International Trade law and Civil Procedure Cross-Influences between Continental European

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Abstract: In order to determine whether a plaintiff in a civil case is entitled to claim, the underlying facts are often decisive. This article discusses the rules on fact-finding mechanism generally named discovery. These rules regulate how information is gathered, evidence is presented and how a decision on matters of fact is made .Romano – Canonical model and Anglo–American model have similarities and also differences mentioned in this article. But it is important to present their effective means and mechanisms for each other system to study and consider them in future legislations. The procedures that are used to resolve factual questions in civil or continental systems differs greatly from those used in American courts, we aimed to enhance our understanding of those differences and aimed to show these differences evolved throughout time .Often ,procedural rules are implemented that were tried and tested elsewhere. Comparative law may serve a useful tool to generate possible legal solutions to pressing procedural problems. In addition, experience in other jurisdictions may be of use to access possible effects of legislative change.

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1. Introduction

Continental systems (like French system as it is studied in this article), have increasingly required the parties to disclose information and have widened the possibilities for discovery. (Cadiet, 2004). Rules were introduced to prevent parties from withholding relevant information. (Kohl, 1971). Parties are required to provide complete and ruthful information and they are also required to disclose in their pleadings the evidence they tend to use in support of their factual legations. Judges have gained more powers to order the parties to produc evidence.(Levy, 1965).

The present U.S. discovery is not rooted in one, but in tow distinct English procedural regimes: "common law and Equity" (Burbank, 1997). Each of these s ystems had their own procedure to resolve factual questions. The differences between systems are discussed in table 1 (Cannon, 2006). .the fundamentals of the English rules on discovery were adopted in many North American colonies (Clark, 1935). A s ystem based on English common law was also adopted at the federal level. Discovery in Anglo-American jurisdictions changed radically in the 18th century. (Cooter, 1995-1996) Moreover, important changes were made to the rules of evidence.(Dobie, 1938-1939).

More recently the American fact finding arrangement have changes: the 1938 Federal rules of civil procedure merged the procedures of law and equity in federal courts (Flanders, 1978-1979). The new rules on discovery aimed to prepare for trial and ensure that all relevant information was available to both parties (Froeb, 2006).These rules enabled the parties to conduct a broad search for facts with little court intervention. (Langbein, 1995). By 1970s, Discovery was the new stage in the U.S. process of fact-finding. (Ly nch, 1963).

Interrogations, depositions and requests for the discovery of documents are currently used in a large proportion of cases. (Millar, 1926).

The discovery consumes a large proportion of time and resources allotted to litigation. In addition, summery judgments became more widely available. (Millar, 1936-1937).

The developments above had led to a fourth general trend in U.S. litigation: A gradual shift in the roles of parties, lawyers, and judges in the process of discovery. (Millar, 1937-1938).

The role of court in American civil litigation was at the heart of legislative reform. Since 1983, Judges were granted more and wider discretionary powers to manage the litigation process. (74 Harv. L.Rev., 1961).

2. Research questions and general overview

What is the historical background of discovery rules and have there been cross-influences between the procedural systems and what solutions are considerable from U.S model of discovery? What are the differences between procedureal systems on fact-finding?

3. Historical changes in both systems

The action to **produce and exhibit** was one in the nature of a bill of discovery which today is

called **discovery** in U.S. system and **Forced production of documents** in continental civil system.Both **Romano-canonic and Anglo-American** mechanisms to have access to the proofs in a civil procedure are **rooted in action ad exhibendum**, an action from Romano-canonical system, to enable a claimant of a proof whom the possessor refused to show it and bring it to another action.

At present, discovery is the legal process used to disclose evidence relevant to any matter at issue in a civil dispute. Each party has the right to call on others to provide discovery of relevant documents. Today we have wide discovery mechanisms in civil procedure of U.S. but in continental (civil) systems of civil procedure, there is no such means, mechanisms,and opportunities for litigants. In the U.S. system, if the discovery is called for, the formal procedure begins with opposing parties creating a list of all relevant documents which are or have been in their possession custody or power.

But in continental procedural systems, the parties can ask for that proofs before the judge, and this is the judge which verify the demand and may order the other party or third party to disclose the proof, but there is no discovery period, and there is not enough sanctions for refusal, while in U.S. model of discovery we have empowered judge jury and litigants who make a list of all relevant documents with details and the other party must comply by producing these documents in the action.

For example in French legislation, la production force des pieces is the solution when the proof which can prove the claim or defend of one party is in the possession of the other party ,if it is shown to the court that there is such a proof, and it is really in the possession of that person, the judge based on ask of that party, could order to be produced and if there is refusal of production, it could be order to pay a sum, for each day of refusal, or affirmative conclusion against refusal party. But in U.S. Federal rules of civil procedure, the role of judge is different.

There is a period before the trial is started, this time is for gathering evidences and have access for parties to all relevant documents. Discovery in U.S. approach is not asking for some proof only, it is a procedure, aimed to gather all related information for Parties of a civil case.

In this article we present American discovery to civil and continental system, although in U.S.system in some cases the existing process of discovery have caused delay and expense ,however, the disclosure is essential to achieve a just result in litigation.

4. Discussion

It is apparent that procedural rules have frequently been transplanted from one jurisdiction into another (Daigre, 1979), those that draft procedural legislation generally adopt rules and principles that were used, tried and tested elsewhere. (92 Yale L.J., 1982-1983).

There have been many examples of crossinfluence contributed to a gradual approximation of procedural systems . The pleading rules introduced by the 1848 New York Field code were similar to those on the continent. (Olivier, 2000) At the same the introduction of very liberal party driven discovery rules in the U.S. provides the clearest example. (Rosenberg, 1969 and 1988)

American model of discovery is supposed to provide the parties with relevant documents before trial. It can assist parties in preparing their cases or determining whether to settle before trial. It also should save the court time and expense through: Narrowing the issues in dispute preventing parties being taken by surprise at trial and enabling a dispute to be settled or determined at trial on its merits and not tactics.

In American model, the judge has no role of digging for facts and parties are required to have such a role, although the judge takes a more **active role** in **case management** .Thus it is strongly recommended to civil systems to make their **own** model of discovery and take the positive aspects of American model.

In American model of discovery any party may serve on any other party a request to produce and permit the party making the request, to inspect and copy any designed documents including writings,drawing, graphs, charts, photographs, phone- records electronically stored information and other data compilations from which information can be obtained, translated if necessary by the respondent or inspect and copy test or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in possession ,custody or control of the party upon whom the request is served .The request may without leave of court be served upon the plaintiff after ommencement of action and upon any other party with or after service of summons and complaint upon that arty. The request shall ecify a reasonable time, place and manner of making the inspection and performing related acts. The request mayspecify the form in which electronically stored formation is to be produced. The party upon whom the equest is served shall serve a written response within 30 days after the service of the request.

5. Comparing legal systems

As it was mentioned how legal systems accepted and created rules of discovery in civil procedure, it must be said that the differences in Continental legal systems and U.S. Federal rules of discovery in civil cases are numerous. (Schwarzer, 1989) In addition, there are many differences in the way in which the laws are applied. In French system(Gabdeil , 1903), the process of access to written proof and presentation of evidence may take place at a number of dispersed court sessions .In the United States there may be many procedural steps in pretrial stage of litigation. At the same time, evidence will be presented to the Trier of fact during a single uninterrupted hearing Sofare, 1982-1983). In discussing the ifferences between legal systems, it is important to distinguish them.

Often the written rules in one system differ greatly from those in other systems. Out of court depositions are important within the U.S. System of discovery,unavailable in French system, for example. (Surbin, 1997-1998)

In all jurisdictions, the laws allow to have full access to all related information about the civil case,but with different features and means. (Sunderland,1932-1933).

Most of rules of European legal system (continental) were initially influenced by the Romano – canonical model. In more recent times, and sometimes contrasted with Anglo-American systems.

Main differences are **mentioned in table 1**. These **differences** flow from tow fundamental differences:different roles of judges in the civil procedure. (Sunderland, 1938-1939)

It is commonly believed that the pursuit of truth is the primary end of the process of discovery.(Fleming, 1928)

However, the pursuit of truth is not an end in itself, but a means directed towards a more remote end. (Grossen, 1960)

Technical or pure epistemological perspective does not suffice to understand the discovery arrangements of legal systems. (Keeton, 1954)

The pursuit of truth is believed to be importance to promote settlement, reach a correct decision, and level the playing field and to make the ourt's decision acceptable in the eyes of the litigants and the public. (Louisell, 1957)Thus in every egal system, it is relevant to identify the final ends of the litigation process. Different jurisdictions emphasize different ends of the process of discovery. Rules of discovery were designed to establish the facts" correctly". The pursuit of truth was hence of great importance in U.S. legal system. (Macllister, 1950) Thus all the means are available to achieve the facts of civil case in civil procedure. Tow distinctive features are most prominent in U.S. model of discovery in civil procedure: the civil jury and the adversarial system. (Speck, 1951) In U.S. civil procedure, the "adversarial system" provides both parties with sufficient opportunities to voice their pinion. Thus, in this system, the "role of parties" is more (Warren, 1890). The parties have the possibilityof ask for production of all related documents which are "in the possession of the other party". (Weinstein, 1957).

But on the other hand, The U.S. Federal system seems to be also concerned with the "resolution of disputes" (Wigmore, 1940). We may conclude that the federal U.S. rules primarily aim for the fair and legitimate resolution of disputes. (Interim Report, 2010) Use of direct sanctions against parties in reliance of presentation of evidence in civil process is a distinctive feature of U.S. legal system. (Adams, 1998)

6. Conclusion

The procedural differences between the common law and continental systems have been thoroughly examined. Despite different features, the ultimate goal of both systems is essentially identical: to achieve the just, efficient, and speedy resolution of disputes. (Julien, 2003) Perhaps the most interesting phenomenon is that neither system is satisfied with its own performance in achieving this ultimate goal,(Kohl, 2004) and both systems are trying to seek inspiration from each other to reform their procedural arrangements. (Vincent. 2001)

The notion of active judicial management and supervision is sweeping both the United States and England and has dominated as the theme of their reform movements for the past twenty years (Heron2002). The focus of judicial attention is shifting from trial to the pretrial stage. (Lebars, 1997)The opposite directions of these reform movements are clearly bringing the two systems into convergence. (Braas,1945) Despite this convergent trend, the attitudes of the two ystems toward civil discovery remain far apart. (Gabdeil , 1903) In the common law system, parties are equipped with discovery rights to gather information and evidence in preparing their cases.(Lewald, 1937)

DISCOVERY enables them to compel disclosure of information from their opponents and even third parties. (Jodlowski, 1967) In the continental systems, no such rights are recognized. (Nouveau Code, 2003)

The civil judges exclusively enjoy investigative power(Dunand , 1940). Almost all commentators find the answer to be rooted in different procedural arrangements and concepts of procedural justice between the two systems. (Linsmeau, 1999) I

turn to the board subject of discovery in civil actions. Viewed comparatively, in this particular realm of procedure, the civilians' mindset-still hostile to disclosure as well as discovery on the grounds of party privacy and autonomy- starkly differs from the common-law mindset. (Mougenot, 1990) However, some movement in the civil law has recently occurred, and the future should see more. Boudreau, 2006) Two points should be made perfectly clear at the outset. First, my proposal of **introducing discovery is made for the sole purpose of curing the problems arising from the continental system's lack of efficient discovery**. (Guinchard, 1999). It is not an attempt to harmonize the two systems' conflict on this issue or to build a set of universally rules. The most important lesson I find in the study of comparative civil procedure is that procedural law should be socially constructed and defined with an eye on the need and culture of a rticular society. (Tarzia, 1996) Second, I would like to mphasize that while I propose to ntroduce iscovery into the continental system, I do not propose to ransplant the whole common law discovery Scheme. It would be silly to suggest such a complete transplant. (Couchez, 1998)

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