Discovery and Civil Law Systems

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**A version of this article first appeared as a commentary on Discovery and Civil Law Systems, October 2006 issue of Mealey's International Arbitration Report. The subject matter is just as relevant today as it was in 2006.

I shall divide the article into 6 sections as follows:

1. Aim Of The Article
2. Concept Of Discovery And The Development Of E-Discovery
3. Discovery In International Arbitration Versus Litigation
4. Provisions Governing Discovery Contained In The Arbitration Rules Of The Leading Arbitral Institutions And In The Arbitration Clauses Agreed By The Parties
5. Discovery Under Common Law And Civil Law Systems, Difficulties Of Application
6. Discovery Under a Selected Civil Law System (Spain)

Due to newsletter space considerations, I shall address sections 1, 2 and 3 in this newsletter, to be followed by the other sections in future newsletters. Stay tuned.

Section1. Aim of the Article

This article seeks to examine the purpose and use of discovery in dispute resolution proceedings in general, and in international arbitrations in particular, where it has rapidly gained in popularity and is becoming increasingly used.

A further area singled out for examination will be the use of discovery in international arbitration, in juxtaposition to its limited use in litigation in the ordinary law courts of non-Common Law systems.

Attention will also be drawn to the way in which discovery has come down to us from the English-speaking world, chiefly from systems that apply Common Law. In countries with the Civil Law system, in contrast, this institution is almost completely unknown. The scope of application of discovery will therefore be compared from the standpoints of both Common and Civil Law.

Similarly, a review will be conducted of Spain's legal provisions governing certain institutions that possibly display similar features to discovery, such as certain aspects of advanced examination of evidence and witnesses in special circumstances ("prueba anticipada") or other procedures, such as pretrial evidentiary proceedings ("diligencias preliminares").

The difficulties of applying these discovery techniques to areas other than those in which they originated and have since been developed to the full, will also be targeted for discussion.

So, without further ado, let us embark upon an examination of the topics outlined above and a comparison between these Common-Law-derived mechanisms and their reduced or limited impact on a chosen Civil Law System; Spain.

Section 2. Concept of Discovery and the Development of E-Discovery.

Discover may be defined as a formal investigation lying at the core of judicial proceedings, conducted prior to trial to ascertain facts pertaining to the case. By virtue of this device, one party compels the other to produce certain documents or furnish any other physical evidence.

One major purpose of discovery is to assess the strength or weakness of an opponent's case, with the idea of opening settlement talks. Another is to gather information to use at trial.

The theory of broad rights of discovery implies that all the parties will come to the trial with all possible knowledge of the case, and that, save for the Constitutional right not to incriminate oneself, no party will be allowed to keep information secret.

It can truly be said that, in any judicial proceeding, the fiercest phase of the battle usually takes place at the discovery stage, before the actual trial itself.

In the United States, the use of discovery has assumed crucial importance. Within US jurisdictions, where this mechanism has enjoyed extensive development, the rules embodying permissible methods of discovery have been laid down by Congress (for Federal courts) and State legislatures (for State courts).

The most common forms of discovery are:

• Depositions, which involve an in-person session at which one party to a lawsuit has the opportunity to ask oral questions of the other party or its witnesses under oath, while a written transcript is made by a court reporter.

• Interrogatories, consisting of written questions the other party must answer truthfully under penalty of perjury.

• Requests for admissions, whereby one party asks the other to admit or deny certain facts in the case. Once admitted, such facts do not have to be proven during the proceedings.

• Request for physical examination, consisting of a request by one party to the other that she undergo a physical examination if her health is at issue.

• Request for production of documents, consisting of a request by one party to the other that it hand over certain documents.

• Request for inspection, consisting of a request by one of the parties that certain tangible items in the possession or under the control of the other party be examined. Examples of items to be inspected include houses, cars, appliances and any other tangible item.

• Subpoena, which consists of an order instructing a witness to appear in court or at a deposition. Subpoenas are issued by the court, and failure by the witness to comply will be deemed to constitute contempt of court.

• Subpoena duces tecum, a court order instructing a witness to deliver up certain documents to a specific person or bring them to a scheduled deposition. Once again, disobedience can give rise to an order for contempt of court.

Viewed in this light, the scope of discovery is very wide and enables a broad spectrum of documents to be obtained, a spectrum not restricted to what may be used in the trial. The criterion is usually to allow the parties to ascertain any information which may reasonably lead to the unearthing of evidence that is both relevant and admissible. It is a considerably wide-ranging criterion, and parties normally disagree as to which information ought to be exchanged and which ought to be kept confidential. Disputes on these matters are normally settled by discovery motions and/or court rulings.

Legal acceptance of discovery in the English-speaking world has recently been extended to the possibility of requesting information stored in electronic files, which is known as "e-discovery" and can be defined as follows:

"electronic discovery refers to any process in which electronic data is sought, located, secured, and searched with the intent of using it as evidence in a civil or criminal legal case. E-discovery can be carried out offline on a particular computer or it can be done in a network. Court-ordered or government sanctioned hacking for the purpose of obtaining critical evidence is also a type of e-discovery."

As has been noted above, the United States already had specific rules addressing the possibility of discovery. The Federal Rules of Civil Procedure have also been amended to address discovery of electronically stored information so as to better accommodate discovery directed at information generated by computers.

Section 3. International Arbitration versus Litigation.

Discovery-related issues are resolved in different ways in arbitrations and in the ordinary courts of law. The approach to discovery constitutes one of the greatest differences between the arbitral and judicial systems. Indeed, the availability of discovery procedures varies widely from one system to another.

Whether and to what extent discovery is available in an arbitration remains unsettled, particularly when discovery is sought from third parties. One must anticipate potential obstacles to discovery requests from the opposing party (or parties) in the arbitration, from the arbitrators, and from the party from whom discovery is sought (the third party).

In arbitration there are no specific rules as to discovery per se, and matters relating to discovery can usually be decided by agreement between the parties. Should the parties be unable to come to an agreement, however, the arbitrator enjoys the necessary discretion to take a decision in this respect.

The extent to which a party can obtain discovery will depend on the arbitration agreement, applicable arbitration rules, and the disposition of the arbitrators. When seeking third-party discovery, a party's fortunes will also depend on the jurisdiction in which the arbitration is held and that in which the third party is located.

In jurisdictions where there are legal provisions regulating discovery in the context of the courts, such rules are not automatically applicable to arbitration. Hence, one cannot formulate a request for discovery from the same untrammeled point of view as a party may have under its own legislation. Instead, one would have to look at what the parties have specifically agreed in this respect. In the absence of any provision addressing the issue, many arbitrators tend to hold that, in deciding to submit to arbitration, the parties were precisely seeking to avoid the type of open-ended discovery permitted in the courts.

One frequent reason to choose arbitration over conventional litigation is to avoid the time and expense required for traditional litigation discovery. Accordingly, a party's right to discovery will depend in large part on the terms of the arbitration agreement itself.

The arbitrators will therefore approach discovery from the instance of the arbitration clause agreed by the parties, the rules of the arbitral institution, the law applicable to the arbitration, and any pertinent precedents relating thereto. Only after reviewing these tools, will they have regard to the relevant state legislation.

Discovery issues typically confronting arbitrators are for example: what degree of discovery ought to be allowed between the parties; what forms of discovery can be used — the traditional mechanisms, such as production of documents, interrogatories, depositions, exchange of documents, witness lists or production of experts' reports — or something more limited; and whether the obligation of discovery affects third parties not bound by the arbitration clause.

Arbitrators will normally attempt to enforce any agreement that the parties have reached. In the absence of such an agreement, the scope of discovery will depend on the monetary sum in dispute, the complexity of the matters under debate, and the burden entailed by production of documents compared to the importance of the information likely to be obtained. The arbitrator will be guided by the principle that discovery ought to give prior access to sufficient information to enable the parties to prepare and present a case that is both cogent and complete. The arbitrators will also bear in mind that most of the parties who opt for arbitration wish to avoid the charges and costs traditionally associated with the sweeping type of discovery that could be set in motion in court proceedings. In default of agreement by the parties, many arbitrators thus tend to lean towards the low costs, swiftness and effectiveness of limited discovery.

In important cases, experienced arbitrators often give leave for fairly wide-ranging discovery procedures. Even in these cases, however, it is normal for the arbitrators to impose limits on the amount or duration of the discovery procedures, and rarely will they consent to as wide a scope of interrogatory or deposition as that typically associated with court proceedings. What arbitrators usually tend to do is to heed the terms agreed by the parties as regards implementation of interrogatories or depositions. In default of agreement, they tend to be fairly cautious and prudent, so as to avoid being overly permissive insofar as the rules on discovery are concerned.

In general, both the nature and the scope of discovery available in international arbitrations tend to vary widely from one case to another, depending on the terms of the agreement between the parties, the identity of the parties or the arbitrators, the arbitration rules, and the seat at which the arbitration is scheduled to take place.

Section 4. Provisions Governing Discovery Contained In The Arbitration Rules of the Leading Arbitral Institutions and In The Arbitration Clauses Agreed By The Parties.

The rules of the leading international arbitration institutions vary as regards discovery.

The Rules of the International Chamber of Commerce (ICC) contain no provisions whatsoever as to discovery, save the stipulation that the parties must produce to the tribunal and to the opposing side those documents on which they base their claim or defense. There are two provisions, however, that might be relevant for the purposes of discovery, viz., Article 25(1) and (5) which vest the arbitrators with

the power to “establish the facts of the case by all appropriate means” and “summon any party to provide additional evidence,” respectively.

The rules of other institutions are somewhat more indulgent towards parties who wish to use discovery mechanisms. The Rules of International Arbitration of the American Arbitration Association’s International Center for Dispute Resolution (ICDR) provide that “At any time during the proceedings, the tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate” (Art. 20(4)).

The Rules of the London Court of International Arbitration (LCIA) envisage that, unless the parties have agreed otherwise, the tribunal shall have the power “to order any party to make any property, site or thing under its control . . . available for inspection by the . . . other party . . .” and “to order any party to produce . . . any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant” (Article 22(1)(iv), (v) and (vi)).

Article 27(3) of the Rules of the United Nations Commission on International Trade Law (UNCITRAL), which are widely used in ad hoc arbitrations, provides that, “At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence . . . .”

The Rules of the International Centre for Settlement of Investment Disputes (ICSID), which settles disputes between governments and private investors, lay down that, “The Tribunal may . . . : (a) call upon the parties to produce documents, witnesses and experts; and (b) visit any place connected with the dispute or conduct inquiries there.” (Article 34(2)).

In 2010, the International Bar Association adopted revised Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules), which envisage the exchange of documents before the arbitral hearing. These rules are increasingly used in international cases by agreement between the parties, either prior to or at the time of the preliminary hearing. The IBA Rules permit the parties to make application for “a narrow and specific requested category of documents that are reasonably believed to exist” (Article 3.3(a) (i)).

Even where there is no agreement by the parties to apply the IBA Rules, when one party makes a reasonable request for production of certain documents or classes of documents material to the settlement of the dispute, it is unlikely that the tribunal will deny it, or that the other party will be able to refuse to comply with the requested production, for fear that the arbitrators might construe such refusal as elusive and suspicious, hinting at concealment of information prejudicial to said party’s interests.

Whatever the case, however, when it comes to weighing up such evidence the nationality of the arbitrators may play a relevant role, as will be seen below.

The wisest course for parties who submit to international arbitration would be to make express inclusion or exclusion of the possibility of discovery in their arbitration clauses, as outlined above. Agreements can expressly provide that there is to be no exchange of information whatsoever or, alternatively, that recourse may be had to the existing wide range of possibilities of discovery, e.g., in the U.S. Federal Rules of Civil Procedure. Similarly, parties can opt for an intermediate mechanism, such as exchange of only those documents that prove relevant, as provided for by the IBA Rules.

The typical case is that parties in international arbitrations are not unduly interested in recourse being had to far-reaching possibilities of discovery. In turn, arbitrators who do not come from jurisdictions where discovery enjoys popularity tend to be wary of a policy of extensive application of such methods. As will be seen below, a US party who agrees to submit to arbitration with a foreign-based body in a Civil Law jurisdiction, where the arbitral tribunal is in all likelihood going to be presided over by an arbitrator with a Civil Law background, ought to give careful consideration to the advisability of having or not having certain stipulations regarding discovery included in the arbitration clause.

The fact that one party may have benefited from or been prejudiced by the use of discovery depends on the type and nature of the contract, as well as the particular claims or defense pleas submitted in the arbitration. For instance, take the case of a manufacturer who enters into a distribution agreement with a distributor in a third country. Were such a manufacturer to suspect that the distributor might be in breach of his non-competition clause, the manufacturer would want a right of recourse to broad-based discovery mechanisms, since he would need to obtain information on any possible sales made by the distributor of products belonging to the competition. On the other hand, were the distributor to sue the manufacturer, pleading that the manufacturer's products did not comply with the agreed terms and conditions, it is likely that the latter would have an interest in restricting any information that he might have to furnish in this regard.

Section 5. Discovery Under Common Law And Civil Law Systems, Difficulties Of Application.

The wide gap that exists between the concepts of discovery in the context of Common Law and Civil Law has already been noted.

Despite the growing globalization now at work in international legal practice, it is nonetheless still possible to detect a wide range of matters where the purported convergence is not yet in evidence, or where the points in common are more apparent than real. One such matter is discovery. The approach typical of Common Law, founded on the premise of allowing ample leeway in the obtaining of evidence in advance of the trial, stands in sharp contrast to the limited scope of pretrial discovery envisaged by the Civil Law tradition.

As will be seen below, it is true to say that, in this regard, there are irreconcilable differences between the concepts of the respective systems.

For most countries that trace their legal heritage to the Civil Law tradition, discovery as understood by the English-speaking world is inconceivable. It is construed as being an intrusive, unnecessary and unjust device.

In international arbitration, which shares procedural aspects with both Civil and Common Law traditions, discovery is not countenanced to a degree comparable to what is seen as commonplace in American legal practice.

As seen above, for attorneys from a legal background in which discovery is widely used and permitted, it can be something of a nightmare to find themselves immersed in a legal setting where discovery might be refused or where its application is hampered by every possible type of constraint and obstacle. For their part, however, attorneys from a Civil Law context will tend to view the use of discovery tactics as a dangerous tool vis-à-vis the rights of the parties and the smooth working of commerce and business concerns.

The philosophy of common law discovery is that, prior to the trial, any party to a civil action is entitled to request that the other produce all relevant information in possession of any person, unless such information be confidential.

The US Supreme Court has stated that the deposition-discovery process has ". . . a vital role in the preparation for trial. The various instruments of discovery now serve as a device . . . to narrow and clarify the basic issues between the parties, and as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues."

Such descriptions are extraordinarily wide. The reason for this is that the guiding principles underlying civil proceedings in the USA are full disclosure, equality of information between the parties, and the avoidance of surprises at the time of the trial.

In contrast, Civil Law systems lay emphasis on the principle that each party has the burden of proving his/her own case and that the other party cannot be compelled to incriminate him/herself.

Indeed, the insurmountable difficulties lying in the way of uniform application of discovery methods lead to the conclusion that one of the most important practical problems confronting parties in international arbitration is the obtaining of the necessary documentary evidence for establishing the grounds on which to argue the case.

As has been seen above, Arbitration Rules are generally silent on the point, or leave it to the discretion of the arbitrators to decide upon the degree to which recourse may be had to discovery in order to compel parties to disclose information or produce documents involuntarily.

The IBA Rules of Evidence can be a useful tool for filling this gap, where parties agree on their use or the tribunal decides to adopt them. Outside the confines of arbitral proceedings, there are diverse procedures in the various Civil Law jurisdictions and within the "Anglo-Saxon" context, which permit documents to be obtained from the other side and from third persons who are not a party to the lawsuit. Such differences can be avoided in arbitral proceedings, where a uniform procedure may be agreed, if the above premises are respected.

Section 6. Discovery Under Spanish Law.

Spain is a civil law jurisdiction. Spanish law and, as more fully described above, Civil Law systems in general, do not recognize discovery mechanisms as such.

Having due regard to the purpose and ultimate goal of this institution, as analyzed above, some of the juridical-procedural concepts existing in Spanish law may be likened to what could be viewed as a discovery procedure. There now follows a comparison between advance examination of evidence and witnesses (prueba anticipada) or pretrial evidentiary proceedings (diligencias preliminares) under the Spanish Civil Procedure Act (Ley de Enjuiciamiento Civil) on the one hand, and Common Law discovery on the other, though not without first introducing the Spanish legal context, i.e., the basic features of court procedure in Spain.

Evidence Under Spanish Law

Spanish civil court procedure is characterized, above all, by the 'principio dispositivo', i.e., the principle of freedom of choice, whereby parties may proceed as they please, and the principle of 'aportación de

parte', whereby parties may adduce whatever facts they see fit. Moreover, Spanish procedural legislation abounds in formalisms, though there are continuing efforts to overcome these "rites" which historically form part of Spanish law.

The procedure for examination or sifting of evidence (práctica de la prueba) in Spanish civil procedural law obeys a series of general rules, as well as a series of formal requirements of a procedural nature, regardless of the special nature of the respective means of proof.

Accordingly, this brings us to what could be called the guarantees of probative activity or guideline principles of examination of evidence, namely:

• Unity (unidad de acto), that is to say, all the means of evidence must be examined at the time of the hearing or oral proceedings.

• Immediacy (inmediación). The judge that delivers judgement must have examined the evidence, or alternatively, said evidence must have been examined in his presence.

• Dissent (contradicción). This is the cornerstone of the process. All evidence is to be examined with dissent and full intervention by the parties.

• Publicity (publicidad). Each and every item of evidence is to be examined with total publicity, at a public hearing.

Yet, despite the existence and imperative and compulsory nature of these principles in all proceedings, the reality is that the rules themselves allow for exceptions to each of them. Among such exceptions is the case of pretrial evidentiary proceedings, which, to a certain extent and with many subtle differences, share some of the features of discovery and can be viewed as mechanisms that come close to this institution, an institution that in principle is unknown in Spanish law.

Advanced Examination Of Evidence And Witnesses.

As stated above, the general rule is that evidence is to be examined at the time of the trial or hearing. Nevertheless, it can be examined at an earlier stage under certain circumstances.

Accordingly, such advance examination consists of perusal of the evidence, at the request of the party seeking to initiate the proceedings or of any of the parties during the course thereof, at a point in time preceding the officially appointed date (either prior to commencement of proceedings or once these have begun, before the holding of the hearing or trial), provided that there are well-founded fears that it would otherwise be impossible for such procedures to be conducted on the date appointed in the court calendar, whether due to human agency or to the state of affairs.

Whereas pretrial evidentiary proceedings are actions targeted at preparing the proceedings by obtaining specific information, advancing the evidentiary stage, on the other hand, consists of examining the evidence at a time prior to the officially scheduled date, owing to the danger of such evidence being lost in the interim if the parties waited until said date fell due.

Pretrial evidentiary proceedings are preparatory procedures in the lower and higher courts, the purpose of which is to obtain data and information needed for presentation of the action or complaint. The various instances are laid down in the Civil Procedure Act and are as follows:

• Request for a sworn statement from the person to whom the complaint is addressed, concerning some fact relating to his/her capacity, representation or legitimation, without knowledge of which the lawsuit would not be feasible.

• Request for production by the person to whom the complaint is addressed of a chose or thing to which the trial may have to refer.

• Production, by whomsoever has in his/her power, of the last will and testament of the testator of the inheritance or legacy, at the request of the alleged heir, joint heir or legatee.

• Production of documents and accounts of a company or joint enterprise, at the request of a member or co-owner.

• Production of insurance policy, by whomsoever has in his/her power, at the request of any person who considers him/herself to have be injured or harmed by an event that might be covered by civil liability insurance.

• Whoever should seek to bring an action for defense of the collective interests of consumers and end-users shall be entitled to request specification of the members of the affected group.

• Any such contingencies as are contained in the special Acts for the protection of specific rights.

The designated purpose of pretrial evidentiary proceedings is to prepare the suit by gathering such information as is required by the Plaintiff to be able to conduct the case against the Defendant. Although this would be the overriding purpose, such proceedings would also serve as a means of eliciting evidence were any of the cases envisaged by the Act to be met.

Differences As Against Discovery.

Now that the two institutions have been defined and discussed, certain similarities with discovery will be seen, the most outstanding of which is the fact that in advance examination and pretrial evidentiary proceedings as well as in discovery, the time of implementation is prior to the commencement of the trial, with certain fine differences that will be elaborated upon below.

Yet in spite of having points in common, major differences are nonetheless manifest; and the most glaring of these is the ultimate purpose of each of these mechanisms. It should just be recalled here that, in broad terms, the purpose of discovery is to assess the strength or the weakness of the other side's case, with the aim of compiling sufficient information to form an opinion as to whether or not it would be advisable to continue with the lawsuit. In the case of advance examination, however, the purpose is to scrutinize the evidence beforehand, due to the impossibility of examining it at the statutorily appointed time. With respect to pretrial evidentiary proceedings, their purpose consists of gathering the necessary data and information for proper submission of the complaint or obtaining specific evidence in those cases where it is formally codified.

In no case will an indiscriminate "fishing expedition" be permitted, not even with the leeway typical of discovery techniques. When it came to defining the legal catalogue of cases where recourse could be had to such proceedings, the aim of the legislature was to limit the exceptional situations in which it was possible to stray from the basic probative principles of Spanish law.

Aside from their respective purposes, there are other procedural differences between the institutions discussed, as will be seen below.

There is the timing of the procedures: in the case of advance examination of evidence, two possible points can be identified, namely, (1) prior to commencement of proceedings, or (2) once the proceedings have been set in motion but before the holding of the trial or hearing. In all cases, pretrial evidentiary proceedings are heard prior to the main action. Lastly, insofar as discovery is concerned, this also always precedes the trial, though it constitutes a stage of the main proceedings.

There are many forms of discovery and, though the precise methods are laid down by Congress or the legislative body in question, the freedom enjoyed by the parties is extremely wide. In contrast, the parties' margin of action is exceedingly narrow in the case of advance examination of evidence or pretrial evidentiary proceedings. In advance examination of evidence, such leeway is only allowed where there is a certain danger of loss of evidence if this were to be examined at the normally appointed time, and in pretrial evidentiary proceedings, the cases in which these can be requested are, as has been seen above, weighted by law.

Another difference resides in the need for leave of the pertinent court in the cases of advance examination of evidence and pretrial evidentiary proceedings. Application for either of these two procedures must thus be well grounded and, provided it fits any of the cases weighted by the Act, leave will be given by the court having jurisdiction in the matter. In contrast, discovery does not, in principle, require any such prior formality of authorisation since, as has been pointed out above, it constitutes a stage in the judicial proceedings, in which the parties are — within certain limits — free to ascertain all the facts pertinent to the case. In other words, it is a procedure to which the parties can have recourse whenever they wish or whenever they deem necessary or advisable, and the possibility of it being conducted is not left to the discretion of the court, though the court does rule on motions for discovery when so requested.

Hence, though these institutions may at first sight exhibit certain similarities, they respond to different needs and have a considerable number of differences.

Difficulties Entailed In Implementation Of Discovery In Spanish Law

As has been seen, Spanish law is rife with formalities, despite repeated attempts to overcome these. In the field of evidence, the entire procedure (submission, examination and weighing-up) is governed by the Act, leaving the parties little margin for manoeuvre. It is thus clear that even the exceptions described — advance examination of evidence and pretrial evidentiary proceedings — are extremely limited, referring to very specific cases in which the parties can contribute little.

Why are there so many obstacles lying in the way of the possibility of extending the parties freedom of action? Implementation of discovery in Spanish law would be extremely difficult; the reasons are many and of different types, beginning with the historical tradition of Spanish law, which, as explained above, abounds in "rites."

These difficulties are justified by and founded on the underlying principles of evidence, set out above. The impact had by each of these on the difficulty of importing a concept such as discovery, is analyzed below.

The principle of unity is geared to ensuring that all means of proof are examined at the trial or hearing, something that is directly linked to the principle of oral argument. Although there are exceptions to the principle — evidence examined abroad, evidence examined outside the tribunal's designated area of jurisdiction, etc. — the general rule is that of unity. This unity hinders implementation of discovery which, save in the case of repeating the production and examination of evidence in court, would lack validity under Spanish law. Discovery, under such a premise, would be senseless.

The need for evidence to be examined in court, the result of the need for immediacy under Spanish law, is a huge stumbling block to implementation of discovery. If the information gathered as a result of discovery has to be repeated or examined before the court that is to hand down judgement, the initial phase of discovery would be devoid of all logic, as the data or information obtained would have to be submitted as evidence, which would then have to be accepted and scrutinized. It would be a complete waste of time.

By virtue of the principles of dissent and publicity, all submission of evidence has to be open to challenge by the parties, at a public hearing. These two principles limit the possibility of discovery. Under Spanish law, these principles constitute the cornerstone of the process, and any laxity in their application would more than probably entail the nullity of the procedures on the grounds of a breach of the right of defense and effective judicial protection.

The very principles of examination of evidence enshrined in Spanish law restrict and hinder implementation of discovery in Spain.

Reference could also be made here to a further type of restriction in our system, i.e., trade secrets. Case law defines trade secrets, in a broad sense, as any knowledge or know-how not in the public domain and essential for the manufacture or marketing of a product, performance of a service, or organization of a corporate unit or department. Trade secrets are protected by the Unfair Trade Practices Act (Ley de Competencia Desleal), even in the case where access, though legitimate, entails a duty of non-disclosure. Hence, obtaining the type of information described from any given business undertaking at any time prior to the trial would be very complicated, because its staff could plead trade-secret privilege and thereby block the release of the information sought.

The same thing would occur in the case of certain data or information on private individuals being requested from third parties. In such circumstances, the Personal Data Protection Act (Ley Orgánica de Protección de Datos de Carácter Personal) is intended to guarantee and safeguard the public freedoms and fundamental rights of natural persons insofar as the handling of personal data is concerned. Furthermore, the Act itself imposes a duty of non-disclosure upon anyone who takes part in any phase involving the handling of such data. Hence, there is a series of details of a personal nature that enjoy special protection, with the result that access to these is truly complicated. This protection guaranteed by the Act would restrict the possibilities of application of the institution of discovery, since there would be certain data that would be difficult to access without the owner's consent.

It is thus plain that companies as well as private individuals enjoy special protection with respect to a series of data or information, and this would serve to hamper practical application of discovery under Spanish law, by narrowing the options available.

In conclusion, while there are many different kinds of barriers to the introduction of discovery, the main obstacle which underlies all others, is the purpose fulfilled by discovery, one that is unlikely to be in consonance with the designated purpose of examination of evidence under Spanish law. Whereas the aim of discovery is to enable one party to assess the strength or weakness of the other, examination of evidence in Spanish law could be defined as the desire to achieve certainty on the part of the court, based on facts furnished by the parties.
