDPAC) and sector-specific PAPs impose a pre-action phase: the parties must exchange a letter of claim (or letter before action) and a letter of response, together with key documents, and set out their positions in sufficient detail to understand the claim, assess the defence and explore settlement or ADR mechanisms. Non-compliance does not preclude bringing a claim, but may result in costs sanctions for the non-cooperative party. As Sime<sup>51</sup> suggests, the underlying principle of the Civil Procedure Rules is that parties must provide early notice of the material documentation in their control, thereby characterizing disclosure as a reciprocal exchange of relevant information designed to prevent surprises.

From a broader perspective, Andrews<sup>52</sup> characterises the CPR as a sort of new procedural code intended to make proceedings faster, more economical and judge-managed, with disclosure as one of the central points of control. Once the claim form has been issued and the statements of case served (CPR Part 16, PD 16), the case is allocated to a track under CPR Part 26 (small claims, fast track, intermediate track, multi-track). In multi-track cases, the court will typically list a Case Management Conference (CMC) pursuant to CPR Part 29 and PD 29: a procedural hearing at which the judge, exercising the case management powers under CPR Part 3, identifies the issues, decides whether there will be disclosure and of what type (for instance, standard disclosure under CPR 31.5), and sets a timetable for disclosure and inspection of documents, factual witness evidence and expert evidence. From the perspective of the Business and Property Courts, the Disclosure Pilot (now PD 57AD) is expressly aimed at curbing excessive disclosure and associated costs through issue-based and judge-led disclosure models.

From the Case Management Order issued at the CMC flows the formal obligation of disclosure: each party must carry out a reasonable search, serve a list of documents and a disclosure statement, and the opposing party acquires a right of inspection under CPR 31.3 over the disclosed documents, subject to the classic exceptions of (i) lack of control, (ii) privilege or other right/duty to withhold inspection, and (iii) disproportionality (CPR 31.3(2)). Inspection is usually by copies or by making the documents available at the solicitor's office, without direct court involvement, and only where there is controversy—e.g. as to whether the search has been sufficient or whether privilege properly applies—does a party resort to an application for specific disclosure under CPR 31.12, enabling the judge to make further orders or even *unless orders*.

In *West London Pipeline and Storage Ltd v. Total UK Ltd*<sup>53</sup>, arising from the Buncefield oil depot explosion, Beatson J took the opportunity, in the context of a dispute over litigation privilege, to “summarise the law relating to challenges to claims for privilege” and set out a structured approach to resolving privilege challenges in the disclosure context. The burden of proving privilege lies with the party asserting it, and the court may examine descriptions of documents and, where necessary, conduct a limited review of the material to decide whether it should enter the disclosure process. From a costs and proportionality perspective, the Technology and Construction Court has emphasised that disclosure is one of the principal drivers of expense. In *CIP Properties (AIPT) Ltd v. Galliford Try Infrastructure Ltd*<sup>54</sup>, Coulson J reduced the claimant's costs budget by more than 50% as “not reasonable, proportionate or reliable”. He stressed that

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<sup>51</sup>SIME, *A Practical Approach to Civil Procedure*, 25.<sup>a</sup> ed., 2022.

<sup>52</sup>ANDREWS, *English civil procedure: Fundamentals of the Civil Justice System*, 2003.

<sup>53</sup>*West London Pipeline and Storage Ltd v. Total UK Ltd* [2008] EWHC 1729 (Comm).

<sup>54</sup>*CIP Properties (AIPT) Ltd v. Galliford Try Infrastructure Ltd* [2015] EWHC 481 (TCC).

disclosure costs must be strictly aligned with the overriding objective, a standard reinforced by the TCC Guide<sup>55</sup> which explicitly warns that the court will not sanction search and production exercises that are grossly out of proportion to the true evidentiary needs and value of the case.

In complex commercial litigation before the Business and Property Courts, PD 57AD – *Disclosure in the Business and Property Courts* now largely displaces CPR 31. It introduces, first, a limited regime of Initial Disclosure and, where necessary, Extended Disclosure built around defined Issues for Disclosure and a range of disclosure models. The choice and scope of these models are negotiated in a Disclosure Review Document (DRD) and fixed in a Disclosure Order at a dedicated disclosure CMC. Compared to the old standard disclosure, this regime represents what the commentary describes as a genuine cultural shift. Therefore, Judicial case management, including robust control of disclosure, is presented as the key tool for containing costs and preventing litigation from spiralling out of control.

Zuckerman<sup>56</sup> emphasises that the system have shifted onto judges the responsibility for how judges “do justice” through the selection of procedures and the control of resources, which in practice translates into judge-led, tailored disclosure. Jackson<sup>57</sup> likewise stresses that any serious debate on access to justice must involve rationalising pre-trial costs and, in particular, disclosure, which absorbs a substantial share of the parties’ litigation expenditure. Finally, authors such as Carles<sup>58</sup> have shown how this proportionate, judge-led disclosure regime is specifically designed to avoid the *fishing expeditions* characteristic of U.S.-style discovery and now constitutes one of the main points of contrast between the English evidentiary model and continental civil law.

From the perspective of civil law States, the apparent moderation and proportionality of English disclosure does not eliminate the structural concern: even a judge-led and ostensibly proportionate disclosure exercise may still require the production of large volumes of sensitive documents located in Europe, thereby raising questions about compatibility with domestic procedural law, competition law and, increasingly, data protection law and trade secrets.

### c. *Evidentiary management in common law systems*

In the common law systems of the United States and the United Kingdom, there is no *numerus clausus* of evidentiary means in the civil law sense. The logic is not based on a closed list, but on a functional criterion: any relevant evidence is, in principle, admissible. In the United States, this is expressed clearly in the Federal Rules of Evidence: Rule 401 defines relevance and Rule 402 creates a presumption of admissibility. This reflects the “liberal thrust” of the system famously confirmed by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>59</sup>, which held that the Rules effectively abolished the rigid previous categorical exclusions of the common law.

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<sup>55</sup>HM COURTS & TRIBUNALS SERVICE, *The Technology and Construction Court Guide*, 3.<sup>a</sup> ed, 2022.

<sup>56</sup>ZUCKERMAN, «Civil Litigation: A Public Service for the Enforcement of Rights», *Civil Justice Quarterly*, vol. 26, 2007, pp. 1 ss.

<sup>57</sup>JACKSON, *Review of Civil Litigation Costs: Final Report*, 2010.

<sup>58</sup>CARLES, «La disclosure: aspectos a aprender en España de la experiencia inglesa», *InDret*, nº 1, 2023, p. 343.

<sup>59</sup>*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), sección II.A;

As the Advisory Committee Notes for the Rules of Evidence<sup>60</sup> explicitly state, unless a specific rule operates to exclude it, all relevant evidence is admissible, treating this as a presupposition of any rational system

In practice, this allows the introduction of factual and expert testimony, documents, real evidence (physical objects), demonstrative evidence such as charts, videos and reconstructions, and all forms of electronic or digital evidence. Such material is admissible provided that it can be authenticated and survives filters such as the hearsay rule and Rule 403 on unfair prejudice and confusion. The U.S. Supreme Court has repeatedly emphasised that even relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice. In *Old Chief v United States*<sup>61</sup>, the Court summarised Rule 403 in precisely those terms, illustrating that the system is open as to the forms of evidence but filtered through specific exclusionary rules.

In England and Wales, although the terminology differs, the logic is similar. Evidence is articulated through witness statements and oral evidence at trial (CPR Part 32), expert evidence (CPR Part 35) and documentary evidence obtained through disclosure (CPR Part 31; PD 57AD), but there is no closed, civil law-style list of “means of proof” such as Carnelutti’s. Any material that can be presented through these procedural forms and is relevant and lawful may serve as evidence (including videos, recordings and electronic data). This is, English law organises evidence by procedural form (documents, written statements, expert reports) rather than by a typified list of means of proof.

As Briggs<sup>62</sup> observes, the complexity of modern fact-finding has increased dramatically, requiring the system to handle a diversity of material that ranges from traditional documents to vast amounts of complex electronic records. This openness is illustrated by cases such as *Hoyle v. Rogers & Anor*<sup>63</sup> where the Court of Appeal held that a technical report by the Air Accidents Investigation Branch (AAIB) could be used in civil proceedings. The Court stated that “factual statements in the report, even if hearsay, are *prima facie* admissible; expert opinions are admissible if given by persons with relevant expertise”, confirming that the system admits both factual and expert material contained in complex documents, leaving their true weight to be assessed in the evaluation stage rather than excluding them automatically because they do or do not fit a predetermined “means of proof”.

To this must be added the full integration of electronic evidence (including blockchain-based records) into the civil sphere, as recent doctrine has underscored<sup>64</sup>. From a civil law perspective, this openness in common law evidentiary regimes accentuates the contrast with typified continental systems and further complicates the task of accommodating common law discovery and disclosure demands within the constraints imposed by procedural sovereignty, data protection and other fundamental interests in civil law jurisdictions.

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<sup>60</sup>Advisory Committee Notes to Federal Rule of Evidence 402 (2018).

<sup>61</sup>*Old Chief v. United States*, 519 U.S. 172 (1997).

<sup>62</sup>BRIGGS, *Civil Courts Structure Review: Final Report*, 2016.

<sup>63</sup>*Hoyle v. Rogers & Anor* [2014] EWCA Civ 257; [2015] 1 QB 265.

<sup>64</sup>RIVERO SILVA, «Blockchain evidence versus the State: RAIMUNDO as a case study», *Oñati Socio-Legal Series*, vol. 15, n.º 4, 2025, pp. 1473-1498.

### 3. Discovery and disclosure orders in civil law jurisdictions: blocking statutes.

Given the profound procedural divergences in access to evidence between civil law and common law, attention must now turn to the specific problems raised by the execution of discovery and disclosure orders in continental jurisdictions where evidence-taking is judicialised. In this regard, Curran<sup>65</sup> analyses the notion of “foreign blocking statutes”: legislative instruments in civil law countries designed to block and neutralise common law discovery and disclosure orders on their territory. The underlying tension is particularly evident in *Société Nationale Industrielle Aérospatiale v. United States District Court*<sup>66</sup>, a leading U.S. Supreme Court precedent suggesting that U.S. judges are generally willing—subject to limited exceptions discussed below—to order discovery in civil law jurisdictions notwithstanding the content of the foreign State’s domestic law. Laing<sup>67</sup> argues that one of the very purpose of the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters was to protect against the unilateral extension of common law discovery (and, by analogy, disclosure) into continental territory. Curran<sup>68</sup> highlights the increasing need for U.S. courts to engage in comparative analysis and give greater weight to foreign interests, such as privacy and data protection, potentially leading to more narrowly tailored discovery orders that respect civil law values.

At EU level, Regulation (EC) No 2271/96 (the EU “Blocking Statute”) functions as a horizontal analogue to national *lois de blocage*, aimed at neutralising compliance with certain listed U.S. extraterritorial sanctions within the EU. In *Bank Melli Iran v. Telekom Deutschland*<sup>69</sup>, the Court of Justice made clear that Article 5 can apply even without a formal third-country order addressed to the EU operator: it is enough that a private-law measure (such as the termination or non-performance of a contract) is, in substance, driven by a decision to comply with the listed U.S. measures. Precisely because this can channel public-law sanctions policy into private-law outcomes, the Court required national courts to police those outcomes through a proportionality review grounded in fundamental rights, rather than treating “sanctions compliance” as an automatic justification.

In the United Kingdom, Halkerston<sup>70</sup> suggests that, as a general rule, the fact that compliance with a disclosure order would be unlawful in the addressee’s home State—either because of data protection law or because of a blocking statute—does not constitute a generic excuse in English law for non-compliance with ordinary disclosure obligations, although it may nonetheless carry some weight in the judge’s final decision. The relative moderation of English disclosure compared with U.S. discovery cannot be accepted as a sufficient reason to presume a better fit

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<sup>65</sup>CURRAN, «United States discovery and foreign blocking statutes», *Louisiana Law Review*, vol. 76, 2016, pp. 1141–1194.

<sup>66</sup>*Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522 (1987).

<sup>67</sup>LAING, «In re Societe Nationale Industrielle Aerospatiale: International Conflict over Discovery of Evidence in Foreign Countries», *North Carolina Journal of International Law and Commercial Regulation*, vol. 12, 1987, p. 137.

<sup>68</sup>CURRAN, «U.S. Discovery in a Transnational and Digital Age and the Increasing Need for Comparative Analysis», *Akron Law Review*, vol. 51, 2017, p. 857.

<sup>69</sup>*Bank Melli Iran v. Telekom Deutschland GmbH*, C-124/20, EU:C:2021:1035

<sup>70</sup>HALKERSTON, «English disclosure processes and foreign blocking statutes», *Trusts & Trustees*, vol. 20, n.º 9, 2014, pp. 1–15.

with continental Europe, by way of example, because of EU competition laws<sup>71</sup>. Even when subject to English proportionality standards, disclosure may still reach vast quantities of documents that exceed what would be proportionate under European standards, with serious implications not only for data protection but also for competition law and the protection of trade secrets or other forms of *know-how*.

Some authors<sup>72</sup> argue that, despite its aim of structuring judicial cooperation, the Hague Convention has not been particularly effective in preventing common law courts from resorting to their own internal discovery mechanisms in relation to evidence located in Europe. France is often cited by the doctrine as a paradigmatic example<sup>73</sup>. Its so-called *Loi de blocage* is currently *Loi n° 68-678 du 26 juillet 1968*, as amended by *Loi n° 80-538 du 16 juillet 1980*, on the communication of economic, commercial, industrial, financial or technical documents and information. Articles 1 and 1 bis, “*sous réserve des traités ou accords internationaux*”, prohibit both the direct communication of sensitive economic information to foreign authorities and the act of “*demande, recherche ou communication*” such documents where the request “*tend à la constitution de preuves en vue de procédures judiciaires ou administratives étrangères*”. The French administration itself presents this law as an instrument intended to “*éviter que les autorités étrangères n’aient connaissance d’informations sensibles [...] en les contraignant à respecter les canaux de l’entraide judiciaire ou administrative internationale*”, that is, to compel the use of instruments such as the 1970 Hague Convention.

This legislative choice is reflected clearly in French criminal case law. In the well-known “Christopher X” case,<sup>74</sup> the *Cour de cassation* upheld the conviction of a French lawyer acting for the California Insurance Commissioner in U.S. proceedings concerning the insurer Executive Life. As reconstructed by Cuniberti<sup>75</sup>, “a lawyer was fined €10,000 for seeking information for the purpose of Californian proceedings” after contacting in France a senior executive of MAAF to obtain information about the functioning of its board of directors, outside the rogatory channels provided by the Hague Evidence Convention. The court held that this initiative breached art. 1 bis of the *Loi de blocage*, since it involved seeking economic and financial information in France to use as evidence in foreign civil proceedings. The implicit message is unambiguous: even where evidence is sought for legitimate proceedings before a U.S. court, private actors may not “self-organise” discovery in France outside institutional mechanisms for judicial cooperation. In this regard, certain legal scholars<sup>76</sup> suggest that blocking statutes exert a coercive effect on the very citizen or company compelled by the foreign court. Nevertheless, the “virtual addressee” remains the foreign judge. Unable to force discovery, the foreign judge will be more inclined to seek alternative mechanisms that are more respectful of French domestic law

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<sup>71</sup>KULMS, «Competition law enforcement under informational asymmetry», *China-EU Law Journal*, vol. 5, n° 3, 2017, pp. 209–231.

<sup>72</sup>FRIEDERICH, «Reinforcing the Hague Convention on Taking Evidence Abroad After Blocking Statutes, Data Privacy Directives and Aérospatiale», *San Diego International Law Journal*, vol. 12, 2010, pp. 264–286.

<sup>73</sup>BATISTA, «Confronting Foreign Blocking Legislation: A Guide to Securing Disclosure from Non-resident Parties to American Litigation o American Litigation», *The International Lawyer*, vol. 17, n° 1, 1983, pp. 64–69.

<sup>74</sup>Cour de cassation (chambre criminelle), 12 décembre 2007, n° 07-83.228 (affaire Executive Life/MAAF – “Christopher X”).

<sup>75</sup>CUNIBERTI, «The Criminal Sanction of the French Blocking Statute», *Conflict of Laws.net*. 22 February 2011.

<sup>76</sup>BUSSAC, Normas de bloqueo y obtención transfronteriza de prueba. *Cuadernos de derecho transnacional*, vol. 17, 2025, pp. 578–610.

At the opposite end of the spectrum from *Société Nationale Industrielle Aérospatiale*, the case of *Kashef v. BNP Paribas S.A.*,<sup>77</sup> illustrates how—albeit in an admittedly exceptional manner—some U.S. federal courts have begun to treat the *Loi de blocage* and French evidentiary law more generally as genuine constraints in their *comity* analysis. In *Kashef*, the judge expressly acknowledged the conflict between U.S. discovery and French law. The court noted that the French blocking statute places limits on the taking of foreign discovery in France and that BNP Paribas would, at least theoretically, be exposed to liability if it engaged in large-scale disclosure of client data in violation of that law and of the GDPR. After a detailed analysis of the *comity* factors (origin of the documents, interests at stake, seriousness of the possible infringement of foreign law, availability of alternative means)<sup>78</sup>, the judge concluded that the interests of France and the European Union in data protection and procedural sovereignty outweighed the U.S. interest in unrestricted discovery, stressing that an alternative means for obtaining the information sought is available through the Hague Convention.

From the perspective developed in *Kashef*, the EU GDPR can operate as a sector-specific constraint on discovery insofar as it denies automatic effect to foreign orders demanding personal data. The key provision, according to Swire<sup>79</sup>, is art. 48 GDPR, which states that “any judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data” “may only be recognised or enforceable... if based on an international agreement, such as a mutual legal assistance treaty”. In other words, a foreign discovery order addressed directly to a European controller is not, by itself, a sufficient legal basis for transfer: compliance must either be channelled through an applicable international agreement (MLAT, Hague Convention, etc.) or be justified— independently of the foreign order—under one of the legal bases for third-country transfers exhaustively regulated in Chapter V of the GDPR. Christakis<sup>80</sup> underlines that art. 48 was introduced in order to limit transfer of EU personal data to foreign governments, i.e. to close the route for direct access by third-country authorities to personal data located in the EU.

This transatlantic clash was already visible before the CLOUD Act. In *Microsoft Corp. v. United States*,<sup>81</sup> the Second Circuit held that a warrant issued under 18 U.S.C. § 2703 of the Stored Communications Act could not compel Microsoft to seize and produce the contents of emails stored exclusively on servers located in Ireland, absent a clear congressional statement authorising such extraterritorial reach. Although the *Clarifying Lawful Overseas Use of Data Act* (CLOUD Act) later amended the SCA to require providers subject to U.S. jurisdiction to disclose data within their possession, custody, or control regardless of where it is stored, the Microsoft litigation remains a useful illustration of the underlying *comity* concerns that still surface when U.S. disclosure obligations collide with EU data-protection and secrecy constraints.

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<sup>77</sup>Kashef v. BNP Paribas S.A., No. 16-cv-3228 (PKC), 2021 WL 1844721 (S.D.N.Y. 10 May 2021).

<sup>78</sup>ABDOLLAHI, «The Hague Convention: A medium for international discovery», *North Carolina Journal of International Law*, vol. 40, n° 3, 2015, pp. 771–802.

<sup>79</sup>SWIRE, «When does GDPR act as a blocking statute: The relevance of a lawful basis for transfer», *Georgia Tech Scheller College of Business Research Paper* No. 3473187, 2019.

<sup>80</sup>CHRISTAKIS, «Transfer of EU personal data to U.S. law enforcement authorities after the CLOUD Act: Is there a conflict with the GDPR?», *New York University School of Law*, e-book, 2019, p. 7

<sup>81</sup>Microsoft Corp. v. United States, 829 F.3d 197 (2d Cir. 2016)

Abbas<sup>82</sup> makes this more concrete in the field of data retention: the former Article 29 Working Party held that European controllers “have no legal ground to store personal data at random for an unlimited period of time” merely because of the possibility of litigation in the United States, whereas U.S. courts expect companies to preserve large volumes of information for fear of sanctions for spoliation. The aforementioned Christakis adds that this logic clashes with the extraterritorial obligations imposed by the CLOUD Act, which amended the *Stored Communications Act* to oblige providers subject to U.S. jurisdiction to preserve or reveal data “regardless of whether such information is located within or outside of the United States”. Gascón Marcén<sup>83</sup>, citing the joint position of the European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS), stresses that, unless a U.S. court order under the amended *Stored Communications Act* is recognised or made enforceable on the basis of an international agreement, “the lawfulness of such transfers of personal data cannot be ascertained”. That combination—an aggressive extraterritorial projection of U.S. data-access law on the one hand and blocking from the GDPR of foreign decisions not based on agreements on the other—means that when a U.S. (or other third-country) authority orders a GDPR-subject company to disclose personal data stored in Europe, the default answer under EU law is: only if the transfer fits one of the exhaustively listed bases in Chapter V (adequacy decision, appropriate safeguards under art. 46, or one of the restrictive derogations in art. 49), and never merely because a foreign court so orders.

## 4. Discussion and conclusions

### 4.1. The compatibility between discovery/disclosure and civil law procedural sovereignty

The comparative analysis developed in this article confirms that the tension identified in the introduction is structural. Civil law and common law do not simply offer different “procedural cultures” for accessing evidence; they embody rival conceptions of who controls the evidentiary process, what counts as admissible evidence and how far parties may go in compelling the production of information. In continental systems, evidence is embedded within a judge-led, intra-procedural framework, constrained by typified means (albeit not *numerus clausus*) of proof and *ex ante* admissibility control. In common law, by contrast, evidence is largely party-driven, open-ended in form and organised around expansive pre-trial discovery or disclosure. Nevertheless, it should be pointed out that (a) the ‘quasi-inquisitorial’ label, being a perspective rooted in common law scholarship, requires significant nuance today, driven in part by the impact of EU law; and (b) notable differences can be found even within civil law jurisdictions.

Against this background, the notion of “procedural sovereignty” is particularly useful. If States retain control over the taking of evidence on their own territory, then unilateral attempts by foreign courts to impose their evidentiary model abroad are, *prima facie*, difficult to reconcile with that sovereignty. The Hague Evidence Convention and, within the EU, Regulation (EU) 2020/1783 can be read as institutional responses to this problem: they seek to channel cross-border evidence-taking through court-to-court cooperation, thereby ensuring that the *lex fori* of

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<sup>82</sup>ABBAS, «U.S. preservation requirements and EU data protection: Headed for collision», *Hastings International and Comparative Law Review*, vol. 36, n° 1, 2013, pp. 268 - 269.

<sup>83</sup>GASCÓN MARCÉN, «The extraterritorial application of European Union data protection law», *Spanish Yearbook of International Law*, vol. 23, 2019, p. 421.

the requested State and its fundamental guarantees are respected. Notwithstanding the foregoing, as noted above, the CJEU suggests that this is not the sole or exclusive avenue available to Member States. Also, we can state that EU law will undoubtedly play a significant role in any strides toward greater liberalization that may occur within civil law jurisdictions in the European context.

The practice reconstructed in section 3, however, shows that common law courts have often treated international cooperation instruments as non-exclusive rather than mandatory gateways. *Société Nationale Industrielle Aérospatiale* is emblematic in this respect, in that the U.S. Supreme Court declined to make the Hague Evidence Convention an exclusive route while at the same time articulating a list of factors for deciding whether and how to use it. In functional terms, this non-exclusivity is reinforced by the fact that ordinary discovery or disclosure can compel a party subject to the forum court's jurisdiction to produce documents and data within its possession, custody or control even where the material is physically located abroad. In that setting, Hague channels tend to operate as an available alternative within a comity-based balancing exercise rather than as a strict prerequisite. By contrast, distinct assistance regimes designed specifically to aid foreign proceedings—most notably 28 U.S.C. § 1782 in the United States and the Evidence (Proceedings in Other Jurisdictions) Act 1975 in the United Kingdom—occupy a different conceptual space: they structure how the forum may assist litigation abroad, but they do not themselves explain (nor replace) the ordinary extraterritorial pull of domestic discovery or disclosure directed at parties before the forum court.

From a civil law perspective, this case law creates a structural asymmetry. Common law courts can project their evidentiary orders extraterritorially, while civil law States are largely confined to reactive tools such as blocking statutes and data-protection rules. The French *Loi de blocage*, as applied in *Christopher X*, together with the emerging use of the GDPR as a de facto sectoral blocking statute in cases such as *Kashef v BNP Paribas*, illustrates this dynamic. These developments indicate that continental systems increasingly treat certain categories of information—especially personal data and commercially sensitive material—as legally tied to their own procedural and regulatory regimes.

At the same time, the analysis suggests that incompatibility is not absolute. The very language of *Aérospatiale*, and more markedly the reasoning in *Kashef*, indicates that common law courts are capable of according genuine weight to foreign procedural and regulatory interests when applying comity-based tests. Where a foreign blocking statute or data-protection regime is not merely a pretext for non-cooperation but expresses deeply embedded constitutional or fundamental-rights commitments, those interests can outweigh the forum's interest in unrestricted discovery. The Hague Evidence Convention then re-emerges not as a formalistic obstacle, but as the “appropriate alternative means” through which evidence may still be obtained without disregarding the procedural sovereignty of the requested State.

The answer to the research question is therefore necessarily qualified. As currently practiced, the routine use of unilateral discovery and disclosure orders directed at evidence located in civil law jurisdictions is only partially compatible with procedural sovereignty and with the architecture of international cooperation. Compatibility arises, if at all, within a relatively narrow band of cases: those in which (a) common law courts meaningfully integrate foreign procedural limits and international instruments into their analysis; (b) confine orders to what is strictly necessary and proportionate, and, crucially, (c) are prepared to default to court-to-court channels where

fundamental rights or blocking statutes would otherwise be infringed. Outside this band, discovery and disclosure operate less as tools of cooperation and more as vectors of procedural extraterritoriality.

#### 4.2. Towards “civil-law friendly discovery”? Normative implications for international cooperation

The proposal of a “civil-law friendly discovery” invites a more explicitly normative reflection. The empirical and doctrinal material examined in this article shows that some elements of such a model are already present, albeit unevenly. On the common law side, both U.S. and English procedural reforms have moved in the direction of proportionality and judicial management: Rule 26(b)(1) FRCP narrows the scope of discovery in light of costs and access to information, while PD 57AD re-designs disclosure in the Business and Property Courts around issues for disclosure and tailored disclosure models. On the civil law side, EU law has developed increasingly sophisticated standards of proportionality and necessity in areas such as anti-discrimination litigation, as evidenced by *Meister* and *Kelly*, and has constitutionalised data protection through the GDPR.

These developments, however, remain largely parallel. Proportionality in common law discovery or disclosure continues to be applied within a framework that regards extraterritorial reach as procedurally normal, whereas proportionality in civil law systems is embedded in a judge-led, intra-procedural and territorially bounded conception of evidence. If a genuinely “civil-law friendly” approach is to emerge, at least four elements seem necessary:

First, common law courts would need to recalibrate their comity analysis so that instruments such as the Hague Evidence Convention and, where applicable, Regulation (EU) 2020/1783 are treated as the presumptive primary channels for obtaining evidence in civil law jurisdictions. Rather than asking whether recourse to the Convention is strictly indispensable, the baseline should be that direct discovery or disclosure orders addressed to parties in civil law States are exceptional and require specific justification. *Aérospatiale*'s factors could be re-read through this lens, giving determinative weight to the availability of court-to-court mechanisms, rather than treating them as one factor among many.

Secondly, foreign blocking statutes and data-protection regimes should be integrated into the proportionality assessment not as inconvenient obstacles, but as expressions of constitutional commitments to which courts of cooperating States must give serious regard. *Kashef* points in this direction by recognising the *Loi de blocage* and the GDPR as genuine constraints, rather than formal objections to be discounted. A “civil-law friendly” discovery would generalise this approach: where compliance with a discovery or disclosure order would expose a party to realistic criminal or regulatory liability in the requested State, or would require transfers of personal data contrary to Chapter V GDPR, the order should be narrowed, redirected through Hague channels or refused.

Thirdly, there is room for further clarification on the civil law side. While the GDPR's Article 48 and national blocking statutes send a strong signal, they do so in relatively general terms. Additional guidance—whether through CJEU case law, opinions of the European Data Protection Board, or soft-law instruments—could specify the duties of European controllers and processors faced with foreign discovery or disclosure orders, including obligations to resist or challenge such

orders where they conflict with EU law. Similarly, national courts in civil law States could articulate more explicitly the extent to which compliance with foreign evidentiary orders is compatible with domestic procedural law, competition law and trade-secret regimes, thereby providing clearer parameters for foreign courts engaged in comity analysis.

Fourthly, and more ambitiously, international cooperation frameworks themselves could be adjusted to reflect the realities of large-scale digital evidence. The Hague Evidence Convention was not drafted with global cloud infrastructures, extraterritorial data-access laws and comprehensive data-protection regimes in mind. Emerging tensions between the *CLOUD Act* and the GDPR illustrate that traditional models of mutual assistance are being tested by technological and regulatory shifts. Negotiated instruments—whether amendments, protocols or complementary agreements—could clarify how requests for large volumes of electronic data are to be handled, how proportionality and necessity are to be assessed and how conflicts with data-protection and blocking statutes are to be resolved.

From this perspective, the notion of “civil-law friendly discovery” does not imply the transplantation of civil law evidentiary structures into common law systems. Rather, it suggests a regime in which the extraterritorial projection of discovery and disclosure is constrained by three concentric limits: (a) the procedural sovereignty of the requested State, as operationalised through its own *lex fori* and blocking statutes; (b) the international cooperation instruments to which both States have subscribed, such as the Hague Evidence Convention and, within the EU, Regulation (EU) 2020/1783; and (c) the fundamental-rights architecture of EU law, particularly data protection under the GDPR.

Within those limits, there remains space for effective cross-border evidence-gathering. Common law courts can continue to rely on discovery and disclosure domestically, can make targeted use of those tools in cross-border cases where the evidence is legitimately within their reach and can employ Hague mechanisms and other MLATs to access evidence abroad in a manner acceptable to civil law jurisdictions. Civil law States, for their part, can continue to refine their own evidentiary regimes to ensure that fundamental rights and regulatory interests are protected without degenerating into procedural isolationism.

Ultimately, the analysis conducted in this article suggests that the compatibility of common law discovery and disclosure with civil law procedural sovereignty and international cooperation instruments is contingent and context-dependent. It is not that such tools are inherently incompatible with civil law systems, but that their compatibility depends on a sustained willingness—on both sides—to subject evidentiary demands to the constraints of comity, proportionality and fundamental rights. Where that willingness is present, the Hague Evidence Convention and the GDPR can function as structuring frameworks for a more balanced model of cross-border evidence-taking. Where it is absent, discovery and disclosure risk becoming instruments of unilateral procedural imperialism, at odds with the very idea of international judicial cooperation on which the letters rogatory system was originally built.

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