

# Taking of Evidence in Switzerland\*

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## I. INTRODUCTION

Switzerland is organized as a federation of twenty-six partially sovereign states known as cantons. Most Swiss substantive law is federal, while the procedural rules and the organization of the judiciary have been the domain of the cantons for more than a century. Thus, while the cantonal courts have generally been applying federal law, they were governed by their own procedural rules. This procedure is about to change. On January 1, 2011, the Federal Civil Procedure Code (*Zivilprozessordnung*, or ZPO) and the Federal Criminal Procedure Code (*Strafprozessordnung*, or StPO) will take effect, derogating the corresponding cantonal statutes. The organization of the judiciary (e.g., how judges are elected or appointed, how the districts are organized, etc.) will remain the cantons' responsibility. They may pass legislation within the guidelines set by these new federal statutes.

The ZPO incorporates the core principles found in most of today's cantonal civil procedure laws, as well as those that have been developed by the Federal Supreme Court in its case law in recent decades, and is aimed at setting a consistent national standard on how these concepts are applied.<sup>1</sup> This Article discusses permissible and impermissible means of taking evidence under Swiss law, with particular attention being paid to the stark differences between the Swiss rules and the far more permissive evidence gathering rules of the United States.

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\* Submitted by the authors on behalf of the FDCC International Law and Practice section.

<sup>1</sup> The Swiss equivalent to the U.S. "Blue Book" is Forstmoser/Ogorek, *Juristisches Arbeiten*, 2nd edition, Zurich 1998, which summarizes the citation conventions as established by Swiss doctrine. We have followed these guidelines in the citations in this article. Zurich Judgments have been referred to in accordance with the particular court's citation rules. To find the cited decisions of the Swiss Federal Supreme Court, please type the reference into the search engine on the following website: <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>.



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## II. RULES ON THE TAKING OF EVIDENCE

As in most civil law countries, the rules for taking evidence in Switzerland differ fundamentally from the rules and procedures applicable in the United States. Some standard U.S. procedures for taking evidence are entirely unknown in civil law jurisdictions. In fact, they may not only be unknown (and thus ineffective), but their use could compromise the value or admissibility of important evidence.<sup>2</sup>

In Switzerland, courts in civil cases are usually composed of either one, three, or five judges, depending on the type of claim and the amount at issue. In contrast to the U.S. jury system, the court is the fact finder in Swiss proceedings. It is up to the court to decide what evidence is necessary to decide a case, and the court will freely assess the credibility and weight of the evidence introduced by the parties. The court applies the law to the facts *ex officio*, and it is deemed to know the relevant law via the concept of *iura novit curia*. The parties are therefore not obliged to plead the applicable law (although a diligent lawyer will do so), and the court is free to base its decision on a legal provision that has not been raised by any party.<sup>3</sup> However, it is obviously crucial for attorneys to know what legal provisions may apply to their case in order to gather and submit all the relevant evidence.<sup>4</sup>

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<sup>2</sup> See the discussion of this issue in Part IV, *infra*.

<sup>3</sup> However, if a court intends to base its decision on a legal provision that has not been raised in any party's pleadings, the right to be heard requires the court to bring this to the parties' attention and to give them the opportunity to comment on it. See Hotz, N 28 Art. 29 in: Ehrenzeller/Mastronardi/Schweizer/Vallender, Die schweizerische Bundesverfassung, Kommentar, Zurich 2002.

<sup>4</sup> Staehelin/Staehelin/Grolimund, Zivilprozessrecht, Zurich 2008, p. 118.



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### III. NO PRE-TRIAL DISCOVERY

The American concept of pre-trial discovery is unknown to Swiss procedural law. In Switzerland, a party who draws any legal conclusion from an alleged fact or circumstance must prove the existence of that fact or circumstance, unless otherwise provided for by law.<sup>5</sup> This legal provision requires the plaintiff to produce all evidence necessary to substantiate its claim. If a party is not able to produce sufficient evidence to support a relevant fact, the party must bear the procedural disadvantage resulting from that lack of evidence.<sup>6</sup> Further, a party need only provide the evidence supporting its own position. Evidence that is detrimental to its case need not be submitted to the court voluntarily. Thus, the opposing party might never become aware of the existence of such evidence. However, if the opposing party knows the evidence exists, it can request production.<sup>7</sup> Such a request needs to sufficiently specify the document and its relevance to the case by providing, for example, the approximate date of the document, its alleged content, and the materiality of the document for the respective case. It is then up to the judge to decide whether the requested document is relevant to the question at issue and whether it is therefore justifiable to compel the opponent to produce it.<sup>8</sup> The requesting party must show that its request is

<sup>5</sup> Art. 8 Swiss Civil Code.

<sup>6</sup> BGE 2C\_662/2009, February 2, 2010, c. 2.

<sup>7</sup> Lendenmann, Art. 177 N 5, in: Gehri/Kramer, ZPO Kommentar, Zurich 2010.

<sup>8</sup> Spühler/Vock, Urkundenedition nach den Prozessordnungen der Kantone Zürich und Bern, SJZ 95 (1999) Nr. 3, p. 42.

not a mere “fishing expedition,” which would be illegal, but that there are reliable indications that the requested evidence actually exists.

Should the party that is ordered to produce evidence fail to comply with the court’s order, the court will take this behavior into account when considering the evidence.<sup>9</sup> This consideration can result in the court accepting as proven the requesting party’s allegation as to the content of the document. For example, if the plaintiff alleges that the defendant had admitted in writing vis-à-vis a third party that the object at issue indeed had a design defect, and the defendant refuses to produce this document, the court cannot—in the absence of a contractual obligation of the defendant to give plaintiff access to this document—force the defendant to produce it. Instead, the court can sanction the defendant’s non-compliance by accepting the veracity of the alleged written admission of a design defect.<sup>10</sup>

In certain legal areas there are, however, statutory obligations to submit evidence.<sup>11</sup> If a party fails to comply with these obligations, the court may issue a separate order to compel production of the documents and may impose a fine for non-adherence. In certain areas of the law, such as in divorce proceedings, in the field of child custody and support, in employment matters, and in landlord/tenant matters the court has the statutory duty to establish the relevant facts under the concept of “*Untersuchungsmaxime*.” Because civil courts are not as well equipped as the criminal authorities, the parties are required to present their case and submit the necessary evidence to prove it. The difference is that under the *Untersuchungsmaxime*, the court can—indeed, it must—request the production of additional evidence from the litigants or third parties if the evidence is considered relevant to the outcome of the proceedings.

Moreover, a third party may be required by procedural—or even substantive—law to produce all documents in its possession upon request by the court or another judicial authority.<sup>12</sup> Additionally, any person residing in Switzerland is obliged to testify if called to the stand by a court.<sup>13</sup> Only in special circumstances are third parties allowed to withhold testimony or documents in their possession, such as if the witness is closely related to one of the parties, if the witness is bound by professional secrets, or if a specific privilege ap-

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<sup>9</sup> Art. 164 ZPO.

<sup>10</sup> Thus, the defendant will quite likely refuse to produce the requested document only if it is even more detrimental to the defendant’s case than the plaintiff knows.

<sup>11</sup> E.g. Art. 170 Swiss Civil Code, according to which a spouse has the right to request information on the other spouse’s income, assets, and acquired debts. This includes the production of the pertaining documents. See Spühler/Vock, *Urkundenedition nach den Prozessordnungen der Kantone Zürich und Bern*, op. cit., p. 41.

<sup>12</sup> Vogel/Spühler, op. cit., p. 279; also Art. 160 ZPO.

<sup>13</sup> Art. 160 para. 1 lit. a ZPO.

plies.<sup>14</sup> A third party's refusal to cooperate, to submit documents, or to testify as a witness could result in fines and criminal prosecution.<sup>15</sup>

The court's freedom to assess the evidence submitted according to its own discretion is limited by Article 29 (2) of the Swiss Constitution and Article 8 of the Swiss Civil Code, which provide that a party generally has the right to be heard in court and to present evidence to support its claim in accordance with the applicable procedural rules. The court may, however, restrict the amount of evidence admitted and make an anticipatory assessment of proffered evidence if it is convinced that any additional or newly offered evidence is clearly superfluous or concerns a legally irrelevant fact, or if the additional evidence could not change the outcome of the proceedings in any way.<sup>16</sup> For example, if, during a dispute regarding a construction project, the court is able to clearly determine whether contractual obligations were fulfilled based on the wording of the contract, it is unnecessary to produce the underlying construction plans to further specify the obligations.<sup>17</sup> Therefore, the court could refuse to allow the plans to be admitted as evidence.

#### IV. DEPOSITIONS AND AFFIDAVITS

There is nothing comparable to taking depositions or presenting testimony in the form of an affidavit in Swiss procedural law. In civil cases, witness testimony can be obtained only through direct interrogation by a judge.<sup>18</sup> This procedure was recently confirmed in a 2007 decision of the Zurich Court of Appeals.<sup>19</sup> The court held that the current Civil Procedure Act of the Canton of Zurich does not allow the parties' legal counsel to conduct witness examinations themselves, because this right is reserved solely to the competent judge.<sup>20</sup> In fact, the court went even further and held that if a written statement is obtained through the assistance of a party's legal counsel, the witness is no longer free to testify in court because he or she is likely to feel bound by the earlier written statements, and the testimony may therefore lack credibility. Thus, contacts between counsel and potential witnesses can substantially harm the credibility of otherwise helpful witness testimony in court.

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<sup>14</sup> Vogel/Spühler, op. cit., p. 281-282; see also Art. 163 ZPO.

<sup>15</sup> Art. 167 ZPO.

<sup>16</sup> BGE 4A\_71/2009, March 25, 2009, c. 3.5.

<sup>17</sup> See BGE 4A\_71/2009, March 25, 2009, c. 3.5.

<sup>18</sup> Lendenmann, Art. 173 N 2 and Art. 172 N 1, in: Gehri/Kramer, ZPO Kommentar, Zurich 2010.

<sup>19</sup> ZR 106 (2007) Nr. 14.

<sup>20</sup> ZR 104 (2005) Nr. 62, c. 6b.

However, it is possible to hold a witness hearing in front of a judge before formal legal proceedings have commenced if there is a considerable risk that the witness is about to pass away or leave the country, or if his or her memory is about to deteriorate considerably. Further, Article 158 of the revised ZPO allows such a forehanded taking of evidence if other good reasons so require. Apparently, the need to assess the merits of a case can, at least under certain circumstances, be sufficient grounds to overcome the traditional requirement of judicial interrogation at trial. However, the extent to which courts will endorse such pre-trial taking of evidence remains to be seen.

Memoranda prepared by potential witnesses regarding their discussions or their perception of relevant facts may be used to support the witness's memory and are admissible evidence of the witness's understanding of the facts when the memorandum was written.<sup>21</sup> And according to a judgment rendered by the Attorneys' Supervisory Commission of Zurich in 2007,<sup>22</sup> an attorney may formally question a potential witness before proceedings have begun. However, admissibility of that witness's testimony hinges on the following three criteria: contacting the witness must be in the best interest of the client (e.g., inquiries with the potential witness with regard to his or her knowledge of the relevant facts in order to prevent testimony that is less helpful than anticipated), the questioning has to be conducted in a way that prevents biasing the possible witness regarding the future court proceedings, and it must be absolutely necessary that the questioning proceed without the participation of the authorities.<sup>23</sup> In the 2007 case, the plaintiff's attorney did not satisfy any of the three criteria. The attorney showed a picture to the potential witness and asked him whether the person in the picture was the person to whom he had delivered a certain document. The Commission held that it was not in the client's interest to contact the witness, as doing so would have shortened the proceedings only slightly. Additionally, the Commission found that the attorney unduly influenced the witness by showing him a picture of the alleged recipient of the document, and it concluded that there had been no need to proceed without the court's involvement because the witness had been called to testify in court anyway.<sup>24</sup>

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<sup>21</sup> Hafter, *Strategie und Technik des Zivilprozesses*, Zurich 2004, p. 309 N 1752.

<sup>22</sup> This decision was made by a state-level authority; it remains to be seen how the Swiss Federal Supreme Court would decide this issue .

<sup>23</sup> ZR 106 Nr. 81, c. 2.

<sup>24</sup> ZR 106 Nr. 81, c. 3.

## V. TAKING OF EVIDENCE IN AN INTERNATIONAL SETTING

If a foreign party seeks to obtain evidence located in Switzerland, that party needs to proceed according to the rules of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters of 1970 (the Hague Convention). Failure to adhere to the Hague Convention's rules can lead to criminal prosecution for engaging in illegal activity for a foreign state under Article 271 (1) of the Swiss Penal Code (PC), which reads as follows:

Whoever, without being authorized, performs acts for a foreign state on Swiss territory that are reserved to an authority or an official, whoever performs such acts for a foreign party or another foreign organization, whoever aids and abets such acts, shall be punished with imprisonment and, in serious cases, sentenced to the penitentiary.<sup>25</sup>

However, Article 271 (1) PC does not apply to the gathering of evidence in connection with foreign arbitral proceedings. Arbitral proceedings are not considered state proceedings, and the taking of evidence to be introduced in arbitration is therefore not an act on behalf or at the behest of a foreign state. Accordingly, one is not required to obtain official authorization to gather evidence in Switzerland in the course of foreign arbitral proceedings.<sup>26</sup>

The performance of an act for a foreign state includes the collection of any evidence, be it through witness statements (e.g., the taking of depositions<sup>27</sup>) or by means of obtaining documents. However, Article 271 (1) PC does not apply if documents are offered voluntarily.<sup>28</sup> Informal contacts intended to determine whether a potential witness could be helpful regarding future proceedings are admissible as long as the information received during such meetings is not submitted as evidence in foreign proceedings.<sup>29</sup>

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<sup>25</sup> Art. 271 (1) PC (unofficial translation).

<sup>26</sup> Schramm, *Entwicklung bei der Strafbarkeit von privaten Zeugenbefragungen in der Schweiz durch Anwälte für ausländische Verfahren*, AJP / PJA 2006 p. 491/492.

<sup>27</sup> Donatsch, *Art. 271 Ziff. 1 StGB und das Recht auf Befragung von Entlastungszeugen*, p. 590 in: *Festschrift für Stefan Trechsel*, Zurich 2002.

<sup>28</sup> Hopf, Nr. 15 to Art. 271 in: *BSK-Strafrecht II*, Art. 111-392 StGB, 2nd edition, Basel 2007.

<sup>29</sup> Hopf, Nr. 15 to Art. 271 in: *BSK-Strafrecht II*, Art. 111-392 StGB, 2nd edition, Basel 2007.

Generally, it is in line with Article 271 PC to transmit official documents to parties in Switzerland without judicial assistance. However, if service of such documents is a legally relevant operation—for example if such service leads to the running of a statutory period or sets a deadline for the recipient to react—the document must be submitted through official channels. Failure to do so may violate Article 271 PC.<sup>30</sup>

The strict application of Article 271 PC has not gained universal support from Swiss legal scholars and practitioners. It has been argued that such strict rules are no longer appropriate in a globalized world and economy, where legal disputes often involve a number of different jurisdictions with different rules and procedures. A 2006 decision by the Attorney General of the Canton of Zurich supports this view.<sup>31</sup> In connection with divorce proceedings before a court in the United States, the wife's Swiss attorney was asked to investigate whether the husband had assets in Switzerland or with Swiss banks. The attorney investigated and finally produced an affidavit, "duly sworn," containing his findings intended for use in the U.S. proceedings. The question before the Attorney General was whether the lawyer had infringed Article 271 PC by interviewing people regarding the husband's assets and by signing the affidavit. The Attorney General decided not to prosecute the lawyer, finding that a report containing information about interviews with potential witnesses could not be considered the same as actually receiving a witness' testimony. The Attorney General reasoned that even under Zurich civil procedural laws, counsel it is not prohibited from speaking to witnesses as long as the witnesses are not unduly influenced. It was further noted that prohibiting private investigations might even be incompatible with the Swiss Constitution and the European Convention on Human Rights. Since speaking to witnesses does not constitute a crime in a purely domestic setting, the Attorney General decided to close the investigation. Thus, it appears fair to conclude that signing an affidavit describing one's own knowledge in Switzerland for use in foreign proceedings is not likely to be considered an infringement of Article 271 PC.

If the parties want to be sure to avoid criminal prosecution when gathering evidence located in Switzerland, it is advisable to comply with the rules of the Hague Convention. However, the Hague Convention does not give foreign claimants the right to request pre-trial discovery in Switzerland. Article 23 of the Hague Convention provides that every contracting state may opt to declare that it will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents as is done in common law countries. Switzerland has chosen to make use of this right<sup>32</sup> and will not execute letters of request if

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<sup>30</sup> Hopf, Nr. 15 to Art. 271 in: BSK-Strafrecht II, Art. 111-392 StGB, 2nd edition, Basel 2007.

<sup>31</sup> ZR 104 Nr. 62.

<sup>32</sup> Art. 6 of the Swiss declaration concerning the Hague Convention.

the documents sought have no direct or necessary link to the proceedings in question, if the requested documents are not sufficiently specified,<sup>33</sup> or if third parties' interests are at risk. In 2005, the Swiss Federal Supreme Court denied a U.S. request for judicial assistance based on Article 23 of the Hague Convention.<sup>34</sup> In that case, the U.S. court asked for the production of "all available documents" without further specifying the documents. The Federal Supreme Court held that under such circumstances, it was not even possible to adopt a so-called "blue pencil approach" and reduce the breadth of the request to an acceptable level.<sup>35</sup>

## VI. CONCLUSION

When the ZPO and StPO take effect on January 1, 2011, the procedural rules for both civil and criminal cases will be uniform throughout Switzerland, and will reflect most of the current cantonal rules. Many of the rules for taking evidence and for pre-trial discovery in civil cases vary dramatically from those in the United States, and several of these differences are striking. For example, under Swiss law, a party to a civil proceeding is allowed to withhold evidence that may be detrimental to its position. Unless the opponent knows the evidence exists and can sufficiently specify it, the evidence is almost impossible to obtain. Depositions and testimony by affidavit are not allowed, because all interrogations of witnesses must be performed by the judge. In fact, the taking of depositions in Switzerland by the parties' attorneys or service of process in Switzerland other than through the local court is prohibited by law and can lead to criminal prosecution of the actors involved. Although pre-trial questioning of witnesses by attorneys is permitted, evidence obtained through the questioning must meet several strict criteria for admissibility, including a necessity requirement. While it is acceptable for a person to voluntarily sign an affidavit in Switzerland that is then used in proceedings before a foreign authority, other evidence to be used in foreign proceedings must be taken in accordance with the Hague Convention. However, none of these restrictions apply to the taking of evidence for an arbitration, which is considered a private institution for dispute resolution.

Due to these rules, some material evidence will never be introduced simply because the party that would benefit from it is not aware of its existence. This result is generally accepted by Swiss law, which weighs the right of the individual to protect personal or commercial information more heavily than the interest in having all potentially relevant evidence introduced into civil proceedings. Essentially, each party bears the responsibility to ensure that it possesses the relevant evidence to prove its case in the event a matter becomes litigious one day.

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<sup>33</sup> With regard to this criterion, the standard used is similar to that applied in domestic cases.

<sup>34</sup> BGE 5P.267/2005, December 21, 2005 [officially published as 132 III 291].

<sup>35</sup> BGE 5P.267/2005, December 21, 2005, c. 3.2 [officially published as 132 III 291].