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I. U.S. Discovery and Swiss Law

The American attorney, who is used to a court system that allows the most extensive and far-reaching discovery, will experience considerable difficulty when attempting to utilize the American system of discovery while gathering information in Switzerland for use in the U.S. courts. The reasons are that (1) the concept of secrecy under Swiss law is completely different from the one under American law, and that (2) the taking of evidence in Switzerland is not seen as a matter of the parties but is within the competence of the authorities.

A. ARTICLE 271

Indeed, Article 271 of the Swiss Penal Code states that whoever performs an official act on Swiss territory without previous and explicit authorization commits an offense and will be punished by imprisonment or fine.[1] This article excludes parties from gathering evidence themselves in Switzerland, but it does not exclude the presence of the parties to the taking of evidence by Swiss authorities when a proper prior request has been made. If an attorney for a party thinks it is necessary that he/she attend when the evidence is taken, a request to that effect may be made and is often granted.

B. SECRECY UNDER SWISS LAW

Secrecy is a firmly entrenched principle of Swiss law, and is based on the idea that certain confidential information should be protected from being

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1. Section 271, Swiss Penal Code of December 21, 1937, *as amended*. For an unofficial translation, *see* J. FEDDERS, J. HARRIS, R. OLSEN, & B. RISTAU, TRANSNATIONAL LITIGATION: PRACTICAL APPROACHES TO CONFLICTS AND ACCOMMODATIONS, Vol. II, 1368 (1984) (this is a 3 volume set, hereinafter referred to as ABA TRANSNATIONAL LITIGATION). *See generally* FREI, SWISS SECRECY LAWS AND OBTAINING EVIDENCE IN SWITZERLAND, in *Id.*, Vol I, at 5–38 - ED.

disseminated. Several Swiss statutes such as Article 47 of the Federal law on Banks and Savings Banks (Bank Secrecy Statute),[2] Article 162 of the Penal Code (Business Secrecy)[3] and Article 273 (prohibition to disclose secrets to foreign bodies)[4] deal with the problem of the protection of secrecy. Abroad these provisions are often called blocking statutes. It is doubtful whether this is correct, as there are provisions that make it possible to overcome these obstacles.

To understand the mechanism of overcoming secrecy requirements, one should keep in mind what these three provisions have in common: The secret protected by law may not be revealed without the consent of its master (the bank customer, the client of the company, the partner in a business transaction). Even if the holder of the secret (e.g., the bank) is completely willing to disclose it, he risks punishment if he does so when secrecy was not waived by the person entitled to it.

If secrecy has to be lifted against the will of its master, this can be properly done only by compulsion that is imposed by Swiss authorities, not by a U.S. court that punishes the party or witness with contempt sanctions. The balance of interests test is no solution[5] since Switzerland, among many other nations, opposes it and does not accept that a U.S. court may decide under what circumstances Swiss law has no effect on Swiss territory.

II. International Mutual Assistance

It would, however, be wrong to say that Swiss secrecy statutes constitute an absolute bar to litigation. Swiss law, whether federal or cantonal (cantons are the Swiss states), contains a great many articles that say how secrecy may be overcome and those possibilities are made available to foreign authorities, courts or parties through international mutual assistance. For this reason parties to U.S. proceedings should cause a request to be addressed to the competent Swiss authorities rather than try to enforce the taking of evidence before a U.S. court. Of course, it cannot be denied that taking evidence through that process may be time-consuming; in particular, if the persons concerned by the act of assistance appeal the decision made by the Swiss authority. Nevertheless, it is submitted that the enforcement of subpoenas in the United States may, if litigated, also take considerable time. And in addition, even if the U.S. court decides that the subpoena is to be enforced, it is by no means certain that it actually can be, since Switzerland is not willing to allow foreign authorities to compel defendants with domiciles

2. *See* ABA TRANSNATIONAL LITIGATION, vol. II, at 1402. *See generally id.*, vol. I, at 9–12.
3. *See* ABA TRANSNATIONAL LITIGATION, vol. I, at 7–9.
4. Section 273, Swiss Penal Code of December 21, 1937, *as amended*. For an unofficial translation, *see* ABA TRANSNATIONAL LITIGATION, Vol. II, *supra* note 1, at 1369.
5. *See* RESTATEMENT OF FOREIGN RELATIONS LAW OF THE U.S. (SECOND), § 40 (1965).

in Switzerland to provide evidence that lies there when that evidence may be furnished through the mutual assistance process.

A. U.S.—Swiss Treaty

The process of international judicial assistance offers several possibilities. In criminal matters, the U.S. and Switzerland have concluded a treaty on mutual assistance that provides for the taking of evidence or the gathering of information by the authorities of the other state.[6] It is possible under the treaty, for instance, to ascertain the whereabouts and addresses of persons, to take statements or testimony, to effect the production or preservation of papers or other articles of evidence and to have documents served or authenticated. The treaty provides for the application of compulsory process and, hence, for the setting aside of banking secrecy, if the facts that are described in the request were punishable under Swiss law (assuming that they have been perpetrated in Switzerland). Sometimes this rule of "double criminality" or "dual criminality" leads to unsatisfactory results. In the famous cases of insider trading—an offense that is not punishable per se in Switzerland—a provisional solution had to be found through the Memorandum of Understanding and the related Convention XVI.[7] Under the MOU/Convention process, which closes the gap in the treaty, raising the barrier of banking secrecy is now possible because the customers have to agree that the bank may disclose their identities whenever there is a reasonable suspicion of insider trading.

The parties entitled to ask for assistance under the treaty are not only the prosecutor but also the defense. However, the attorney for the defense has to comply with the requirements of the treaty as to the form and content of the request, which—it is obvious—may cause him some problems when he does not want to divulge his plans for tactical reasons. Although there are few cases where assistance could not be granted altogether nor to the extent desired, it is safe to say that most of the requests processed under the treaty could be executed to the satisfaction of the requesting U.S. authorities.

B. Tax Offenses

Besides tax matters that might involve organized crime, the U.S.-Swiss treaty does not apply to tax offenses. But in 1981, Switzerland enacted the

6. Treaty on Mutual Assistance in Criminal Matters, U.S./Switzerland, *done* May 25, 1973, *entered into force* January 23, 1977, 27 U.S.T. 2019, T.I.A.S. No. 8302. *See* ABA Transnational Litigation, vol. I, at 271.

7. *See* ABA Transnational Litigation, *supra* note 1, vol. II, at 1287. *See generally* Fedders, *Policing Internationalized U.S. Capital Markets: Methods to Obtain Evidence Abroad*, 18 Int'l Law. 89 (1984)

Federal Law on International Mutual Assistance in Criminal Matters (IMAC). IMAC went into force on the first of January, 1983, and under Article 3, para. 3. of that law, evidence may be obtained in cases that would constitute tax fraud under Swiss law. Hence, foreign prosecutors will be put on the same level as their Swiss colleagues, as only in cases of tax fraud there is a criminal prosecution and the possibility of overcoming secrecy in Switzerland (in tax evasion cases, there is usually no criminal proceeding).

Tax fraud lies, under Swiss law, when the tax is evaded and the offender used fraudulent means such as submitting forged ledger books, phony invoices or false statements. Assistance in cases of tax fraud under IMAC is available to U.S. prosecutors in addition to the cooperation under the treaty.

C. Civil Matters

In civil matters, the U.S. is granted assistance on the basis of comity and reciprocity as there is no treaty yet between the U.S. and Switzerland on civil assistance. Switzerland will probably soon sign the 1965 and 1978 Conventions on Service and Obtaining of Evidence,[8] to which the U.S. is a party. In the meantime, U.S. requests for civil assistance are executed under the cantonal (state) codes of civil procedure. More than two-thirds of the cantons also oblige a banker to testify or produce evidence in civil cases.

The U.S. attorney who acts on behalf of a party in a lawsuit and wants to have assistance from Switzerland in civil matters should apply to the U.S. court where the litigation is pending and ask for the issuance of a request for civil assistance. This request will then, if approved, be processed through diplomatic channels. The transmission is sometimes time-consuming, but when the request is in the hands of the Swiss authorities, the execution usually takes only a few weeks.

III. Conclusion

Switzerland has shown her willingness to cooperate with U.S. authorities in obtaining evidence on behalf of U.S. proceedings. The U.S. prosecutor or attorney at law should make use of the possibilities that are offered to them in this field and, in so doing, he will bring home far more than by limiting himself to the unilateral means of U.S. court proceedings.

8. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, *done* Nov. 15, 1965 (*entered into force* for the United States, Feb. 10, 1969) (20 U.S.T. 361, T.I.A.S. No. 6638); and Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *done* March 18, 1970 (*entered into force* for the United States, Oct. 7, 1972) (23 U.S.T. 2555, T.I.A.S. No. 7444).