Mirco Ceregato
lic. iur. HSG, LL.M., CAS in Liability and Insurance Law
Attorney-at-Law, Partner
Phone +41 58 258 14 00
mirco.ceregato@bratschi.ch

Execution of U.S. Pre-Trial Discovery Orders in Switzerland

The taking of a deposition in Switzerland is subject to Art. 271 of the Swiss Criminal Code. Therefore, in cases where jurisdictional discovery is granted by a US court against a defendant who resides in Switzerland, all involved parties and counsels are at risk of becoming liable to prosecution in Switzerland if the envisaged legal path is not duly followed.

In order to prevent the risk of being prosecuted, the means envisaged in the Hague Evidence Convention («Convention») must be used. The US were a signing party and Switzerland joined the Convention in 1994. The Convention comprises two separate and independent systems for the taking of evidence abroad: Chapter I of the Convention sets out provisions for the taking of evidence by means of Letters of Request; Chapter II provides for the taking of evidence by Consuls and Commissioners.

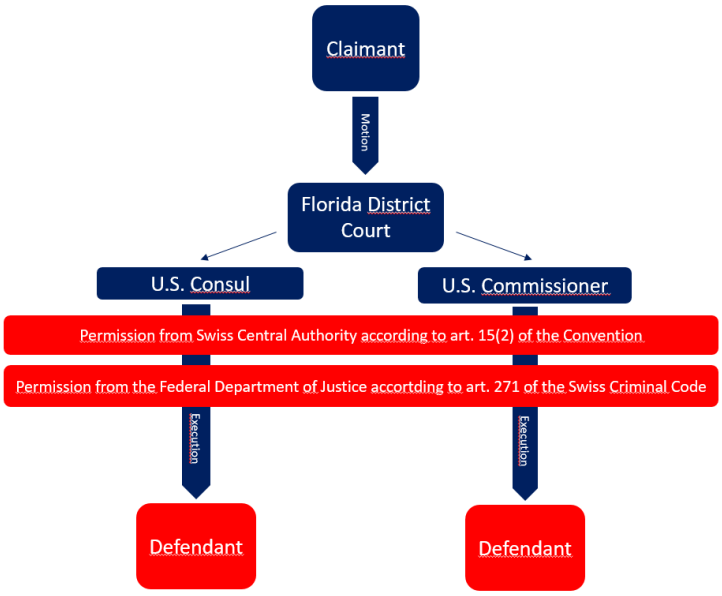
According to Chapter I, the judicial authority which ordered the evidencetaking sends a Letter of Request to the central authority at the requested state. The central authority of the requested state checks on formalities of the request and, if formalities are complied with, it forwards the Letter of Request to the competent judicial authority for execution. As Switzerland is a federalist country with twentysix cantons, Switzerland has not one central authority, but twenty-six. However, it is possible to file the Letter of Request with the Swiss Federal Department of Justice which forwards it to the competent central authority. The chart below in a case of a Florida claimant and a defendant residing in the canton of Zug illustrates this.

According to Art. 23 of the Convention, a contracting state may, at the time of signature, ratification, or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common-law countries. Switzerland has made use of this reservation. However, such reservation is not intended to prohibit common-law style pre-trial discovery. This would be contrary to the purpose of the treaty. According to the Swiss Federal

Supreme Court, the effect of Switzerland's Art. 23 declaration is that Switzerland will accept Letters of Request for the production of documents issued during the pre-trial discovery period where the relevance and precision of the request matches the criteria inspired by Swiss, procedural law. The practical problems when executing US pre-trial discovery orders in Switzerland, according to Chapter I of the Convention, are:

- Where documents are requested, the documents must be specifically identified and the relevance of the requested document for the dispute must be clear from the Letter of Request.
- Where witness examination is requested, the individual interrogatories must be drafted with clarity and the relevance of the questions for the dispute must be substantiated.
- The form used to take oral testimony for the purpose of pre-trial discovery (deposition) is unknown in Switzerland. Cross-examination must be requested in the Request Letter by way of a special method (Art. 9(2) of the Convention). A Swiss judge must survey the questioning and must intervene when necessary.
- English is not an official language in Switzerland.
- Switzerland has no sharp measures of compulsion against a party which does not comply with an order for document production or an order for testimony in a civil procedure.

Chapter II of the Convention envisages the use of US Consuls and Commissioners to execute a US pre-trial discovery order abroad instead of using the foreign court. To do so, the claimant must file a respective motion with the competent court in the United States. However, in order to legally execute such a US court order for pre-trial discovery, two Swiss permissions are necessary. Firstly, the central authority must issue a permission according to Art. 15, para 2 of the Convention. And, secondly, the Swiss Federal Department of Justice must issue a permission according to Art. 271 of the Swiss Criminal Code. The following chart illustrates the procedure:



In contrast to the proceeding envisaged by Chapter I of the Convention, the evidence is to be taken not only according to the procedures provided for by the law of the requesting court (i.e. according to US law) but also by US persons familiar with common law style, pre-trial discovery orders.

Although Chapter II of the Convention provides for a good solution for overcoming the practical problems outlined when using Chapter I, the defendant remains free to not cooperate at all or to interrupt the taking of evidence at any time (Art. 21, let. c of the Convention). This makes the use of the procedures envisaged in the Convention unattractive for US claimants. Therefore, US counsels often try to execute the evidence-taking against a Swiss resident on US soil or in countries which have no blocking statutes (Switzerland has one with Art. 271 of its Criminal Code). In Société Nationale Industrielle Aérospatiale, et al. vs United States District Court for the Southern District of Iowa, 482 US 522, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987), the US Supreme Court held that the discovery procedures provided by the Convention do not necessarily control discovery with respect to foreign litigants before an American court. When determining whether to require use of the optional Convention procedures, or to permit discovery pursuant to the US Federal Rules, the Supreme Court instructed courts to consider the particular facts of each case, the sovereign interests at issue, and the likelihood that resort to Hague Convention procedures would prove effective. According to this precedent, there may be an avenue to circumvent the use of the Convention when executing a pre-trial discovery order in Switzerland. However, this must be assessed on a case by case basis.

Basel
Lange Gasse 15
CH-4052 Basel
Phone +41 58 258 19 00
Telefax +41 58 258 19 99
basel@bratschi.ch

Bern
Bollwerk 15
Postfach
CH-3001 Bern
Phone +41 58 258 16 00
Telefax +41 58 258 16 99
bern@bratschi.ch

Lausanne
Avenue Mon-Repos 14
Postfach 5507
CH-1002 Lausanne
Phone +41 58 258 17 00
Telefax +41 58 258 17 99
lausanne@bratschi.ch

St. Gallen
Vadianstrasse 44
Postfach 262
CH-9001 St. Gallen
Phone +41 58 258 14 00
Telefax +41 58 258 14 99
stgallen@bratschi.ch

Zug
Gubelstrasse 11
CH-6300 Zug
Phone +41 58 258 18 00
Telefax +41 58 258 18 99
zug@bratschi.ch

Zurich
Bahnhofstrasse 70
Postfach
CH-8021 Zürich
Phone +41 58 258 10 00
Telefax +41 58 258 10 99
zuerich@bratschi.ch

 www.bratschi.ch