International Discovery: How to Get Evidence in Switzerland

Time-consuming, burdensome discovery can be challenging enough in purely domestic civil proceedings. These difficulties are intensified when pursuing documents and witnesses in a country that has enacted a blocking statute and sanctions the unauthorized gathering of evidence on its soil for use in foreign proceedings. Switzerland, a financial center at the heart of Europe and home of many multinational companies, is one of a number of European countries with such a statute, and discovery there, may seem overwhelming to parties and counsel unfamiliar with the procedures. The following briefing breaks down the rules and procedures required for foreign discovery in Switzerland.

Switzerland takes a narrow approach to foreign courts or other foreign authorities conducting acts of sovereignty on Swiss territory. Even when all parties engage voluntarily, the unauthorized conduct of discovery on Swiss soil in connection with U.S. judicial proceedings is considered an infringement of Swiss sovereignty and attracts Swiss criminal law prohibitions. The relevant provision is Article 271 of the Swiss Criminal Code which provides for penalties including a monetary fine (peine pécuniaire) or jail time (peine privative de liberté) for up to three years, and in serious cases imprisonment for at least one year and up to twenty years.

This prohibition is rooted in the Swiss rules of civil procedure, which rely on the assumption that gathering evidence is not primarily a matter for the parties or their representatives but rather a judicial function within the exclusive purview of the public authorities. As a matter of principle, the service of process, the deposition of witnesses, and the gathering of evidence in Switzerland in a civil trial are matters for judicial authorities acting de jure imperii, i.e. as holders of the power of the State in its pursuit of the common interest. This also applies where the exchange of documents formally takes place between the parties and not from one of the parties directly to the court. As a result of this culture, Swiss authorities are particularly opposed to parties conducting sovereign activities on Swiss soil. This position has been firmly supported by Swiss Supreme Court case law and by legal commentators.

Although the criminal prohibition is severe, Swiss authorities are fully prepared to collaborate with foreign courts and authorities. To facilitate the gathering of evidence in civil and commercial matters for use in other jurisdictions, including the taking of pre-trial evidence in U.S. litigation, Switzerland ratified the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of March 18, 1970 (the “Hague Evidence Convention”), which went into effect in Switzerland on January 1, 1995. The Swiss government emphasized in its ratification of the Convention solutions to overcome the difficulties in its relations with the United States and other common law countries, and expressed the hope that the United States would, in the future, utilize the Hague Evidence Convention procedures rather than unilaterally engaged in extraterritorial discovery. Switzerland also concluded

1 Other provisions of Swiss law that can function as blocking statutes include Articles 28a (protection of sources), 273 (industrial espionage), 299 (violation of territorial sovereignty abroad), and 321 (confidentiality) of the criminal code; as well as Article 47 of the Federal Act on Banks and Saving Banks.

2 Article 40 of the Swiss Criminal Code.
bilateral agreements with several States authorizing direct correspondence among the judicial authorities or supplementing the Hague Evidence Convention.

The Hague Evidence Convention Procedure

There are several ways to obtain documents and depose or examine witnesses located in Switzerland in full compliance with Swiss law. The Hague Evidence Convention procedure begins with a Letter of Request issued from the relevant U.S. court asking the Swiss judicial authorities to authorize the conduct of discovery on Swiss soil. The requesting party may ask either a Swiss judge to oversee the collection and review of evidence, or for the authorities to approve the appointment of a Commissioner. Alternatively, the parties may also ask that a diplomatic officer or consular agent at the U.S. embassy or consulate in Switzerland be authorized to take the evidence. Each of these procedures has its relative merits and can provide for an expedited document collection or witness deposition.

The Letter of Request

The request to the Swiss authority must be presented in the form of a Letter of Request as provided for in Chapter I of the Hague Evidence Convention, issued by the competent U.S. court and addressed to the competent Central authority of the Swiss canton in which the documents, electronic data, or witnesses are located. A list of the Central authorities of Switzerland’s 26 cantons is available on the website of the Swiss Confederation (http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0083.File.tmp/zentralbehoerden_zivilrecht.pdf). The Letter of Request must contain all necessary information for the Swiss authority to quickly understand the subject matter of the dispute, as well as the purpose and content of the request. At a minimum, the Letter of Request must include:

a. The name of the requesting authority and the authority requested to execute it;

b. The names and addresses of the parties to the proceedings and their representatives (if any);

c. The nature of the proceedings for which the evidence is required, and all necessary information in regard thereto;

d. The evidence to be obtained or the judicial act to be performed.

And where appropriate, depending on the nature of the evidence sought abroad:

e. The names and addresses of the witnesses to be deposed;
f. The questions to be put to the witnesses, or a statement of the subject matter about which they are to be examined (it is recommended to include a list of detailed questions to be used in the witness examination);
g. A list of the documents or other property to be inspected;
h. Whether the evidence is to be given oath or affirmation, and any special form to be used in this regard;
i. Any special procedure to be followed.

Most cantons accept a request in which the fact scenario is sufficiently clear, even if the questions are not drafted in great detail. If the factual issues are not sufficiently certain and clear, the request is either returned for redrafting, or, in most cantons, the competent authorities may blue-pencil Letters of Request, thereby rephrasing, restructuring or striking out objectionable questions or offensive wording so that the Letter of Request may be executed under Swiss law. Experience, however, shows that a detailed request helps speed up the proceedings and ensures an accurate execution of the request.

The Appointment of a Commissioner

The second option to obtain evidence in Switzerland is via the appointment of a commissioner as provided for in Chapter II of the Hague Evidence Convention (Article 17). Under this alternative, the requested evidence is gathered by a commissioner, independent from the parties to the proceedings, and appointed to review and validate the taking of the evidence in lieu of a judge. Parties generally designate a private practicing attorney familiar with the Swiss culture and legal system. The request for approval of a commissioner must be issued by the competent U.S. court along with the Letter of Request, and both documents must be sent to the competent Swiss federal authorities, (i) the Federal Department of Justice and Police, Federal Office of Justice, Section of Private International Law in Bern, (ii) and the competent Central Authority of the canton in which the evidence is located.

The use of a commissioner has the major advantage of allowing for a flexible and speedier collection of evidence. With a carefully chosen commissioner, the parties can ensure the individual’s availability on short notice to review and approve the documents or examine the witness.

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3 Germany, Austria, Belgium, France, Italy, Luxembourg, Greece, Pakistan, Hungary, Monaco, Turkey, Czech Republic, Slovakia, and Estonia. With Austria, direct correspondence is also authorized between a judicial authority and the recipient. Direct correspondence between Swiss and Liechtenstein authorities has become customary, although not regulated in a bilateral agreement.
Recourse to Diplomatic Officers and Consular Agents

A third option is to resort to the services of diplomatic representatives. Subject to the prior authorization of the Federal Department of Justice and Police and the competent cantonal authority where the evidence is located, diplomatic officers or consular agents in office in Switzerland may take the evidence at the embassy or consulate where they exercise their functions. In Switzerland, diplomatic officers, consular agents, or commissioners may not, however, apply for appropriate assistance to obtain evidence by compulsion. As a result, this option is only available if the Swiss entity or individual concerned is compliant.

The Letter of Request, with any letter for approval of a commissioner or for authorization to resort to diplomatic representatives, only needs to be signed by the competent foreign judge; no legalization or Apostille is required. The motions must, however, be submitted with a translation in the language of the competent Swiss court (i.e. French, German, or Italian depending on the canton where the evidence is located).

Provided that the request for judicial assistance is complete and submitted according to the treaty procedure, there is very little risk that the Swiss authorities would refuse to execute it. The risk is moreover almost nonexistent if the Swiss entity or individual in possession of the documents has agreed to produce them, or the witness has agreed to testify. The Swiss authorities share a long history of cooperating with various countries, including the United States, on judicial assistance matters. Numerous Letters of Request or requests for the appointment of a commissioner have been approved in recent years.

Witness Examination in Switzerland

The examination of witnesses by Swiss civil courts in the execution of a Letter of Request is conducted according to Swiss civil procedure rules. It takes place in a courtroom open to the public, unless the judge orders that all or part of the examination be held behind closed doors because of the public interest or the legitimate interest of the witness or the parties. Witnesses are examined by the court in the absence of other witnesses, but a motion for leave for the attorney of the parties to confront a witness may be sought. An oath is not generally administered in Swiss civil procedure and if this modality is required under the applicable foreign procedure, it needs to be expressly requested in the Letter of Request. In the event that a witness needs to be recalled for a further examination, this can be done in most cantons on the basis of the first Letter of Request. In a few cantons, a second request is necessary. Finally, witness testimonies are generally transcribed, although not verbatim, in written minutes of the hearing signed by the witness, and occasionally in audio recordings. The testimony may be recorded on magnetic tape, by video, or by other appropriate means upon request.

Non-cooperative witnesses who refuse to appear or testify without legal grounds or recognized exemptions face sanctions, including court-ordered fines, criminal charges, and law enforcement and the related administrative fees. These also apply to non-compliant parties and witnesses in the production of documents.

The execution of a Letter of Request is generally speedy. In cases where the parties are cooperative, and with the assistance of an experienced local counsel, it can take as little as a couple of days from the day the request is delivered to the competent Swiss authority to the day the documents or the transcript of the witness examination is sent to the requesting foreign court. If one includes cases where the Swiss entity or individual is not cooperating, statistics show that the execution in Switzerland is generally less than four months.

Exceptions to the Blocking Statute

The Swiss blocking statute is not absolute and only applies to taking evidence in Switzerland for use in pending foreign proceedings and with certain exceptions.

First, in certain circumstances, the foreign court or parties to a pending litigation abroad may conduct judicial acts without prior authorization of the Swiss authorities. For example, when a Swiss party to a civil trial in a common law jurisdiction is served with a request for evidence, a list of questions to answer in writing, or summoned to appear before a judge, and such request does not require that the court or the parties’ representatives travel to Switzerland, recourse to international judicial assistance is not required if the party is free to decide to cooperate, and any refusal to comply with the request has purely civil procedural consequences only. Such an invitation must, however, be served on the Swiss party according to the international judicial assistance procedures on the service of process abroad.

Second, the Swiss blocking statute is territorial in application and only governs the taking of evidence that is within the borders of Switzerland. A witness may be validly deposed without prior authorization while abroad, provided that the foreign jurisdiction does not have a blocking statute.
Third, the criminal law prohibition only applies to the taking of evidence for use in a pending litigation. The review and collection of documents in the context of preparation for a potential litigation may be conducted in Switzerland without triggering any restriction; such activities are not considered within the responsibility of the Swiss authorities, and are not carried out under the rules or authority of any foreign court.

The Geneva office of Winston & Strawn LLP has assisted and advised parties in connection with the taking of evidence in Switzerland, as well as in numerous other European countries, including Germany, Austria, Liechtenstein, Greece, Sweden, Belgium, the Netherlands, and Spain.

If you have any questions regarding any matters discussed in this briefing, please contact any of the Winston & Strawn attorneys listed below or your usual Winston & Strawn contact.

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