



# GLOBAL ENFORCEMENT AND ASSET RECOVERY SERIES

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ARTICLE 2: ASSET DISCLOSURE

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# Introduction

In the context of asset recovery, a successful outcome largely depends on the ability of a claimant to garner sufficient disclosure of assets that are amenable to enforcement. This, in turn, explains why the powerful injunctive relief available in common law jurisdictions, and particularly in England & Wales, is often the focal point of successful recovery strategies. In these jurisdictions, freezing injunctions are typically accompanied by ancillary disclosure orders that seek to provide applicants with sufficient asset information to “hold the ring” pending determination of a dispute, and the information gleaned through these disclosure orders will often be the key ingredient to successful enforcement. It also explains why disclosure applications—either against defendants or third parties that may hold valuable information as to defendants’ assets—are a key focus at the outset of disputes, and why they can be so hard-fought. These types of orders can also be used to flush out all prospective defendants to a claim, which can be invaluable to claimants in cases where it is not entirely clear who the ultimate wrongdoers are.

Fraud or enforcement matters on a global scale can present particular problems for lawyers, particularly in circumstances where assets are held in, or have been transferred through, common law and civil law jurisdictions, which can have considerably different rules relating to disclosure. These issues are further complicated by the divergences between common law and civil law jurisdictions on various legal principles, including collateral use of information, privilege, and comity. In such cases, practitioners must be able to navigate the procedural idiosyncrasies of relevant jurisdictions and their disclosure regimes.

This paper aims to clarify these issues and provide an overview of the main asset disclosure strategies available in several major jurisdictions and the key considerations for applicants in the context of global asset recovery exercises.

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## England & Wales

## Overview

The English courts are willing to grant wide-ranging disclosure of assets in a variety of circumstances. Most frequently in the context of fraud claims, the courts will do so ancillary to a freezing injunction or proprietary injunction. The courts also have jurisdiction to grant disclosure orders: (i) in advance of a freezing order to determine whether such an order should be made; and (ii) against judgment/award debtors. The court is often more willing to grant expansive disclosure at the enforcement stage as final relief than as interim relief.

The English courts also have well-established powers to seek disclosure from third parties (of particular use in cases in which a respondent holds assets through nominees and opaque corporate structures). *Norwich Pharmacal* orders are frequently granted against banks, corporate service providers, and other third parties to support and make effective freezing orders by compelling disclosure of information about a respondents' assets and the manner in which they are held. *Bankers Trust* orders are based on a similar jurisdiction, which allows claimants to seek disclosure from third parties for the purposes of tracing proprietary funds.

Imaging orders—now more commonly granted by the English courts than the more draconian search orders—are a valuable method of obtaining disclosure directly from a defendant. Such orders will often oblige a respondent to deliver up electronic devices for imaging, and to hand over documents that reveal the existence of assets.



## Jurisdictional Basis

The jurisdictional bases of the relief described above are as follows:

- 1 For search/imaging orders and disclosure orders ancillary to freezing orders: s.37 Senior Courts Act 1981.
- 2 For disclosure orders ancillary to proprietary injunctions, *Bankers Trust* orders, and disclosure in advance of an application for a freezing injunction: CPR 25.1(1)(g).
- 3 For *Norwich Pharmacal* orders: common law (albeit jurisdiction now partially overlaps with CPR 31.17).



## Key Tests for Relief

A full analysis of tests for all types of disclosure set out above is outside the scope of this article, but two key tests are as follows:

For *Norwich Pharmacal* relief:

- 1 There must be a good arguable case that there has been wrongdoing by an ultimate wrongdoer.
- 2 There must be the need for an order to enable legal proceedings to be brought, or appropriate redress sought, against the ultimate wrongdoer.
- 3 The respondent must be more than a "mere witness" and must be caught up in wrongdoing, even if innocently.
- 4 The respondent must be able, or likely able, to provide the information or documents necessary to enable the ultimate wrongdoer to be pursued.
- 5 The application must be made for a proper purpose.

For *Bankers Trust* relief:

- 1 There must be good grounds to conclude that the property in respect of which disclosure is sought belongs to the applicant.
- 2 There must be a real prospect that disclosure will lead to the discovery of the whereabouts of the assets.
- 3 The order sought is no wider than necessary.

- 4 The interests of the applicant and the detriment of the respondent must be balanced.
- 5 Applicant must use only documents obtained for purpose specified.



## Scope

Traditionally, the scope of disclosure orders ancillary to freezing injunctions was coterminous with the scope of the freezing injunction. However, this is no longer the case. The courts are willing to grant domestic freezing injunctions, supported by international asset disclosure. Proprietary disclosure orders and orders *ag* inst third parties can also be made in respect of assets internationally.

Further, the new gateway for service of non-party disclosure orders (PD 6B 3.1(25)) now means that major disclosure orders against third parties can generally be served out of the jurisdiction. It is unclear at present, however, how enforceable such orders will be against respondents located abroad.

*Norwich Pharmacal* orders, however, will not be granted where the sole purpose is to facilitate enforcement proceedings abroad, so there must be a sufficient connection with the jurisdiction.



## Disclosure Against Third Parties

*Norwich Pharmacal* and *Bankers Trust* orders are available against third parties in fraud and enforcement contexts. Bear in mind that disclosure from third parties can also be compelled indirectly—bespoke freezing injunctions will often include obligations compelling a respondent to write to third parties such as banks, instructing and providing permission for information as to assets to be provided to an applicant's solicitors.



## At What Stage Is Relief Available?

Disclosure against parties to litigation and against third parties is generally available in anticipation of proceedings (ancillary to freezing injunctions or as *Norwich Pharmacal* relief) and during proceedings. At the enforcement stage, the position in English law remains unclear, and it is fair to say that the tools available to judgment/award debtors may be more robust in civil law jurisdictions, in contrast to the position at other stages of proceedings.

While disclosure relief against judgment/award debtors is well established (by way or cross-examination as to assets or otherwise), the availability of equivalent relief against third parties to identify assets amenable to execution has not been definitely established. *Norwich Pharmacal* relief is conceptually available at this stage but will likely require a third party to be involved in a judgment/award debtor's illicit efforts to evade execution.



## In Support of Foreign Proceedings?

Under s.25 of the Civil Jurisdictions and Judgments Act 1982, the English court has jurisdiction to grant freestanding injunctive relief in support of foreign proceedings. Equivalent assistance in support of foreign arbitration exists under s.44 of the Arbitration Act 1996.

Third-party disclosure in support of foreign proceedings is much more restrictive. *Norwich Pharmacal* relief has been established by case law to be unavailable in support of foreign proceedings, even if those proceedings have yet to be brought. Instead, applicants are required to seek such support via the Evidence (Proceedings in Other Jurisdictions) Act 1975 (in civil cases), which can be cumbersome and time-consuming.



## Limitation on Use of Information Obtained

The disclosure orders described above will most often be accompanied by restrictions on the collateral use of information or documents provided pursuant to them. For example, disclosure in support of an English injunction will normally be restricted for use in the proceedings as part of which it was obtained. Applicants can seek permission to use disclosure in other proceedings and in other jurisdictions, and frequently will need to do so in circumstances in which disclosure orders reveal the existence of assets abroad, that can only be secured through local action.



## Consequence of Breach

Breach of civil orders constitutes contempt of court in England, and contemnors may be fined, imprisoned (up to two years), or have their assets seized.

Disclosure orders ancillary to freezing orders, and, occasionally, *Norwich Pharmacal* orders, will include penal notices—these notices make clear the consequences of breach, and serve to notify third parties on whom the order is served that their conduct may also be contempt of court even if they are not respondents to the order.





## United States

### Overview

In the context of domestic U.S. litigation, plaintiffs have a broad range of options with respect to obtaining disclosure from defendants and third parties alike. This can be helpful to identify stolen funds in fraud disputes and to identify assets amenable to enforcement in post-judgment contexts.

Further, Section 1782 of Title 28 of the United States Code enables a party to legal proceedings (civil or criminal) outside the United States to apply to a U.S. court to obtain discovery for use in the foreign proceedings. Section 1782 applications may be made by foreign litigants seeking documentary or witness evidence in the United States for use in foreign proceedings which are either pending or contemplated.



## Jurisdictional Basis

There are several jurisdictional bases for discovery in the context of domestic U.S. litigation:

- 1 For obtaining evidence of crimes committed by individuals or companies in signatory countries: mutual legal assistance treaties.
- 2 For general discovery from parties to litigation: Federal Rules of Civil Procedure 26, 33, 34, and 36.
- 3 For seeking discovery from parties and non-parties in the context of pending litigation: Federal Rules of Civil Procedure 45.
- 4 For orders to identify assets amenable to execution: Exchange Act (Sections 17(a) and (b) and 21(b)), Advisers Act (Sections 204 and 209(b)), Securities Act (Section 19(c)), Investment Company Act (Section 42(b)) and Federal Rules of Civil Procedure 69.

As noted above, the jurisdictional basis for a wide range of discovery (including documents or testimony) in aid of foreign proceedings, including in support of freezing injunctions, is 28 U.S.C. § 1782(a).



## Key Tests for Relief

The relevant test for section 1782 relief involves consideration of both nondiscretionary and discretionary factors:

- 1 Nondiscretionary factors: (i) the person from whom discovery is sought “resides or is found” in the district of the district court to which the application is made; (ii) discovery is “for use” in a foreign proceeding before a foreign or international tribunal; and (iii) the application is made by a foreign or international tribunal or any interested person. *Mees v. Buiter*, 793 F.3d 291, 297 (2d Cir. 2015).
- 2 Discretionary factors: (i) whether “the person from whom discovery is sought is a participant in the foreign proceeding” and therefore would be subject to discovery there; (ii) “the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign . . . court . . . to U.S. federal-court judicial assistance”; (iii) whether the request is “an attempt to circumvent foreign

proof-gathering restrictions or other policies of a foreign country or the United States”; and (iv) whether the discovery requests are “unduly intrusive or burdensome.” *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004).



## Scope

In domestic fraud disputes, disclosure can be sought in the following terms:

- 1 Government requests can be made under a mutual legal assistance treaty to obtain evidence of certain designated crimes committed by an individual or business entity in one of the signatory countries. This is available only to governments but a helpful tool if an investigation is conducted in parallel with a government investigation.
- 2 Under the Federal Rules of Civil Procedure:
- 3 Depositions and document requests by subpoena from court where litigation is pending can be made against both parties and non-parties to the litigation.
- 4 Interrogatories, requests for production of documents, and requests for admission can be sought from parties to the litigation.

At the enforcement stage, the following orders are available to identify assets amenable to execution:

- 1 Administrative subpoenas may be issued by a federal agency without prior judicial review in order to obtain business records of real estate agents, title companies, cable companies, insurance companies, and brokerage firms.
- 2 Document requests can be made to regulated entities, pursuant to Section 17(a) and (b) of the Exchange Act and Section 204 of the Advisers Act.
- 3 Subpoenas for documents and witnesses can be made in accordance with Section 19(c) of the Securities Act, Section 21(b) of the Exchange Act, Section 209(b) of the Advisers Act, and Section 42(b) of the Investment Company Act.
- 4 Discovery in aid of enforcement of money judgments is also available under Federal Rules of Civil Procedure 69 (and may also be used in relation to foreign judgments, provided such judgments are first domesticated).

Section 1782 applications may be used to obtain discovery in civil proceedings, even those that have not yet been commenced but are only within “reasonable contemplation,” and criminal proceedings prior to accusation. See *Intel*, 241 U.S. at 243.



## Disclosure Against Third Parties

Disclosure is available against third parties and is usually sought against third parties under the analysis above. For example, in aid of disclosure of fraudulently obtained assets, a court may order disclosure of wire transactions through correspondent banks located in the United States where there is a reasonable suspicion that the funds at issue were transferred through those banks.



## At What Stage Is Relief Available?

The 28 U.S.C. § 1782 discovery can take place:

- 1 During proceedings in a foreign or international tribunal.
- 2 In support of criminal investigations before a formal accusation.
- 3 Pursuant to a letter rogatory issued or request made by a foreign or international tribunal or upon an application of any interested person.



## In Support of Foreign Proceedings?

28 U.S.C. § 1782(a) permits a district court to “order [a person] to give his testimony or statement or to produce a document or other thing for use in a foreign or international tribunal.”

However, such disclosure cannot be sought in support of private arbitration (*ZF Automotive US, Inc. v Luxshare, Ltd.*, 213 L Ed 2d 163, 142 S. Ct. 2078 (2022)) or arbitrations before the ICSID and tribunals under UNCITRAL Rules. The New York district courts found no material difference between arbitral tribunals constituted under the Convention on the Settlement

of Investment Disputes between States and Nations of Other States and the arbitration tribunal convened in accordance with the UNCITRAL Rules, all of which are convened pursuant to investment treaties between contracting states.



## Limitation on Use of Information Obtained

Section 1782 is silent on whether produced documents may be used in other proceedings. Two circuits have ruled on the issue, both finding that nothing in section 1782 or the Federal Rules of Civil Procedure restrict as a matter of law information lawfully obtained under a section 1782 order from being used in other proceedings, including a proceeding within the United States.

The courts do not seem particularly concerned about abusing section 1782 powers and stated that “[p]arties concerned in a particular case that a § 1782 applicant is attempting to use foreign litigation as a ruse for obtaining discovery in the United States without complying with the usual procedures of the Federal Rules of Civil Procedure can and should bring evidence of such chicanery to the § 1782 court’s attention.”

Courts frequently issue protective orders that restrict the use of produced information. Therefore, a protective order restricting the use of produced documents may accompany a section 1782 order.



## Consequence of Breach

The consequences of breaching a section 1782 disclosure order are:

- 1 Sanctions for the failure to make disclosure or cooperate in discovery. Fed. R. Civ. P. 37(c). Possible sanctions include: a payment of reasonable expenses, including attorneys’ fees; an order staying further proceedings until the order is obeyed; and rendering a default judgment against the disobedient party.
- 2 § 1782 explicitly prohibits violation of “any legally applicable privilege” while compelling a person to give testimony or statement. 28 U.S.C. § 1782(a).





## Switzerland

## Overview

Fraud is predominantly a matter of criminal law in Switzerland, and it is an offense punishable under the Swiss Criminal Code.

Civil proceedings in fraud-related matters tend to be preceded by criminal proceedings as a means of obtaining evidence and securing assets in support of civil claims. This is because the production of documents in civil proceedings is usually very limited, and those documents sought must be precisely described by the requesting party. As such, in cases where many of the facts are initially unknown to the victim of a fraud, it is advisable to collect evidence and secure assets through criminal proceedings before starting civil proceedings.

During the criminal investigation, the plaintiff has the rights to: (i) seek orders from the prosecutor (including freezing, production, and search orders); and (ii) attend the examination of witnesses or suspects and have questions put to them.

There are several ways of obtaining evidence in Switzerland: by criminal disclosure and search orders, by the civil precautionary taking of evidence and civil production orders, and by disclosure orders handed down by the bankruptcy authorities.



## Jurisdictional Basis

The jurisdictional bases of the relief described above are as follows:

- 1 Criminal disclosure orders: Articles 263–268 Swiss Code of Penal Procedure (“SCPP”).
- 2 Search orders: Article 244–250 SCPP.
- 3 Civil precautionary taking of evidence: Article 158 Swiss Code of Civil Procedure (“SCCP”).
- 4 Orders of disclosure of information by the bankruptcy authorities: Article 222 Swiss Debt Collection and Bankruptcy Act.

Other relevant jurisdictional bases to note:

- 1 For Swiss jurisdiction to be granted to pursue the predicate offense and/or the subsequent money laundering of the proceeds of the felonies committed: Articles 3–8 Swiss Penal Code (“SPC”).
- 2 For Criminal proceedings being opened *ex officio* or upon criminal complaint by a private plaintiff: Article 301 SCPP.



## Key Tests for Relief

Article 146(1) of the SPC provides the definition of “fraud” under Swiss law, which is narrower in meaning than asset recovery practitioners are generally used to: “any person who with a view to securing an unlawful gain for himself or another wilfully induces an erroneous belief in another person by false pretenses or concealment of the truth, or wilfully reinforces an erroneous belief, and thus causes that person to act to the prejudice of his or another’s financial interests.”

For criminal proceedings to be opened by the office of the attorney general (through a prosecutor), the reports or the first investigations must show that there exists a sufficient suspicion that a criminal offense was committed (Article 309(1) (a) SCPP).

For *criminal disclosure orders*, items and assets belonging to an accused or to a third party may be seized if it is expected that the items or assets:

- 1 Will be used as evidence.
- 2 Will be used as security for procedural costs, monetary penalties, fines, or damages.
- 3 Will have to be returned to the persons suffering harm.
- 4 Will have to be forfeited (Article 263(1) SCPP).

For *search orders*:

- 1 Houses, dwellings, and other rooms not generally accessible may be searched only with the consent the proprietor. However, the proprietor’s consent is not required if it is suspected that on the premises:
- 2 There are wanted persons;
- 3 There is forensic evidence or property or assets that must be seized; or
- 4 Offenses are being committed.
- 5 Documents, audio, video and other recordings, data carriers, and equipment for processing and storing information may be searched if it is suspected that they contain information that is liable to seizure.
- 6 Persons and property may be searched without consent only if it is suspected that forensic evidence or property or assets that must be seized may be found.

For *civil precautionary taking of evidence*, the court will take evidence at any time if:

- 1 The law grants the right to do so; or
- 2 The applicant shows credibly that the evidence is at risk or that it has a legitimate interest.
- 3 Additionally, the provisions regarding interim measures must apply. Article 261 SCCP states that: “The court shall order the interim measures required provided the applicant shows credibly that: (a) a right to which he or she is entitled has

been violated or a violation is anticipated; and (b) the violation threatens to cause not easily reparable harm to the applicant.”

For *Production Orders* issued by a civil judge:

- 1 The claimant has to target specific documents or evidence.
- 2 The claimant has to quantify its damage by detailed requests for relief.
- 3 The claimant has to allege all the facts necessary to prove the damage immediately in its first submissions (Article 321(1) SCCP).



## Scope

Production orders issued by civil judges are very narrow as the claimant has to target specific documents or evidence. As the claimant has to quantify its damage by detailed requests for relief and to allege all the facts necessary to prove the damage immediately in its first submissions, requesting the production of evidence during the civil trial is an inefficient strategy in fraud-related cases.

Contrastingly, in the context of criminal claims, the Swiss criminal authorities have extensive investigatory powers and can obtain information on assets in Switzerland belonging to a defendant (or of which the defendant is a beneficial owner), at any stage of the investigation or ensuing criminal trial. The criminal authorities may conduct a search and seizure of documents or data at the defendant's residence or place of business. The criminal authorities may also freeze assets.

In turn, where the victim of a criminal offense is not in possession of sufficient information to commence a civil claim or file for an attachment order, it may be advisable to seek evidence and secure assets with the help of a criminal investigation.



## Disclosure Against Third Parties

In civil proceedings, a party may refuse to cooperate if the taking of evidence would expose a close relative to criminal prosecution or liability in torts or the disclosure of a secret

would be an offense under Article 321 SPC. Any third party may refuse to cooperate in establishing facts that would expose it or a close relative to criminal prosecution or civil liability in torts or to the extent that the revelation of a secret would be punishable by virtue of Article 321 SPC.

With the exception of lawyers and clerics, third parties must cooperate if they are subject to a disclosure duty or if they have been released from duty of secrecy, unless they show credibly that the interest in keeping the secret takes precedence over the interest in finding the truth.

The institution of criminal proceedings enables the victims of fraud participating as plaintiffs to request that the law enforcement authorities issue broad freezing and disclosure orders from defendants and third parties holding assets or information.



## At What Stage Is Relief Available?

In principle, evidence is administered only after the parties have exchanged their briefs

and rejoinders. It is only under specific condition that a claimant may make new factual allegations or amplify the reliefs sought. Consequently, in cases where many of the facts are initially unknown to the victim of a fraud, it is advisable to collect evidence and secure assets through criminal proceedings *before* starting civil proceedings.

As a civil law country, obtaining pre-trial evidence in Switzerland is difficult. Article 158 SCCP, in this context, provides for the possibility of taking evidence located in Switzerland at any time if the applicant shows likelihood that the evidence is at risk or that it has a legitimate interest to obtain the requested evidence. The Swiss Federal Court ruled that a legitimate interest is sufficiently demonstrated if the applicant wants to appraise the chances of success of a contemplated legal action (FCD 5A\_295/2016).





## In Support of Foreign Proceedings?

Switzerland has a blocking statute, contained in Article 271 SCP, which punishes with up to three years of imprisonment unauthorized activities conducted on Swiss territory on behalf of a foreign authority. The gathering of evidence in support of foreign proceedings is considered a breach of Article 271 SCP.

Precautionary taking of evidence can be granted even if the trial will occur outside of Switzerland. The proceedings are conducted *inter partes* (in

principle, gag orders are not available). This domestic tool is an interesting alternative route to requesting international judicial assistance. It can be faster, and the rights of the civil plaintiff are broader than under a request for judicial assistance. However, the grounds for refusing the taking of evidence are much more limited in the context of the execution of a request for judicial assistance than in the independent request on the precautionary taking of evidence.

In the context of bankruptcy proceedings, an amendment to SPILA (Chapter 11: bankruptcy and composition) entered into force on January 1, 2019, now facilitates a foreign insolvency officeholder to act directly in Switzerland.



## Limitation on Use of Information Obtained

In principle, under Swiss law, parties do not have the obligation to keep the investigation secret. Therefore, they can access and use all of the evidence on file, in particular the result of the disclosure orders issued by the prosecutor. Articles 108(1) and (3) SCPP provide, however, that restrictions may temporarily apply when there is justified suspicion that a party is abusing its rights or when this is required for the safety of persons or to safeguard public or private interests in preserving confidentiality.



## Consequence of Breach

Under certain conditions, third parties may refuse to cooperate. The right to refuse cooperation is absolute if third parties have a family connection or a close personal relationship to one of the parties, or if the party is requested to produce documents covered by attorney–client privilege.

A refusal to cooperate that the court deems unjustified will have procedural consequences depending on the status of the party in question. A failure to comply by a trial party is not sanctioned as such, but the court will be entitled to take it into account when assessing the facts (e.g., adverse inference). A refusal to cooperate by a third party/witness is punishable by a disciplinary fine, an order to comply under the threat of criminal penalties, compulsory measures, or an order obliging the third party to bear costs arising from the collection of the evidence requested from it.

In bankruptcy proceedings, the debtor is obliged under threat of penal law sanctions to divulge all assets to the bankruptcy office and to hold himself at the office's disposal. The debtor must open premises and cupboards at the bankruptcy official's request.

If necessary, the official may use police assistance. Third parties who have custody of assets belonging to the debtor or against whom the debtor has claims have the same duty to divulge and deliver up as the debtor.

Creditors and other interested parties have a right to consult the bankruptcy file and to use the evidence that it contains.



## France

### Overview

The interplay between and structure of civil and criminal proceedings are broadly similar to those of Switzerland.

In certain circumstances, victims of crimes are able to use the full force of legal enforcement agencies' investigative powers to trace assets and obtain discovery for future civil proceedings.

In civil proceedings, the French courts are often willing to order investigative measures so as to allow parties to collect evidence, through *ex parte* proceedings, in order to avoid the dissipation of evidence. Disclosure can be obtained in support of anticipated and ongoing civil proceedings.

In an award or judgment enforcement context, bailiffs have far-reaching powers that allow them to search national databases of information relating to bank accounts, securities accounts, vehicle registrations, etc., without notice to the debtor.



## Jurisdictional Basis

The jurisdictional bases of the relief described above are as follows:

- 1 For civil *in futurum* investigative measures made in support of future proceedings: Article 145 of the French Code of Civil Procedure;
- 2 For civil requests for disclosure of documents and other evidence in the context of an ongoing proceeding: Articles 11 and 138 to 142 of the French Code of Civil Procedure;
- 3 For seeking reparation from the French criminal courts: Preliminary Article II and Article 114 of the French Criminal Code; and
- 4 For requesting the disclosure of evidence or summoning of a witness in criminal proceedings: Articles 81-82 of the French Criminal Code.



## Key Tests for Relief

For *in futurum* investigative measures pursuant to Article 145 of the French Code of Civil Procedure:

- 1 There must be a legitimate reason to preserve or establish evidence of facts upon which the resolution of a potential dispute depends, i.e., the claimant has to demonstrate that this relief is useful to collect evidence in anticipation of a potential dispute.
- 2 The relief must be sought prior to commencing proceedings.
- 3 The investigative measure sought is legally admissible and proportionate to the aim pursued.

For requests for disclosure of documents sought in support of ongoing proceedings pursuant to Articles 11 and 138–142 of the French Code of Civil Procedure, a party can seek an order for the production of documents held by a party or by a third party if the identification of the evidence requested is sufficiently precise.

With respect to the communication of documents and evidence between the parties, articles 132 et seq. of the French

Civil Procedure Code provide that the party who refers to a document has to communicate it to any other party.

As regards criminal proceedings, there are two guiding principles governing the gathering of evidence by public authorities:

- 1 The legality principle, which means proof of an offense, cannot be gathered by committing another offense.
- 2 The loyalty principle, which entails that an investigator cannot obtain proof of an offense by provoking it or devising schemes and ruses to uncover information.

Within these boundaries, public authorities can take all measures that can help uncover the truth by gathering evidence.

Seeking reparation before criminal courts allows victims to have access to the entirety of the criminal file (French Criminal Code, Preliminary Article II and Article 114). Victims can therefore benefit from the full investigative powers of the criminal authorities to build their civil case. Victims can seek from the investigative judge any type of relief that appears useful to uncover the truth, such as, but not limited to, summoning a witness or requesting that a party produce documentary disclosure (French Criminal Code, Articles 81–82).



## Scope

*In futurum* investigative measures and requests for disclosure of documents are available in any anticipated or ongoing civil or commercial proceedings against parties and third parties alike.

These requests, however, must be proportionate to the purpose of the seeking disclosure. The applicant must also prove that it will be useful to collect evidence in anticipation of a potential dispute or in the context of building a case in existing proceedings.

In the context of criminal proceedings, however, French criminal public authorities can take all measures that can help uncover the truth. No type of evidence is given a superior legal value to another, and the means by which an offense can be proven are not restricted.





## Disclosure Against Third Parties

The *in futurum* investigative measures (referenced above) are available against third parties in France (Article 145 French Code of Civil Procedure).

Article 10 of the French Code of Civil Procedure also imposes a general obligation to contribute to justice to establish the truth. The French courts may, at the request of a party, ask or order the production of documents held by third parties if there is no legitimate objection. Financial penalties may be imposed if the third party fails to comply (Article 11 French Code of Civil Procedure).



## At What Stage Is Relief Available?

*In futurum* investigative measures are available in support of anticipated proceedings if there is a legitimate reason to preserve or establish evidence of facts on which the resolution of a dispute may depend (Article 145 French Code of Civil Procedure).

Requests for disclosure of documents and other evidence (including from third parties) are also available in the context of ongoing proceedings.

In a post-judgment context, bailiffs have the exclusive right to carry out enforcement and preventive measures. These measures include the power

to obtain information on the debtor's financial situation without notifying the debtor. Bailiffs have access authorizations to databases held by government agencies or by banks without such access being challenged on the basis of professional secrecy or bank secrecy. This can be invaluable to judgment creditors who are seeking to enforce.



## In Support of Foreign Proceedings?

The French Blocking Statute prevents parties from collecting evidence and/or disclosure in support of foreign proceedings, except if such collection is governed by international

conventions such as the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

Like Switzerland, France is a Contracting State of the Hague Convention of 1954 on civil procedure and the Hague Convention of 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

In accordance with international private law, French civil courts may grant the enforcement of a foreign judgment rendered in asset recovery proceedings. EU judgments will receive automatic exequatur and assets located in France may easily be recovered. Non-EU judgments must meet certain requirements to be enforced: (i) the decision must have been made by a court rightly designated as having jurisdiction over the matter; (ii) it must comply with the international public order; and (iii) it must not constitute any fraud to French law.

As to criminal proceedings, France is a party to a number of judicial cooperation treaties, which govern how French and foreign authorities cooperate in the collection of evidence in support of criminal proceedings abroad. Criminal authorities can also attach assets to safeguard evidence or secure assets for the purposes of enforcement.



## Limitation on Use of Information Obtained

No limitation on use of information obtained by way of *in futurum* investigative measure or request for document production.



## Consequence of Breach

For *in futurum* investigative measures, in the event of noncompliance, the bailiff may request the assistance of the police to seize evidence.

For requests for production of documents:

- 1 If a party refuses to comply with the order, the judge may draw all the necessary consequences.
- 2 If a third party refuses to comply with the order, the judge may compel him to comply with it, if need be ordering a daily penalty or a civil fine.

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