TRANSATLANTIC LITIGATION: DISCLOSURE, DISCOVERY AND THE DIFFERENCE

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An essential part of the litigation process, whether the case was initiated in the courts of England and Wales, or in the federal (and state) courts of the United States, is the formal process of exchanging information between the parties about the factual evidence that they intend to present at trial. Known as 'disclosure' in England and Wales and as 'discovery' in the US, the objective of this procedural stage is to give parties the opportunity to review the available evidence and to assess the strengths and weaknesses of their own and their adversary's case before a trial on the merits or final hearing.

Both are essentially designed to prevent a trial by ambush. The underlying reasoning is that, with all of the relevant information and documentation out in the open, litigants will be better equipped to concentrate on the specific issues presented by the matter and, ultimately, to assist the court in achieving justice. In addition, both processes allow the parties to consider the prospect of settling the dispute prior to trial or a final hearing.

Although the final objective of the two regimes is the same, there are some key differences between the disclosure process in England and Wales and the discovery process in the United States, which are examined below. Note that, although this article focuses on the discovery process under federal law in the United States, practitioners in state courts in the US should acquaint themselves with state specific rules, as many have their own rules of civil procedure governing discovery.

Disclosure in England and Wales

The disclosure regime in England and Wales is governed either by Practice Direction 57AD or Part 31 of the Civil Procedure Rules (CPR). The new disclosure regime (under PD57AD) was introduced in January 2019 to make the disclosure process more efficient and proportionate to the value of the dispute. It now applies in almost all disputes in the Business and Property Courts (where most commercial disputes are argued).

PD57AD requires parties to understand their 'data universe' and issues in dispute at an early stage of litigation, and to cooperate with each other and agree (as far as possible) the scope of disclosure. This is a shift away from the previous regime of CPR 31, where disclosure would only really be considered in the run up to the first 'case management conference' (CMC), a hearing at which the future conduct of the claim and a timetable for trial is decided by the court. Importantly for practitioners, PD57AD places duties and obligations on the legal representatives of the parties, as well as the parties themselves.

Whatever disclosure regime applies, as soon as a party knows that it is, or may become subject to, litigation, it has specific obligations to preserve relevant documents for the duration of the proceedings. This includes, but is not limited to, suspending document destruction processes. What is new in PD57AD, however, is the requirement to (i) notify employees and former employees of the need to preserve documents as potential custodians of relevant documents and (ii) take reasonable steps to ensure that agents or third parties who may hold relevant documents on the party's behalf do not delete or destroy them. A party must provide written confirmation that this has been done.

Further, when serving a statement of case, a party is now required to provide 'initial disclosure' of key documents relied on by a party, and which are necessary for their opponent to understand the case to be met.

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Whilst there is no presumption that further disclosure will be ordered at a later stage of the litigation, a party can seek an order for 'extended disclosure' from the court at the CMC. There are five models for 'extended disclosure' (model A through model E) which range from disclosure confined to known adverse documents and limited disclosure (including documents which should have been but were not provided for under 'initial disclosure') – through to request-led or narrow search-based disclosure of documents relevant only to the background or context of material facts or events (similar to the disclosure in international arbitration) – to the most wide-ranging order requiring disclosure of documents, which may lead to a train of inquiry resulting in the identification of further documents for disclosure, usually reserved for cases alleging fraud. Orders specifying disclosure of the latter type will only be made in exceptional cases.

In considering which model to apply, the court will have regard to an agreed list of issues for disclosure, and to other information provided in the disclosure review document (DRD) which parties must collaborate on and complete in advance on the first CMC. Interestingly, the DRD encourages the use of technology and artificial intelligence software which is increasingly used among litigators in England and Wales in commercial disputes.

Discovery in the United States

For cases tried in federal courts, the discovery procedure in US civil cases is governed by rules 26-37 of the Federal Rules of Civil Procedure (FRCP). As mentioned above, many states have their own rules of civil procedure for cases initiated and tried in their jurisdictions. Whilst those state rules are generally similar to the federal rules, many contain some key differences. As a starting point, rule 26(b)(1) of the FRCP provides that litigating parties may 'obtain discovery regarding any matter, not privileged, which is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.'

Under the FRCP, there are several authorised methods of discovery. The most common include:

- Initial disclosures: after commencement of proceedings, each party is obliged to voluntarily disclose non-privileged documents in its possession relevant to its claims or defences, and to identify all witnesses known to have knowledge of facts relevant to the parties' claims or defences (see FRCP 26).
- Interrogatories: each party may serve any other party no more than 25 written interrogatories. These are formal, written questions to be answered under oath by one party to another, with the purpose of obtaining detailed information about persons, corporations, facts, and witnesses, as well as the identity and locations of records and documents (see FRCP 33).
- Requests for production: the parties may also serve any other party with requests for production. These are written requests for the other party to produce certain items in their possession, custody, or control that the requesting party can inspect, copy, test, or sample. Such items include: documents or electronically stored information, including writings, drawings, graphs, charts, photographs, sound recordings, images, or other data (see FRCP 34).
- Requests for admission: a party may serve on any other party a written request for the responding party to admit, for the purposes of the pending action, the truth of any relevant matter relating to the facts, the application of law to fact, or opinions about either, and the genuineness of any described documents (see FRCP 36).
- Depositions: finally, a party may request an out-of-court statement, given under oath, by any person involved in the case. This is one of the most common methods to take discovery in the US. These statements (which are in the form of a written transcript or oral questioning), are conducted to enable a party to know in advance what a witness will say at trial, and also serve to preserve a formal record of a witness' recollection of events while they are still fresh (see FRCP 30 and 31).

Disclosure and discovery – key differences

As can be seen above, the disclosure and discovery processes are distinguished by more than their different names. Key differences include:

- The wording of FRCP 26 provides that parties can obtain discovery of any non-privileged material that is relevant to any party's claim or defence. 'Relevant' in this context is anything that is reasonably calculated to lead to the discovery of admissible evidence. As discussed above, this type of broad discovery is not permitted under PD57AD in England and Wales, save for where the court grants the (very rare) order to permit model E extended disclosure. In practice, this can cause issues for US based attorneys when they seek disclosure from witnesses abroad under the applicable Hague Convention regime. The English courts may refuse or drastically modify 'discovery requests' from US attorneys who utilise letters of request/letters rogatory to obtain evidence from an English-based resident, for use in the foreign proceedings. Unlike in the US, the English system requires a level of specificity when seeking disclosure. Documents must be known to exist, individually identified, and intended to be admitted at trial. The process cannot be used as a 'fishing expedition'. This is generally seen to be one of the great benefits of litigating under the English system. When disclosure of documents is limited in this way, it allows for more proportionate searches and in turn reduces both time and costs for litigants.
- The concept of depositions does not exist under the English system. Disclosure relates only to documents (hard copy or electronic). The exchange of written factual witness evidence is the next stage of the litigation, once disclosure has taken place, but the witnesses cannot be cross-examined until trial.

The obligations imposed in England and Wales are, on the whole, more restrictive than those in the US, where parties are generally required to make substantial oral and documentary disclosures. Despite the mechanical differences in the procedures, what is clear is that parties litigating in either the US or England and Wales must consider proportionality in terms of requesting and providing documents ahead of trial.

It is important that US attorneys and their clients who look to litigate in or obtain disclosure under the English system understand the key differences from US discovery so their disclosure requests are not unnecessarily struck down or substantially modified by the English courts. However, as noted above, the more restrictive approach taken by the English courts is not all negative; it will likely result in a quicker and more cost-effective disclosure process than that under the US system.

This article was co-written by Trey Reliford and Robert Lowell of US law firm, Polsinelli.

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