Disclosure in cross-border disputes: traversing the procedural minefield

Introduction

The process of "disclosure", as it is known in England and Wales, or "discovery", as it is known in the US and in much of the Commonwealth, is for many civil law practitioners an unknown and conceptually alien legal construct. Thus, legal systems in the civil law family often do not provide for a disclosure process or, to the extent they do, nurture a radically different and more limited approach. This can cause frictions where a party to English litigation seeks disclosure of documents, perhaps located in another jurisdiction, held by a foreign party. As Gross LJ aptly stated in *Bank Mellat* v *HM Treasury*:

> 'Disclosure and the inspection of documents form a part of the law of procedure governed by the *lex fori*. On occasions, a tension can arise between the English law requirement for the inspection of documents and the provisions of foreign law in the home country of the litigant.'[1]

Tensions do indeed arise and, given the affirmation in *Bank Mellat* of the courts' broad powers to order disclosure, will likely increase as the complexity and multi-jurisdictional nature of litigation is on the rise. This is not only an issue when litigating before the English courts. From a purely geographical perspective, it is important to note that similar rules of disclosure (or 'discovery') apply in the Commonwealth and many former colonies and dominions, including several offshore financial centres.

This includes, notably the British Virgin Islands, the Cayman Islands, Hong Kong, Australia, Canada and (to a certain extent) Singapore.[2] In Europe, Cyprus has also adopted civil procedural rules providing for discovery.[3] As for the United States, the general consensus is that US pre-trial discovery casts a much wider net than the disclosure rules in England (which are currently in flux, with an ongoing pilot scheme in the Business and Property Courts).[4] The concrete possibility of being party to disclosure/discovery proceedings, and subject to the ensuing procedural burdens, are thus truly global.

Due to the significant consequences which disclosure can have on the conduct of a case, parties involved in cross-border litigation must be made aware of the duties of disclosure imposed on the solicitor and his or her client in common law jurisdictions. For the purposes of our discussion, we take the example of a party involved in parallel proceedings in both Switzerland and England. Thus, this article discusses the party's disclosure obligations in respect of each set of proceedings, as well as the differences between the respective duties of its English and Swiss counsel. These differences are particularly pertinent where disclosure

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[1] *Bank Mellat v HM Treasury* [2019] EWCA Civ 449.

[2] Paul Matthews and Hodge M Malek, *Disclosure* (5th edn, Sweet & Maxwell 2018) paras. 1-19-1.21.

[3] Cyprus Procedural law, Order 28.

[4] ibid, para. 1.22; *South Carolina Insurance Co v Assurantie Maatschpij "De Zeven Provincien" NV* [1987] AC 24, 35–37; Reagan William Simpson, *Civil Discovery and Depositions* (2nd edn, Wiley Law Publications 1994). One notable difference is that US discovery includes pre-trial oral depositions, which can contribute to the length and cost of litigation.

of material in one jurisdiction may have an effect on proceedings in the other, and requires counsel to plan ahead and advise their clients of the risks arising from cross-border litigation.

The view from England

The nature of the materials subject to disclosure

At the outset, it is necessary to identify the types of materials or information that could be subject to disclosure, especially when considering the legal privilege and its extent, under English law and common law jurisdictions more generally.

Under Part 31 of the Civil Procedure Rules ('CPR'), any 'document' may be the subject of disclosure, defined as 'anything in which information of any description is recorded'.[5] Case law has espoused a broad view of what constitutes a document. Photographs, films, microfilms, videotapes (as long as they contain information) and plans are considered documents under the CPR.[6] The same is true for most formats of electronic documents, including e-mails, text messages, instant messages, voicemail, security logs, metadata and deleted files,[7] whereas any material that does not include information (such as a blank sheet of paper) may not be considered as a document.[8] The material potentially subject to disclosure can therefore be vast, particularly as parties may need to conduct searches on back-up drives and employees' personal devices.

In principle, a party must disclose all documents on which it relies as well as those which adversely affect its case, adversely affect another party's case, support another party's case, or which it is required to disclose by a relevant practice direction (so-called *standard disclosure*).[9] However, since January 2019, the Business and Property Courts of England and Wales have been subject to a Disclosure Pilot Scheme which trials several reforms to the disclosure process. Whereas CPR 31 was written primarily with physical documents in mind, the pilot is designed to manage the volume of documents in light of the realities of e-disclosure and to promote the efficient use of technology.

The pilot scheme provides for a variable 'menu' of disclosure options. For example, depending on the dispute, the court may order broad disclosure based on the traditional 'train of enquiry' test, standard disclosure, disclosure of specific documents or categories of documents, or disclosure of 'key' documents only. The idea is that, in each case, the court will determine a 'reasonable and proportionate' scope of disclosure tailored to the complexity and value of the dispute.[10] The scheme also codifies the disclosure obligations of the parties and their counsel, and provides for different levels of disclosure at different stages of the proceedings. It will remain in effect until the end of 2020; if a success, the changes may become permanent from 2021.[11]

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[5] CPR 31.4.

[6] Matthews and Malek (n 2) paras 5.04-5.06 and references therein.

[7] 31B PD 5.3.

[8] *Hill v R* [1945] KB 329 at 334.

[9] CPR 31.6.

[10] 51U PD 8.

[11] 51U PD 1.2; Helen Eastwood and Laura Feldman, 'Disclosure pilot scheme guidance and case law update' 2019(5) Civil Procedure News 9–12.

Legal professional privilege as grounds for withholding inspection of documents

English law distinguishes between *disclosure* and *inspection* of documents. Disclosure is where a party states that a document exists, typically by providing a list of documents to the other side (which may describe certain documents as a category).[12] The other party will then have a right to inspect those documents, that is, to review the originals or copies. However, a party may withhold inspection of documents, or parts of documents, on the ground of privilege.[13] A common objection is that the materials in question are subject to legal professional privilege.

Often, one of the fundamental tasks undertaken by common-law solicitors receiving instructions and access to documents will be to assess which documents are privileged and which documents must be produced since, as discussed below, disclosure is a duty owed to both the client and the court. Although most jurisdictions have analogous concepts of privilege or professional secrecy, terminology and scope vary between legal systems.

From an English perspective, legal professional privilege covers two sub-heads of privilege, namely legal advice privilege and litigation privilege:

- Legal advice privilege covers confidential communications between a client and a lawyer for the dominant purpose of giving or receiving legal advice. 'Legal advice' is not limited to a simple statement of the law but includes advice 'as to what should prudently and sensibly be done in the relevant legal context'. In addition, the continuum of communication surrounding the advice is also privileged, such as meetings and correspondence intended to keep both lawyer and client updated.[14]
- Litigation privilege covers confidential communications between a client and a lawyer, or between either one of them and a third party, produced for the dominant purpose of litigation that is existing, pending or in reasonable contemplation. This includes all forms of adversarial proceedings, both civil and criminal, and – pertinently for this article – similar proceedings before foreign courts and arbitral tribunals.[15] The communications must seek or obtain evidence or information to be used in or in connection with the proceedings.[16] Moreover, there must be a reasonable prospect of litigation at the time the document is created; a general fear of future litigation will not suffice.[17] Where documents have been produced for one set of proceedings, they are also privileged in subsequent proceedings: in this sense,

[12] 31A PD 3.2

[13] CPR 31.3, 31.19. In the Disclosure Pilot Scheme, 51U PD 13 uses the language of 'production' rather than 'inspection'.

[14] *Balabel* v *Air India* [1988] Ch 317, 330 (CA); *Société Française Hoechst* v *Allied Colloids Limited* [1992] FSR 66, 68 (Ch); *R (Jet2.com Ltd) v Civil Aviation Authority* [2020] EWCA Civ 35 (CA) [30], [68]–[69].

[15] *Re Duncan* [1968] P 306; *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102, 110–12 (CA); Matthews and Malek (n 2) para 11.40.

[16] *Skymist Holdings Limited v Grandlane Developments Limited* [2019] EWHC 1834 (Comm) [98]; Matthews and Malek (n 2) para 11.54.

[17] *United States of America v Philip Morris Inc (British American Tobacco (Investments) Ltd intervening)* [2003] EWHC 3028 (Comm) [47].

the rule is 'once privileged, always privileged'.[18] This is true even where the previous proceedings involved different parties.[19]

Although privilege is an exception to the English policy that litigation must be conducted on a 'cards face up on the table' perspective, it must nonetheless be applied within justifiable bounds.[20] The tendency is to regard both strands of legal professional privilege as reflections of a higher legal principle, namely, that disclosure of these communications would discourage clients from being candid with the facts, and discourage lawyers from giving frank advice, and hamper preparation for litigation.[21]

As regards the burden of proof, it falls on the party claiming privilege to establish it (which in practice may prove more difficult if the document in question predates litigation). In a cross-border context, international counsel should be aware of the following key points:

- Legal professional privilege covers all members of the legal profession, including in-house counsel, provided they are acting in their capacity as legal advisers.[22]
- English courts apply their own conception of legal professional privilege to foreign lawyers, regardless of the applicable procedural rules or professional standards where the latter are based.[23] For instance, an English court may regard advice from a German in-house lawyer as privileged, even if a German court would not.
- Companies should also be wary before sending communications to lawyers from employees across disparate departments or corporate entities. In *Three Rivers*, the Court of Appeal famously took the narrow view that only members of a specialist unit tasked with instructing a bank's lawyers were the "client" for the purposes of privilege; as a result, communications with other bank employees were not privileged.[24] Although more recent case law has suggested the case may be decided differently today,[25] *Three Rivers* remains good law. Particular care is therefore needed when determining the 'client' and addressees for the purpose of seeking or receiving legal advice.

A solicitor's duty to explain disclosure: what the client must be made aware of and when

Whilst the CPR imposes duties on the parties to search for and to disclose documents, their legal representatives also have a responsibility to ensure their clients understand their duties and to supervise the disclosure process. Simply informing the client of its duties of disclosure will not necessarily be enough; under Practice Direction 31A, a legal representative must

[18] *Re Duncan* [1968] P 306, 313–14.

[19] In some older cases, the proceedings concerned the same facts or subject matter even if the parties were different: *Bullock & Co* v *Corry & Co* [1878] 3 QBD 356, 359 (QB); *Nordon* v *Defries* (1882) 8 QBD 508, 510 (QB). However, Matthews and Malek (n 2) para 11.40 express the view that the documents remain privileged in the latter proceedings even if the subject matter is different, referring to *Winterthur Swiss Insurance Co* v *AG (Manchester) Ltd* [2006] EWHC 839 (Comm).

[20] *Balabel v Air India* (n 14) 332.

[21] *Re Barings Plc* [1998] Ch 356, 364–67 (Ch).

[22] There is a notable exception in EU competition investigations, where privilege is limited to external lawyers: Case C-550/07 *Akzo Nobel Chemicals and Akcros Chemicals Ltd v Commission*.

[23] *R (Prudential) v Special Commissioner of Income Tax* [2013] UKSC 1 [29], [45], [73], [123].

[24] *Three Rivers District Council and others v Bank of England (No 5)* [2003] EWCA Civ 474.

[25] *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2018] EWCA Civ 2006 [130]; *R (Jet2.com Ltd) v Civil Aviation Authority* (n 14) [47]–[57].

'endeavour to ensure' that his or her client understands the duty of disclosure.[26] As held by Megarry J in a decision predating the CPR, solicitors must advise their clients not only of the scope and nature of the disclosure obligation, but also of the need to preserve documents:

> '…it seems to me necessary for solicitors to take positive steps to ensure that their clients appreciate at an early stage of litigation, promptly after writ issued, not only the duty of discovery and its width, but also the importance of not destroying documents which might by possibility have to be disclosed. This burden extends, in my judgment, to taking steps to ensure that in any corporate organisation knowledge of this burden is passed on to any who may be affected by it.'[27]

A similar duty applies to the duty of disclosure under CPR 31.[28] The client's solicitor must therefore explain and take steps to preserve relevant evidence from destruction so as to avoid, at trial, adverse inferences due to its disappearance.[29] For example, a client may need to suspend its normal document retention and deletion policies. It is imperative that the solicitor explains the need to preserve documents as soon as litigation is contemplated, particularly in the case of electronic documents.[30]

In addition, as soon as the prospect of litigation materialises, the solicitor should draw the client's attention to the risk of creating new documents or obtaining additional documentary evidence from third parties.[31] Unless covered by litigation privilege, these materials could be subject to inspection by the other side and could damage the client's case.

More generally, legal representatives have a duty to investigate and supervise the disclosure process and cannot simply leave this to their client. This will usually mean the solicitors taking hold of the original documents and reviewing them for relevance, so as to ensure that the client complies with its duty of disclosure. They owe this duty to the court as well as their client.[32] Solicitors should not leave the client to carry out redactions itself, nor should they take their client's assertions that there are no more disclosable documents at face value if there are grounds to believe the client has additional documents that it has not disclosed.[33]

As for arbitrations seated in England, English law does not specifically regulate disclosure. Under s 34(1) of the Arbitration Act 1996 it is for the tribunal, subject to any agreement of the parties, to decide 'all procedural and evidential matters'. Whereas the IBA Rules on the Taking of Evidence in International Arbitration are silent on counsel's duties to supervise document production, the IBA Guidelines on Party Representation go further:

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[26] 31A PD 4.4.

[27] *Rockwell Machine v Barrus* [1968] 1 WLR. 693, 694 (Ch).

[28] *CBR (Wakefield) Ltd v Puccino's Ltd* [2006] EWHC 2993 (QB) [53]; *Taylor v Stoutt* [2011] EWHC 324 (Ch) [36].

[29] Thus, in *Infabrics Ltd v Jaytex Ltd* [1985] FSR 75, the court applied the maxim *omnia praesummuntur contra spoliatorem* ('all things should be presumed against the wrongdoer') where documents relevant to quantum had been lost or destroyed after proceedings had started.

[30] See e.g. 31B PD 7.

[31] Matthews and Malek (n 2) para 18.08.

[32] *Myers v Elman* [1940] AC 282, 322 (HL).

[33] *Taylor v Stoutt* [2011] EWHC 324 (Ch) [36], [40]–[45].

> '(12) When the arbitral proceedings involve or are likely to involve Document production, a Party Representative should inform the client of the need to preserve, so far as reasonably possible, Documents, including electronic Documents that would otherwise be deleted in accordance with a Document retention policy or in the ordinary course of business, which are potentially relevant to the arbitration […]
> (14) A Party Representative should explain to the Party whom he or she represents the necessity of producing, and potential consequences of failing to produce, any Document that the Party or Parties have undertaken, or been ordered, to produce.
> (15) A Party Representative should advise the Party whom he or she represents to take, and assist such Party in taking, reasonable steps to ensure that: (i) a reasonable search is made for Documents that a Party has undertaken, or been ordered, to produce; and (ii) all non-privileged, responsive Documents are produced.'

Whilst the IBA Guidelines are not binding, tribunals may consider them as a form of 'soft law' guidance. Guideline 12 in particular is controversial in that it may be seen to introduce a type of 'litigation hold' though the back door, even though the IBA Rules say nothing on this point. Commentators have described Guideline 12 as introducing a concept 'totally foreign' to many civil-law parties and counsel, and suggested that in international arbitration it should usually be acceptable for parties to continue their normal document retention policies.[34] It should be noted that the London Court of International Arbitration (LCIA) *General Guidelines for the Parties' Legal Representatives* do not go nearly as far; rather, they provide simply that counsel should not conceal, or help to conceal, any document ordered to be produced by the tribunal.[35]

Particular considerations in cross-border disputes

The responsibility of lawyers to explain disclosure obligations takes on added importance when advising clients from outside the United Kingdom, particularly in civil law jurisdictions, who may not be familiar with the process of disclosure and who may be resistant to turning over harmful documents to their opponent. The costs, burden and risks of disclosure may even discourage some parties from litigating before the English courts where they have a choice of forum. Thus, as Matthews and Malek observe correctly,[36] international counsel should explain the scope of the disclosure obligation to any client considering litigation in England or other jurisdictions which apply similar rules on disclosure.

Divergent rules on disclosure and professional secrecy may give rise to conflicts in cross-border litigation. An English court may order disclosure and inspection of documents by a party notwithstanding that they may be confidential or privileged under relevant foreign law.

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[34] Domitille Baizeau, 'The IBA Guidelines on Party Representation in International Arbitration: A Plea for Caution' (2015) 2(2) BCDR International Arbitration Review 343, 349; Reto Marghitola, *Document Production in International Arbitration*, (Kluwer Law International 2015) 108–10. For an alternative viewpoint, see Anke Meier and Lucie Gerhardt, 'Seven Guidelines on Party Representation – The New LCIA Rules' (2015) 13(1) German Arbitration Journal 10, at 13, who consider Guideline 12 'understandable' given the objective of a level playing field.

[35] LCIA Rules 2014, *Annex on General Guidelines for the Parties' Legal Representatives*, para 5.

[36] Matthews and Malek (n 2) para 18.04.

Thus, in *Bank Mellat*, the Court of Appeal upheld an order for an Iranian bank to produce unredacted account records, even though these documents were protected by banking secrecy in Iran and their disclosure could cause the bank to commit a criminal offence.[37] The court held that foreign law could not override its ability to order disclosure under the *lex fori*, though banking secrecy under Iranian law was a relevant consideration when exercising its discretion to order disclosure. It was necessary to conduct a balancing exercise between the actual risk of prosecution against the bank, on the one hand, against the importance of the documents to the fair resolution of the proceedings, on the other hand.[38]

A party in the same position as *Bank Mellat* may therefore find itself caught between a rock and a hard place. Conflicts between different legal systems may also pose a dilemma for counsel. In another case, a Swiss defendant had declined to provide unredacted copies of certain bank statements, arguing that this would cause it to breach Swiss law on banking secrecy; this led to that party being debarred from defending the claim and ultimately losing the case.[39] The claimant subsequently sought a wasted costs order against the defendant's solicitor. Although the solicitor narrowly escaped liability for wasted costs, the court found that he had failed to comply with his professional standards in supervising the disclosure process; he should have alerted the opposing party and the court of the irregularity in his client's disclosure as soon as possible or withdrawn from the case.[40]

By contrast, as examined below, in some civil law countries it may be considered a breach of professional ethics, as well as the retainer with his or her client, for a lawyer to disclose documents which damage the client's interests without the client's consent. Where there are parallel proceedings in England and abroad, coordinating counsel must therefore consider how to manage the risks from potential conflicts between national rules and explain these to the client at an early stage. In particular, there is the risk that material disclosed in one set of proceedings – once referred to in open court – may be employed in parallel proceedings, which may affect a party's global strategy.[41]

The view from Switzerland

Swiss law does not have a procedural equivalent *per se* to the common law legal construct of disclosure. Indeed, following the predominant approach applied by continental European jurisdictions to discovery,[42] Swiss civil procedural law does not obligate a party to spontaneously disclose documents that would be harmful to its procedural standing or helpful to its opponent's.[43]The party may, under certain conditions, be obliged by a Swiss judge to disclose documentary evidence,[44] as will be discussed in further detail below.

[37] *Bank Mellat* v *HM Treasury* (n 1).

[38] ibid [63].

[39] *Taylor* v *Stoutt* [2011] EWHC 324 (Ch).

[40] ibid [54]–[64].

[41] In principle, documents disclosed in litigation may only be used for the purpose of those proceedings. However, CPR 31.22(1) provides an exception where the document has been read or referred to at a public hearing, or if the court gives permission to use the document, or if the parties agree.

[42] Matthews and Malek (n 2) para 1.25.

[43] Nicolas Jeandin, *Commentaire Romand du Code de procédure civile* (Helbing Lichtenhahn, Basel 2019, 2nd edn), para. 12 a, p. 756.

[44] Nicolas Jeandin, *Commentaire Romand du Code de procédure civile* (Helbing Lichtenhahn, Basel 2019, 2nd edn), para. 12 a, p. 756.

However, although certain similarities exist between a party's duties to disclose information and documentation in both common law jurisdictions and Switzerland, the party's respective Swiss and common law lawyers' duties towards disclosure are singularly contrasted.

The predominant duty in defending the client's interests

From a purely conceptual perspective, a Swiss lawyer's duty is predominantly that of defending his client's interests, as his purpose in society is to guarantee that his principal's rights be upheld and to act as a counterweight to administrative and judicial entities' powers.[45] As a matter of public interest, a Swiss lawyer also fulfils the essential function of protecting the Swiss judicial order and access to justice.[46] Therefore, in order to guarantee that a client may confide his secrets without fear of unwarranted or uncontrolled divulgation, a Swiss lawyer's professional secrecy is quasi-absolute.[47] Concretely, Swiss law imposes an extensive duty on Swiss lawyers to assure the protection of their client's secrets and to avoid any breach of professional secrecy by auxiliaries under their supervision or instruction.[48] Swiss lawyers will be in breach of their duties if they do not take every precaution when sharing information relating to the client's secrets with their auxiliaries: they must instruct the auxiliaries on the extent of professional secrecy and assure stringent supervision over them in order to avoid any breach.[49]

Swiss lawyers are, however, bound by certain restrictions, notably the duty to establish what authorities have identified as a *formal truth*,[50] *i.e.*, a procedural truth that may not be the real/material truth[51]. The consequence of this duty is that the Swiss lawyer must undertake to ensure that the process that would lead to a procedural truth be respected at all time.

Concretely, this rule means that a Swiss lawyer must respect the law of the land and abide by it. A lawyer may not for example assist his or her client in any illegal activity. As regards behaviour *vis-à-vis* the courts, Swiss lawyers must not espouse their client's case to the extent that they deliberately mislead, or attempt to mislead, the court by actively presenting allegations or means of evidence that they know to be false.

However, contrary to the common law rules on disclosure or discovery, a Swiss lawyer may not submit means of evidence that could be damaging to the client's procedural position unless he or she is objectively unaware of their damaging nature at the time they are communicated or where the client has expressly authorized him or her to divulge their contents or existence. Were a Swiss lawyer to disclose this evidence without the client's consent, he or she would be in breach of duty towards his or her client[52] and could face

[45] François Bohnet/Vincent Martenet, *Droit de la profession d'avocat* (Stampfli Editions SA Berne 2009), paras. 3158 and 3327.

[46] Swiss Supreme Court Judgment, ATF 145 II 229, c. 7.1 and references.

[47] Swiss Supreme Court Judgment, ATF 145 II 229, c. 7.1 and references.

[48] Art. 12 (a) Swiss Lawyers Act (LLCA)/RS.935.1; Swiss Supreme Court Judgment, ATF 145 II 229, c. 7.2 and references.

[49] Art. 12 (a) Swiss Lawyers Act (LLCA)/RS.935.1; Swiss Supreme Court Judgment, ATF 145 II 229, c. 7.2 and references.

[50] François Bohnet/Vincent Martenet, *Droit de la profession d'avocat* (Stampfli Editions SA Berne 2009), para. 3334 and references cited.

[51] Swiss Supreme Court Decision ATF 127 III 496, c. 3b/bb.

[52] François Bohnet/Vincent Martenet, *Droit de la profession d'avocat* (Stampfli Editions SA Berne 2009), para. 3339.

professional disciplinary action, such as an admonition, fine or even disbarment in severe cases.

Therefore, even if the lawyer's personal inclination would be to disclose the information or evidence, he or she may not proceed without the client's prior approval. The fact that the means of evidence in question would objectively allow a sitting magistrate to take a decision that would be closer to the objective truth would not provide lawful justification authorizing the Swiss lawyer to breach his or her duties towards his client.

The client thus maintains quasi-absolute control over the means of evidence held by his or her Swiss lawyers, the information to disclose and the timing of their disclosure, subject to certain exceptions detailed and examined below.

The Swiss civil procedural rules on taking evidence: a simulacrum of disclosure?

Articles 160 et seq. of the Swiss Civil Procedure Code ('CPC') govern the parties' obligations to co-operate in evidence-taking in civil litigation.[53]

As regards evidence production, Article 160(1)(b) CPC provides that 'a party shall produce the physical records, with the exception of documents forming correspondence between a party or a third party and a lawyer who is entitled to act as a professional representative, or with a patent attorney as defined in Article 2 of the Patent Attorney Act of 20 March 2009'.[54] This duty follows the general procedural objective to establish the truth.[55] The search for the truth does not, however, supersede all other considerations and is limited by the procedural rights of the parties, or third parties. Notably, there is no general duty of disclosure as exists in litigation in England. Moreover, this procedural remedy may not be used as a fishing expedition; a party seeking the production of evidence must identify the evidence sought (either specifically, or by reference to a category) and explain its relevance in connection with specific facts that it needs to establish.[56]

In practice, one party will file an application to compel another party (or third party) to produce evidence under its control, which a civil judge may grant or decline.[57] Of further note, Article 160(1)(b) CPC does not offer specific guidance in relation to a party's duty (or absence of) to provide the adverse party and the court with evidence under its control that would be damaging to its case or defence.[58]

As regards legal privilege, Article 160(1)(b) CPC provides for such an exception by excluding from the party's duty to produce as evidence all communications between lawyer

[53] This duty also extends to third parties, although not under the same rules or at the same conditions.

[54] Although the official English translation refers to 'physical records', the French and German texts refer to "documents" more broadly. These are defined under article 177 CPC, which lists a non-exhaustive list of means of evidence that could be subject to production (notably writings, drawings, plans, photos, audio and visual recordings or digital records).

[55] Nicolas Jeandin, *Commentaire Romand du Code de procédure civile* (Helbing Lichtenhahn, Basel 2019, 2nd edn), ad article 160 CPC, para. 1.

[56] Nicolas Jeandin, *Commentaire Romand du Code de procédure civile* (Helbing Lichtenhahn, Basel 2019, 2nd edn), ad article 160 CPC, para. 1.

[57] Swiss Supreme Court Decision 5A_295/2009.

[58] Nicolas Jeandin, *Commentaire Romand du Code de procédure civile* (Helbing Lichtenhahn, Basel 2019, 2nd edn), ad article 160 CPC, para. 12a.

and client in the context of a lawyer's mandate and activity covered by Article 13 of the Swiss Lawyers Act ('LLCA'), and that may be objectively considered as being subject to professional secrecy. Once the party (and its Swiss lawyer) has ascertained which materials are subject to legal privilege and which are not, the party will then need to determine whether there are any other lawful grounds for objection.

Art. 163 CPC sets out several grounds on which a party or third party may refuse to collaborate in providing documentary evidence or witness testimony:

- First, a party may object where the taking of evidence would expose a close associate, as defined in Article 165 CPC to criminal prosecution or civil liability (Art. 163(1)(a) CPC). The underlying objective of this rule is to avoid the divulgation of facts that could incriminate, or lead to civil liability for, a party's immediate family – similar to, but broader, than spousal privilege.[59] The party objecting will need to establish the risk of criminal or civil proceedings.[60] The burden of proof is thus relatively low.
- Second, Art. 163(1)(b) CPC applies where disclosure of this information would be tantamount to committing an offence under Article 321 of the Criminal Code and aims at protecting specific professions and their secrets. In essence, the professionals protected are clergymen, health professionals (doctors, nurses, dentists and midwives) legal professionals (lawyers and notaries), as well as their auxiliaries. Defendants in litigation are also protected by this exception.[61]
- Finally, Art. 163(2) CPC provides that persons who are privy to other secrets protected by law may refuse to collaborate, but only if the interest in maintaining confidentiality outweighs the interest in disclosure. The scope of this exception is restrictive and may only be invoked by limited categories of persons, and only if a specific provision of Swiss law applies. For example, a banker may invoke Article 47 of the Swiss Federal Banking and Savings Banks Act[62] to avoid providing the requested evidence data if this would breach banking secrecy. However, the judge will balance the parties' interests and decide whether, on the facts, production of the evidence is nevertheless justified.

Art. 164 CPC provides that if a party refuses to collaborate without a valid reason, the court shall take this into account when considering the evidence. In particular, the judge may derive adverse inferences when considering any non-disclosure by a recalcitrant party, notwithstanding the general burden of proof at Art. 8 of the Swiss Civil Code. However, in practice, if the party or its Swiss lawyer refuse to produce documents by claiming professional secrecy, the court cannot rule on the question in camera or in another manner preserving the confidentiality. The courts have limited (if any) means to determine whether a secrecy defence has merits. Were the judge to find that the recalcitrant party's objection without merit, a party may not be compelled to produce the litigious documents, the strongest sanction available being that it may only draw adverse inferences.

Contrast this with the situation in England, where judges are equipped with – and frequently use – severe sanctions to punish non-compliance. A party which fails to satisfy its disclosure

[59] Nicolas Jeandin, *Commentaire Romand du Code de procédure civile* (Helbing Lichtenhahn, Basel 2019, 2nd edn), ad article 163 CPC, para. 6a.

[60] Hans Hüppi-Schmid, *Kurzkommentar ZPO Schweizerische Zivilprozessordnung* (Helbing Lichtenhahn, Zurich/St. Galllen 2014), ad article 164 CPC, para. 4.

[61] Nicolas Jeandin, *Commentaire Romand du Code de procédure civile* (Helbing Lichtenhahn, Basel 2019, 2nd edn), ad article 163 CPC, para. 11.

[62] RS. 952.0.

obligations is often given a final chance to comply, failing which its claim or defence may be struck out in whole or in part, or it may be debarred from participating further in proceedings. This may result in an all-but-assured victory for the other side. Particularly serious non-compliance with a court's disclosure orders may also be punished as contempt of court. Thus, in addition to imposing broader disclosure obligations, common-law systems such as England also apply powerful sanctions to enforce these obligations.

Conclusion: Managing disclosure in cross-border litigation

In cross-border litigation, a proper understanding of disclosure and privilege rules in each jurisdiction becomes imperative. Unless a party and its legal representatives appreciate the extent of their disclosure obligations, they may risk being debarred from proceedings and may suffer adverse cost orders and even professional disciplinary action. Moreover, a shrewd opponent can seek to exploit differences between legal systems. For example, a party may use the broader disclosure rules in a common law jurisdiction to obtain evidence which it can then deploy (or request specifically) in parallel proceedings in a civil law jurisdiction – evidence which it would not otherwise have obtained in the second jurisdiction. This could derail a client's global strategy or even sway the outcome of the second proceedings.

Best practice would dictate that lead counsel, upon instruction, identify any conflicts and potential risks from different disclosure standards across different jurisdictions. This also means getting to grips with the key documents and the likely volume of documentary evidence, including e-documents, at an early stage. Where there is a choice of forum, some clients may prefer to avoid the procedural burdens that result from common-law disclosure, particularly if it could interfere with parallel proceedings. On the other hand, disclosure far often works in favour of the claimant by providing the appropriate level of evidence necessary to enable the claimant to discharge its burden of proof. English-style disclosure, and US discovery even more so, provides the claimant with an enormously powerful tool to extract otherwise unavailable information, without which the claimant's case may founder. International counsel, with extensive knowledge of (civil and criminal) cross-border disputes, is therefore needed to advise on where to commence proceedings.

In many cases, however, there will not be a choice of forum. The client may be the defendant or may need to litigate in a common-law jurisdiction to vindicate its rights, for example, or may want to take advantage of certain remedies available in common law. Here, too, there is a role for an international case manager. This includes advising the client, and its advisers and lawyers in different jurisdictions, on the applicable disclosure rules, their responsibilities to retain documents, and the need for caution before creating any new evidence – in the form of emails or minutes discussing the case, for example – or requesting documents from third parties. Lead counsel can then supervise obtaining evidence for the various proceedings and manage the flow of information to local counsel and advisers.

This is particularly relevant if there is a global dispute involving different companies in the same corporate group. In a recent case, *Pipia* v *Bgeo Group Ltd*,[63] the claimant sought disclosure in English court proceedings from the UK parent of a Georgian bank. The parent company argued that it did not have control over documents held by its subsidiaries, and that they were covered by banking secrecy in any event. In English law, the principle of the corporate veil means that, generally speaking, the parent company does not necessarily exercise control over documents held by its subsidiaries, even if they share the same shareholders and management. In this case, however, the Georgian subsidiaries had already

[63] [2020] EWHC 402 (Comm).

agreed in a letter to provide documents relating to the English lawsuit on request by the parent. The court held that this brought at least some of their documents within the parent's control and therefore subject to disclosure.[64]

The case illustrates how, in their efforts to obtain documents as part of their initial fact-finding, parties and their counsel may inadvertently expand the scope of their disclosure obligations. The risk is even greater where there is a global dispute pending in multiple jurisdictions with radically different approaches to the concept of disclosure. If parties are to navigate this procedural minefield, it is key for lead counsel to consider disclosure within the initial case analysis and global strategy before launching proceedings.

[64] ibid [116]–[117].