



Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
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Swiss Confederation

Federal Department of Justice and Police FDJP

Federal Office of Justice FOJ

3th edition 2003 (updated in July 2005)

International Judicial Assistance in Civil Matters

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ABREVIATIONS

AI	Canton of Appenzell Innerrhoden
Art.	article(s)
FOJ	Federal Office of Justice
BE	Canton of Bern
ATF	Recueil officiel des arrêts du Tribunal fédéral (Swiss Federal Supreme Court's decisions Reporter)
ATFA	Recueil officiel des arrêts du Tribunal fédéral des assurances (Swiss Federal Insurance Court's decisions Reporter)
RS	Recueil Systématique du droit fédéral (Systematical Record of Swiss Legislation)
FDJP	Federal Department of Justice and Police
DFA	Federal Department of Foreign Affairs
PC 311.0)	Swiss Penal Code of 21 December 1937 (RS)
BL	Canton of Basel-Landschaft
BS	Canton of Basel-Stadt
FR	Canton of Fribourg
GE	Canton of Geneva
GR	Canton of Graubünden
JU	Canton of Jura
NE	Canton of Neuchâtel
SZ	Canton of Schwyz
TI	Canton of Vaud
ZG	Canton of Zug
ZH	Canton of Zurich

FOREWORD - DISCLAIMER

These Guidelines are intended for practitioners (central authorities, judges, lawyers, diplomatic and consular agents) confronted with questions on international judicial assistance in **civil** matters. Above all, they provide practical advice and information. However, in addition to this advice, the Section for Private International Law of the Federal Office of Justice FOJ considered it to be useful to give its opinion on certain frequently asked questions which are controversial and which have not yet been ruled on by a court. *In such cases, the FOJ is unable to provide any guarantee in respect of its solution to these questions within the scope of any proceedings before a court.*

In addition to these Guidelines, we would also recommend you consult the “Guide de l’entraide judiciaire internationale en matière civile et pénale” (Guide on Judicial Assistance, <http://www.rhf.admin.ch/rhf/de/home/rhf.html>). This guide is updated on a regular basis. It gives practical recommendations with regard to the procedures to follow for Swiss requests abroad on a country-by-country basis (To which authority should the request be addressed? How many copies? In which languages? How long does it take for the request to be executed? etc.).

Finally, the FOJ has put together information downloadable over the Internet for those wanting to determine the locally competent Swiss authority in a given case (<http://www.elorge.admin.ch>).

I. GENERAL REMARKS

A. The Concept of International Judicial Assistance in Civil Matters

International judicial assistance in civil matters forms part of the law on international civil procedure, which, in terms of assistance, deals with questions relating to the international competence of the courts as well as those relating to the recognition and execution of judgements.

The object of international judicial assistance is the provision of support to the legal system of the state making the request by the authorities and courts of the state to which the request is made, by carrying out procedural acts or other official acts and communicate the results to the authorities or courts of the requesting state, with a view to their being used in specific proceedings (JAAC 1985 [49/I], p. 93).

Assistance measures in the normal sense include the service of judicial and extra-judicial documents as well as the obtaining of evidence¹. These Guidelines are devoted to this category of assistance measures. Assistance measures in the broader sense include other official measures in relation to foreign proceedings, such as international judicial assistance (see e.g. Convention of 25.10.1980 on International Access to Justice [RS 0.274.133] and European Agreement of 27.1.1977 on the Transmission of Applications for Legal Aid [RS 0.274.137]), the enforcement of decisions (see e.g. the Convention on the Recognition and Enforcement of Decisions re-

¹ Such as local inspections, taking statements from witnesses and parties, production of documents, providing expert opinions, etc.

lating to Maintenance Obligations of 2.10.1973 [RS 0.211.213.02], the Convention on the Recovery Abroad of Maintenance of 20.06.1956 [RS 0.274.15]), assistance in connection with the abduction of children (c.f. Convention on the Civil Aspects of International Child Abduction of 25.10.1980 [RS 0.211.230.02] ; European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children of 20.05.1980 [RS 0.211.230.01]) and in connection with the application of the law (c.f. European Convention on Information on Foreign Law of 7.06.1968 [RS 0.274.161]).

B. Assistance and Sovereignty

In terms of article 271 para. 1 of the Swiss Penal Code (PC; RS 311.0), it is an offence for anyone “to carry out on Swiss territory without lawful authority activities on behalf of a foreign state that are the responsibility of a public authority” as well as for anyone “to carry out such acts on behalf of a foreign party or organisation” or for anyone to “encourage such acts”. This provision strikes against acts that violate Swiss territorial sovereignty and which as a consequence cannot be carried out without the permission of the Swiss authorities. According to article 299 para. 1 PC it is an offence for anyone “to violate the sovereignty of a foreign country, notably by committing official acts on the territory of that country without permission.” These provisions express the general principle of international law according to which the sovereignty of any state extends only to its national frontiers; accordingly, the authorities of a state cannot, in principle, exercise their public powers outside their territory.

According to the Swiss view – as well as that of numerous other states – the service of judicial or extra-judicial documents as well as the obtaining of evidence for court proceedings constitute the exercise of public powers (on the subject of service see BGE 124 V 47 [50]). Accordingly, these procedures cannot simply be undertaken from beyond the frontiers of the state concerned without authorisation. The authority in question must therefore resort to the mechanisms of assistance, otherwise it will violate the sovereignty of the state in which it is carrying out these acts. The concept of sovereignty under public international law, however, may come into conflict with the power of the judge in question, who has jurisdiction to rule on a case. We will examine in greater detail the interaction between sovereignty under public international law and the prerogatives of the judge who has local jurisdiction to rule on the case (see III.A.2, p. 23). After all, the service of certain documents without resorting to judicial assistance is tolerated in certain circumstances (see II.B, p. 10).

C. Legal Basis and Applicable Law

1. Hague Conventions

The multilateral conventions in the field of international judicial assistance in civil cases are as follows:

- The Hague Convention relating to civil procedure of 1 March 1954 (1954 Hague Convention; RS 0.274.12) ;
- The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention ; RS 0.274.131) ; and

- The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention; RS 0.274.132)².

It should be pointed out that the Hague Convention of 17 July 1905 relating to civil procedure (RS 0.274.11) only applies to relations between Switzerland and Iceland.

2. Bilateral Agreements

There are also a number of bilateral agreements between Switzerland and certain states that authorise direct contact between *judicial authorities* or which serve to complement the aforementioned Hague Conventions. Switzerland has entered into such agreements with Germany (RS 0.274.181.361), Austria (RS 0.274.181.631 ; with Austria, not only is direct contact between authorities permitted, but also contact between the authority and the addressee of the proceedings), Belgium (RS 0.274.181.721), France (RS 0.274.183.491), Italy (0.274.184.542), Luxembourg (RS 0.274.185.181), Greece (RS 0.274.183.721), Monaco (0.274.185.671), Pakistan (RS 0.274.186.231), Poland (RS 0.274.186.491), Turkey (0.274.187.631), Hungary (RS 0.274.184.181), the Czech Republic (RS 0.274.187.411), Slovakia (RS 0.274.187.411), and Estonia (RS 0.274.721). Although there is no such agreement with Liechtenstein, direct contact between authorities has become customary.

3. Absence of a Treaty

In the absence of any international agreement, Switzerland applies by analogy the 1954 Hague Convention to the foreign requests that it receives.

Where there is no agreement and unless there is an established practice to the contrary, Swiss requests must follow diplomatic channels (see II.D.2.2, p. 15).

4. Applicable Law

Judicial assistance in civil matters, which is an area of public international law, falls under federal jurisdiction (art. 54, 56, 172 and 184 of the Swiss Constitution of 18 April 1999 (SR 101). There is however only one brief provision at a federal level in articles 11 and 12 of the Swiss Private International Law Act of 18 December 1987 (RS 291). As a result, the details relating to notification and obtaining evidence are primarily regulated by the law of the canton in which the proceedings are conducted (laws on the constitution of courts, civil procedure codes).

² The application of Hague Service and Evidence Conventions in the various countries is explained in the “Practical Handbook on the operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters” and the “Practical Handbook on the operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters”, which can be ordered from *Permanent Bureau, Hague Conference on Private International Law, 6, Scheveningseweg, 2517 KT The Hague, the Netherlands*, secretariat@hcch.net.

5. Principle of Reciprocity

Under article 21 para.1 of the Vienna Convention on the Law of Treaties of 23 May 1969 (RS 0.111), a state that has not established a reservation in respect of a Convention may take advantage of a reservation established by another state in its relations with that state. Article 21 of the Vienna Convention reflects the principle of reciprocity in public international law. The legal effect of a reservation is that it modifies for the reserving party in its relations with other parties the provisions of the treaty to which the reservation relates to the extent of the reservation. The reservation also modifies those provisions to the same extent for these other parties in their relations with the reserving State. Thus in matters of judicial assistance, the Swiss authorities must refrain from conducting proceedings abroad that are not authorised on Swiss territory, due to the reservations made by Switzerland in respect of the aforementioned Hague Conventions. This applies in particular to reservations relating to the methods by which requests are transmitted (see II.D.1.2.1, p. 13 and II.D.2.2, p. 15). Be that as it may, states may renounce to invoke the principle of reciprocity (see II.D.1.2.2, p. 14). It is important to note here that, in an unpublished judgement (5P.225/1996), the Swiss Federal Supreme Court indicated in an *obiter dictum* that direct notification by post to a state that was party to Hague Service Convention and which had not made a reservation in this regard was admissible. In this decision, however, the Swiss Federal Supreme Court failed to mention Article 21 of the Vienna Convention. It also failed to indicate if the recipient state had waived its right to invoke the principle of reciprocity.

D. Civil or Commercial Matter

The aforementioned Hague conventions all apply to “civil and commercial matters”. This concept should be defined in the same manner regardless which of the three Hague Conventions applies.

This concept is not defined in the conventions and is the object of some controversy. One Special Commission, in which Switzerland participated, stated, however, in relation to the Hague Service and Evidence Conventions, that the expression “civil or commercial matter” would have to be interpreted autonomously, without exclusive reference to the law of the requesting state or the state receiving the request, nor by the joint application of the laws of both states (see Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, 2nd Ed, Anvers – Apeldoorn 1992 [“Handbook Hague Service Convention”], p. 34³; see also Art. 31 para. 1 Vienna Convention on the Law of Treaties of 23 May 1969). The Special Commission then considered that bankruptcy law, insurance law, and employment law can also fall within the concept of a “civil or commercial matter” (for Switzerland see ATF 94 III 37 and 96 III 65 where the Federal Supreme Court accepted that this concept also included the proceedings in relation to debts and bankruptcy when the claims are of a civil nature as well as ATFA 1966, 67-73 where the Swiss Federal Insurance Court stated that it was important to grant assistance in the same manner in the matters relating to social insurance as in civil matters).

The Federal Office of Justice has come around to this point of view and is thus of the opinion that the concept of the “civil or commercial matter” should be understood in

³ See note 2.

the broader sense and need not necessarily correspond to the concept used at a domestic level. It is, however, difficult to give a precise definition of what could be a “civil or commercial” matter in terms of the Hague Conventions. To take a negative approach, it can be said that the Hague Conventions envisage neither a criminal law matter nor a tax matter. Moreover, the fact that in the requesting state the case is designated to be “civil” is of no relevance. Finally, when the case relates to litigation between a public authority and a private individual, where the public authority is acting in the exercise of public powers, the case cannot be considered to have a “civil or commercial” nature. The same applies, in general, when an authority brings civil proceedings against an individual in order to safeguard public interests⁴. In litigation where the plaintiff is a private individual and the defendant is the state, account may be taken in designating an action as “civil or commercial” of the fact that it is a case where the plaintiff is asserting i) a *right* (the state does not have a discretionary power) ii) *of a pecuniary nature*, even if under national Swiss law this right relates to an administrative matter (in this sense, ATFA 1966, 67-73).

However, a large number of cases in civil matters – in the traditional sense of the term (family law, law of succession, company law, law of contract, intellectual property law, etc.) – are not necessarily pecuniary in their nature, but nevertheless come within the scope of application of the Hague Conventions. In such cases, in relation to notification, the fact that the notifying authority is an administrative authority (e.g. a supervisory authority) is of no significance.

II. SERVICE OF DOCUMENTS

A. The Concept of Service

Most procedural laws provide that in order to allow proceedings to begin the communications to the parties must be served on them or notified to them in order to have legal effect. Service is the transmission of documents by an official method: at the request of a foreign authority, the authorities of a state pass on the documents to the addressee in return for a simple receipt or by means of a special certificate that proves that service has been effected. In the Swiss view, this constitutes an official act (see I.B, p. 7).

Countries with Anglo-Saxon legal systems deal with service in a fundamentally different way. According to their law, it is the responsibility of the parties to inform their opponents by serving them with the important documents in the case. Thus there is not necessarily an official act involved. This completely divergent system can be the source of some conflict. When seeking solutions, this different approach will be taken into account.

B. Documents that must be served by means of Judicial Assistance

The Hague conventions are directed as much at “judicial documents” as at “extrajudicial documents”. A “judicial document” is understood as “*any document that relates to contentious or non-contentious proceedings or the arrest of the assets of a debtor*” (CAPATINA, L'entraide judiciaire internationale en matière civile and commerciale, Re-

⁴ E.g.: the procedures introduced by the American administrative authorities, such as the Anti-Trust Division of the Justice Department.

cueil des Cours 1983 [179], p. 347). “Extra-judicial documents” include “*documents intended to produce effects beyond any procedure that is ongoing in a court of law*” (CAPATINA, op. cit., p. 348). Extra-judicial documents must, however, emanate from an authority or a judicial officer. Notaries are regarded as judicial officials inasmuch as they undertake a public duty in this particular case.

In general, any judicial or extra-judicial document must be communicated by means of judicial assistance. Indeed, on the one hand, assistance provides a better guarantee that the rights of the addressee will be respected, particularly the right to be heard⁵. On the other hand, from the point of view of public international law, the service of such documents on Swiss territory without passing through the judicial assistance channel constitutes a violation of territorial sovereignty. However, it is accepted that when the document in question has no legal effect or is not liable to have any legal effects on the addressee, the judicial assistance channels need not necessarily be followed (JAAC 1976 [40/I], p. 105 s.; Circular of 5.12.1956 from the Administrative Commission of the Supreme Court of the Canton of Zurich, RSJ 1957, p. 16).

C. Competent Authorities

1. Hague Service Convention

1.1 Forwarding authority

Article 3 of the Hague Service Convention provides that the authority or judicial officer competent under the law of the state in which the documents originate should forward his request to the Central Authority of the state addressed. It is thus the law of the requesting state that primarily determines the competent authority for forwarding the requests for foreign assistance. It is, however, important to note that it has been accepted that lawyers, to the extent that their law permits them to serve documents, must be regarded as *judicial officers* and hence as persons competent to approach the Central Authority of the state addressed. Private individuals, however, (for example the parties) are not, in themselves, competent to approach the Central Authority directly, even if, under their law, they are entitled to serve documents (Explanatory Report of TABORDA FERREIRA, Acts and Documents of the 10th session (1964), Tome III, Service of Process, p. 368 ;

http://hcch.e-vision.nl/index_fr.php?act=publications.details&pid=2942&dtid=3;

for a list of the competent authorities by country see Handbook Service Convention, Second Part, letter B).

The competent Swiss authorities forward their requests abroad via the Central Authority of the requested State⁶. However, they address their requests to the competent authority or court in the place where the relevant proceedings are taking place (e.g.: “to the competent civil court ...”). As previously mentioned, Switzerland has concluded bilateral agreements with certain countries that permit direct contact between authorities (see I.C.2, p. 8). For additional information, please consult the Guide on Judicial Assistance (<http://www.rhf.admin.ch/rhf/de/home/rhf.html>).

⁵ The fact, for instance, to ask from the requesting State to furnish translations aims to guaranty the right to be heard of the addressee.

⁶ AI, FR, GR, JU, NE, SZ, TI and ZH require that outgoing requests be transmitted via the central cantonal authority. This authority transmits them to the Central Authority of the state addressed.

1.2 Receiving Authority

Article 2 of Hague Service Convention provides for the designation of central authorities that are responsible for receiving requests for assistance. Article 18 paragraph 3 of the Hague Service Convention permits states to designate more than one Central Authority.

In Switzerland, the receipt of requests from foreign states and the processing of these is a cantonal responsibility. Accordingly, there are 26 cantonal Central Authorities (for an up-to-date list see <http://www.rhf.admin.ch/rhf/de/home/zivil/behoerden/zentral.html>).

These authorities ensure, on the one hand, that the requests conform to the formal requirements of Hague Service Convention or any other provisions that must be taken into consideration, and, on the other hand, that judicial assistance does not clearly appear to be excluded for any other reason. If there is no reason to do otherwise, they take the action required. If a request does not satisfy the requirements of the Service Convention, the Central Authority informs the requesting authority without delay (art. 4 of the Service Convention).

Since it can prove very difficult for the requesting state to know which of the 26 central cantonal authorities has jurisdiction, the FOJ is also designated to be a Central Authority to which requests may be addressed irrespective of where they may have to be executed. The jurisdiction of the FOJ is secondary. It does not subject the requests to any examination before passing them on to the competent cantonal authorities, but it consults with the Cantons and provides any coordination that may be necessary. Please note, however, that the FOJ has created a data bank that allows one to find the competent Cantonal Central Authority (<http://www.elorge.admin.ch>).

For Swiss requests addressed to foreign states, see the Guide on Judicial Assistance, <http://www.elorge.admin.ch>

2. 1954 Hague Convention

The 1954 Hague Convention does not provide for the designation of central authorities. Under Article 1 paragraph 1 of the 1954 Convention, requests for assistance must follow “consular” channels. This means that foreign authorities – this can be a lawyer if, under the law of the requesting state, he is entitled to serve documents – send the documents to be served to the consulate, embassy or other representation of its country in Switzerland. This representation addresses a request to the FOJ, which in turn passes it on to the competent cantonal authority (see Ordinance of the Organisation of the FDJP of 17.11.1999 [RS 172.213.1]).

Requests from Swiss authorities must also pass through the FOJ (see Ordinance on the Organisation of the FDJP of 17.11.1999 [RS 172.213.1]). The FOJ passes these on to the relevant Swiss representation in the receiving state, which in turn passes the requests on to the authority designated by the receiving state (Art. 1 para. 1 1954 Hague Convention; see Guide on Judicial Assistance <http://www.rhf.admin.ch/rhf/de/home/rhf.html>).

In relation to incoming or outgoing requests for assistance, the FOJ confines itself to examining whether these comply with the formal requirements of the applicable inter-

national conventions and ensuring that international judicial assistance does not appear to be excluded for any other reason.

3. Absence of a Treaty

In the absence of any agreement, Switzerland applies the 1954 Hague Convention by analogy to any foreign requests (see I.C.3, p. 8). Reference is therefore made to the comments made in II.C.2, p. 12.

Swiss requests made to foreign states must, in the absence of contrary practices, follow diplomatic channels (see II.D.2.2, p. 15). For a description of the procedure applicable in each country, reference is made to the Guide on Judicial Assistance, <http://www.rhf.admin.ch/rhf/de/home/rhf.html>.

D. Channels of Transmission

1. Hague Service Convention

1.1 Ordinary Channel (arts. 2 to 7 Hague Service Convention)

As already indicated, under Article 2 of the Hague Service Convention, each contracting state must designate a Central Authority that has the task of receiving and dealing with requests for service from another contracting state. The Hague Service Convention only requires the creation of a Central Authority for the purpose of *receiving* requests for service. Thus a request that is being sent is not required to pass through the forwarding country's own Central Authority⁷. The competent authority according to the law of the requesting state (see II.C.1.1, p. 11) addresses its request to the Central Authority of the requested state.

1.2 Alternative Channels (arts. 8 to 10 Hague Service Convention)

1.2.1 Reservations and declarations made by Switzerland

Apart from the ordinary channel, the Hague Service Convention, in its articles 8 to 10, provides for alternative channels for effecting service.

Switzerland has, however, made reservations to articles 8 and 10.

Thus in relation to article 8 of the Hague Service Convention, Switzerland permits service of documents through consular or diplomatic only with regard to persons who are nationals of the originating state (see JAAC 1968-1969 [34/15], p. 34)⁸. If that is not the case, the ordinary channel has to be followed. Consular and diplomatic agents are not permitted in any case to resort to coercive measures in order to effect service.

With regard to article 10 of the Hague Service Convention, Switzerland has declared its opposition to *direct service abroad by postal channels* as provided for in letters a), b) and c) of that article. Nevertheless, it sometimes happens that documents are sent

⁷ For Switzerland, see n. 6.

⁸ However, if the addressee of the document is a national of both the requesting state and the state receiving the request, service by consular or diplomatic agents is not permitted. It remains possible if the addressee is a national of the requesting state and a third state.

directly from abroad to parties resident in Switzerland. This occurs primarily from countries with Anglo-American legal systems, where the service of documents is the responsibility of the parties and not of the authorities. In other words, and contrary to the Swiss view, such a procedure is not necessarily considered an official act in those countries. The recipient of documents served in this way can notify the matter to the Federal Department of Foreign Affairs (DFA). If the Swiss sovereignty is violated, the DFA will instruct the relevant Swiss Embassy to intervene with the originating authorities and explain that this method of service is punishable under article 271 of the Swiss Penal Code⁹. *It should, however, be noted that the inadmissibility of direct service by mail in Switzerland does not automatically invalidate the service of the document as part of the foreign proceedings. It may, however, have repercussions with regard to whether the judgment will be recognised.* At any rate, the DFA regularly gives notice that errors in the service of documents can under Swiss law result in the non-execution of foreign civil judgments (see II.F.2, p. 21). Occasionally, service is effected again by means of judicial assistance.

The deliberate service of documents by mail can be reported to the Office of the Attorney General of Switzerland (violation of article 271 of the Swiss Penal Code).

Finally, article 9 of Hague Service Convention provides for the use of consular channels, that is, the ordinary channel stipulated in article 1 of the 1954 Hague Convention (see II.D.2.1, p. 14). With regard to this, Switzerland has also designated the cantonal central authorities as recipient authorities for requests from abroad.

1.2.2 Consequences of the Principle of Reciprocity

In application of the *principle of reciprocity*, the Swiss reservations may be invoked by the recipient state in relation to requests for service coming from Switzerland, even if the recipient state has not made the same reservations (see I.C.5, p. 9). Thus, the Swiss authorities may not use the transmission channels in respect of which Switzerland has stipulated reservations. Recipient states may, however, waive their right to invoke the principle of reciprocity. The Guide on Judicial Assistance, <http://www.rhf.admin.ch/rhf/de/home/rhf.html>, mentions possibilities for Swiss authorities to use channels of transmission alternative to those that Switzerland has objected to. For example, in relations between Switzerland and *Ireland* as well as between Switzerland and *Canada*, it is accepted that requests for service coming from Swiss authorities may be sent via the FOJ to the competent Swiss representation in Ireland or Canada. The Swiss representation serves the documents on the addressees by registered mail with acknowledgement of receipt. In matters between Switzerland and the *United States of America*, the cantonal central authorities can address their request to the competent Swiss representation, which in turn serves the documents directly on the addressee (see ATF 109 III 100; for the requirements in relation to form, see II.E.1.1, p. 16).

2. 1954 Hague Convention

2.1 Ordinary Channel (arts. 1 to 4)

The 1954 Hague Convention provides for the service of documents via the consular channel (art. 1).

⁹ However, only an intentional act is unlawful, and in any case, it is practically impossible to prove that an act was intentional.

This means that the competent foreign authorities address their requests to the consulate, embassy or any other representation of their country in Switzerland. This representation forwards the request to the Federal Office of Justice, which, in turn, forwards it to the relevant cantonal authority.

Requests from a Swiss authority are addressed to the FOJ, which forwards them to the competent Swiss representation in the receiving state, which, in turn, sends them on to the authority designated by the recipient state (art. 1 para. 1 1954 Hague Convention).

2.2 *Alternative Channels (art. 1 paras. 3 and 6 1954 Hague Convention)*

First of all, the states that are parties to the 1954 Hague Convention may declare that they wish to use the diplomatic channel instead of the consular channel (art. 1 para. 3). In such a case, requests from Switzerland must be addressed to the FOJ, which forwards them to the Swiss representation in the receiving state, which, in turn, forwards the request to the foreign affairs department of the receiving state. The latter sends the request on to the competent local authority.

Moreover, article 6 of the 1954 Hague Convention permits direct service by mail in respect of an addressee resident abroad, or via the competent judicial or public officials of the recipient country, or, alternatively, through diplomatic or consular agents. *Although Switzerland has not made any reservation in relation to this, it does not permit service by mail on its own territory.* However, Switzerland permits service by diplomatic or consular agents as provided for in the Hague Service Convention, provided the addressee is a national of the state of origin of the documents (see JAAC 1968-1969 [34/15], p. 34 and footnote n° 8 above). The consular or diplomatic agents are not permitted to make any use of coercive measures.

Just as is the case under the Hague Service Convention, the *principle of reciprocity* is applicable to the 1954 Hague Convention. Thus the Swiss authorities may not use channels for service abroad that are not permitted in Switzerland (see I.C.5, p. 9).

3. **Absence of a Treaty**

In the absence of any treaty, Switzerland applies the provisions of the 1954 Hague Conventions by analogy to requests received from abroad (see I.C.3, p. 8). Switzerland also accepts the service of documents by consular or diplomatic agents on the requesting country's own nationals. Finally, Switzerland does not accept direct service from abroad by mail.

Swiss requests to other countries must, unless there is a contrary custom, for example in favor of consular channels, follow diplomatic channels (see II.D.2.2, p. 15). Direct service by mail is permitted only if the recipient state accepts this form of service. For a description of the procedure applicable to each country, please see the Guide on Judicial Assistance, <http://www.rhf.admin.ch/rhf/de/home/rhf.html>).

4. **Other Transmission Channels**

All Hague Conventions authorise states to enter into bilateral agreements that provide more favourable conditions. As a result, direct correspondence between re-

requesting and recipient authorities or courts in certain countries remains possible (see I.C.2, p. 8).

Diplomatic channels can always be used (see II.D.2.2, p. 15), even where a convention provides for a quicker means of service. Where the Hague Service Convention applies, its article 9 para. 2 provides for a special rule in this regard.

E. Requirements for the Request

1. Hague Service Convention

1.1 Form

In its article 3, the Hague Service Convention provides for the use by contracting states of a model form for requesting the service of judicial or extra-judicial documents. The text printed on the form must include a version in either English or French¹⁰. It consists of three parts, the request for service, a certificate containing the details of execution, and a page containing a summary of the document being served (art. 7 para. 1 Hague Service Convention ; http://www.rhf.admin.ch/rhf/de/home/rhf/muster/zustellung_HZUe65.html).

The responses to the printed requests for information are written either in the language of the state receiving the request, or in English or French (art. 7, para. 2 Hague Service Convention). Some states require, in our opinion incorrectly, that the printed responses be written in their language (Guide on Judicial Assistance, <http://www.rhf.admin.ch/rhf/de/home/rhf.html>).

The model form and the documents to be served are to be sent in duplicate (art. 3 para. 2 Hague Service Convention). The authentication of the documents or any similar formality is not required (art. 3 para. 1 Hague Service Convention). Regarding the necessity to join the translation of the exhibits, see II.E.1.2, p. 16.

When the alternative channels of service are used (see II.D.1.2, p. 13), the model forms do not need to be used, and no translation is required. It should, however, be noted that if the addressee is unable to understand the nature and significance of the documents served, this can pose problems when it comes to the recognition of the judgment (violation of the right to be heard) and this may remain a problem even where the receiving state permits the use of the alternative channels for service. Accordingly, it is recommended that the forms in the Hague Service Convention are used for the alternative channels as well in order to ensure that the addressee is informed of the nature of the documents served. The Hague Conference has adopted a recommendation to this effect (see http://hcch.e-vision.nl/index_en.php?act=publications.details&pid=3121&dtid=2 see also http://www.rhf.admin.ch/rhf/de/home/rhf/muster/zustellung_HZUe65.html). The OFJ recommends that the form be filed in the language of the executing state.

1.2 Execution and Languages

The Swiss authorities effect the service of documents requested by a foreign state, on the first occasion and in the absence of any special requests by the requesting state, by “simple delivery” to the addressee. Simple delivery is covered by article 5

¹⁰ Under article 7 the Hague Service Convention, the additional printing of the text in one or more official languages of the requesting state (state of origin) is permitted.

para. 2 of the Hague Service Convention. The translation of the documents to be served is not necessary for this mode of service; service is effected, as a general rule, by registered mail or by judicial act¹¹. This form of service is, however, permitted only if the addressee accepts service (art. 5 para. 2 Hague Service Convention). If the addressee refuses to accept service by simple delivery, the Central Authority or the competent cantonal court will make a note of this on the certificate and will notify the requesting state that formal service has to be effected. For formal service, however, the Swiss authorities require the translation of the documents into German, French, or Italian, depending on the region in question before attempting to service the document again (see the Swiss reservation to art. 5 para. 3 of the Hague Service Convention). In order to guarantee the right of the addressee as provided by article 5 para 2 of the Hague Service Convention to refuse service by simple delivery and to require a translation, it is advisable to inform the addressee in an appropriate manner. The FOJ has thus recommended the cantonal authorities to inform the addressee at the moment of service of his rights and to fix, where appropriate, a short period within which to exercise such rights. For example, if service is effected by mail, an accompanying letter or a notice on the envelope could inform the addressee of his rights and the way in which he should exercise them. Simple service by the procedure used for court documents is not sufficient to allow the addressee to exercise his rights.

With regard to Swiss requests to other countries, it is recommended to consult the Guide on Judicial Assistance (<http://www.rhf.admin.ch/rhf/de/home/rhf.html>) to find the requirements specified by the recipient country. Certain countries require the immediate translation of the documents to be served and will therefore not proceed in the first instance with service by simple delivery.

The requesting authority can demand that service be made formally from the beginning either according to one of the forms prescribed by the law of the receiving state (art. 5 para. 1 lit. a Hague Service Convention), or according to a special form prescribed by the law of the requesting state (art. 5 para. 1 lit. b Hague Service Convention). In the latter case, the demand will only be met if the required form is compatible with the law of the receiving state. If a request is made for formal service or if this form of service proves to be necessary due to the refusal of the addressee to accept service, the requesting state may have to pay the resultant costs (art. 12 para. 2 Hague Convention 14 ; see II.E.1.5, p. 19).

It is important to note that the effects of the impossibility or refusal of service are not governed by the Hague Service Convention. The question of the law under which the validity of service needs to be decided is not easy to answer. The Swiss Federal Court has taken a stab at the question (SJ 2000, p. 89 et seq.). In the view of the FOJ it is generally the law of the requested state that is relevant, unless the law of the requesting state imposes particular requirements to be met. In the latter case, in the view of the FOJ, it will be up to the requesting authority to request a special form (Art. 5(1)(b) of the Hague Service Convention).

With regard to a foreign request for service in Switzerland, the authority effecting service must complete *the relevant certificate in every case, even if it is not attached to the request.*

¹¹ Delivery of a "judicial document" is regulated in the general terms and conditions of the Swiss Post Office and its information brochure.

1.3 Protection given to addressees, sanctions

Articles 15 and 16 of the Hague Service Convention provide for a mechanism intended to protect the defendant who has not been served with a document. The aim of article 15 is therefore to ensure rights of defence (Report of TABORDA FERREIRA, Acts and Documents of the 10th session (1964), Tome III, Service of Process, p. 93 ; http://hcch.e-vision.nl/index_en.php?act=publications.details&pid=2942&dtid=3).

Article 15 of the Hague Service Convention deals with the service of a summons or equivalent document in accordance with the provisions of the Convention when the defendant fails to appear in court.

Article 15 therefore provides in its first paragraph that when a summons or equivalent document has to be transmitted abroad for the purpose of service, under the provisions of the Hague Service Convention and the defendant fails to appear, the court is required to *defer judgment* until it is established that *the document was either served in accordance with the methods prescribed by the law of the state addressed* (art. 15 para. 1 lit. a Hague Service Convention), *or the document was actually delivered to the defendant or to his residence by another method provided for by the Hague Service Convention* (art. 15 para. 1 lit. b). The first possibility envisages cases where service has been effected in accordance with article 5 para. 1 lit. a of the Hague Service Convention. The second possibility is aimed at cases of transmission in accordance with article 5 para. 1 lit. b of the Hague Service Convention as well as cases where alternative channels of transmission (see II.D.1.2, p. 13) are used. In this second case, it is not sufficient that the alternative channels of transmission or a method of transmission peculiar to the requesting state (art. 5 para. 1 lit. b Hague Service Convention) was used, it is also necessary that *service has been effected on the defendant in person or at least at his residence* (Report of TABORDA FERREIRA, op. cit., p. 95). With regard to alternative channels of transmission, the reservations made by contracting states in relation to certain methods of transmission should be taken into account. In addition, the court may only defer judgement, whatever the situation, if service has been effected in sufficient time for the defendant to be able to defend himself.

Article 15 para. 2 of the Hague Service Convention qualifies the protection given by the first paragraph to the extent that it allows contracting states to declare that their courts may give judgment irrespective of paragraph 1, subject to the conditions, however, that *i)* the document has been transmitted by one of the methods provided for by Hague Service Convention *ii)* that a period of not less than six months has elapsed and *iii)* that no certificate has been obtained despite every reasonable effect being made by the competent authorities. Switzerland has not made any declaration in terms of article 15 para. 2 of the Hague Service Convention. This option is, however, open to any Swiss court through the application of the principle of reciprocity (see I.C.5, p. 9) when, firstly, service should have taken place in a state which has made such a declaration, and secondly, cantonal procedural law permits the court to act accordingly.

If, however, a judgment has been given against a defendant who has not been able to appear, the defendant may, under article 16 of the Hague Service Convention request the court to relieve him of the effects of failing to appeal against the judgment within the given time. Article of 16 does not, however, apply to judgments relating to the status or capacity of persons.

1.4 *Grounds for refusing service*

If the Central Authority concludes that the provisions of the Hague Service Convention have not been complied with, article 4 of the Convention mandates that the Central Authority promptly inform the applicant.

Furthermore, service may be refused if the document does not relate to a civil or commercial matter (art. 1 para. 1 Hague Service Convention; see I.D, p. 9), if a particular form is required that is contrary to the law of the state addressed (art. 5 para. 1. lit. b), or if the execution of service is such that it would infringe upon the sovereignty or security of the state addressed (art. 13 para. 1). The term “sovereignty” must be interpreted restrictively. It cannot be understood as being equivalent to public policy. In this sense, article 13 paragraph 2 of the Hague Service Convention indicates that the execution of a request may not be refused solely on the ground that the law of the state addressed claims exclusive jurisdiction over the subject matter of the action or does not permit the action upon which the application is based. In other words, these grounds are not considered relevant to the sovereignty of the state addressed.

1.5 *Costs*

In principle, no charges may be made for services relating to service of documents provided under the Convention (art. 12 para. 1 Hague Service Convention). There is, however, an exception for cases requiring the involvement of a judicial officer or the use of a particular method of service (art. 12 para. 2 lit. a and b Hague Service Convention). Moreover, bilateral agreements may provide different rules (see I.C.2, p. 8).

2. **1954 Hague Convention**

This convention served as the basis for the Hague Service Convention. The requirements and conditions applicable to the service of documents under the Hague Service Convention have been largely restated and differ from those contained in the 1954 Hague Convention only in a few points. Only these differences are considered below.

2.1 *Form*

Requests for service based on the 1954 Hague Convention need not be transmitted in a standardized form.

Under article 1 paragraph 1, the request must indicate the authority issuing the document transmitted, the name and designation of the parties, and the address of the person to be served. In addition, the request must mention the nature of the document to be served, i.e. it should state the subject matter of the action and describe in detail the documents to be served (e.g.: legal claim, response to the claim, judgment on the evidence; art. 1 para. 1 Hague Convention 1954). A receipt should always be attached to the request. If service must be effected in a special form (e.g. according to the law of the requesting state), it is advisable to request this expressly and to justify the request (art. 3 1954 Hague Convention).

2.2 *Execution and language*

Here too, service can be effected either by simple delivery (art. 3 1954 Hague Convention together with art. 2 1954 Hague Convention; without translation; see II.E.1.2, p. 16), subject to refusal by the addressee, or by formal service (with translation; in Switzerland either in German, French or Italian, depending on the place of execution of the request, see ATF 103 III 69). With regard to simple delivery, it should be recalled that the FOJ is of the opinion that it is advisable to inform the addressee of his right to refuse service if the documents have not been translated (see II.E.1.2, p. 16). The court is not obligated to complete the certificate; it is sufficient if the addressee signs the receipt.

2.3 *Protection for the addressee*

In contrast to the Hague Service Convention, the 1954 Hague Convention does not provide any mechanism for the protection of the rights of the defendant.

2.4 *Costs*

The execution of the request for service may not give rise to the right to the reimbursement of costs, unless service is made forcibly or if a special form is required (art. 7 para. 2 Hague Service Convention). Moreover, bilateral agreements may provide different rules (see I.C.2, p. 8).

3. **Absence of a Treaty**

In the absence of any treaty, the Swiss authorities apply the 1954 Hague Convention by analogy to requests received from abroad.

With regard to requests made by Switzerland to other countries, reference is made to the Guide on Judicial Assistance (<http://www.rhf.admin.ch/rhf/de/home/rhf.html>). It is, however, worth noting that, in relation to costs, Swiss representations in those states where no agreement exists in this regard will request the Swiss authority to guarantee a refund in the event that charges are made.

F. **Special Questions**

1. **Service addressed to foreign states or state entities**

In the case of service addressed to foreign states or to nationalised companies that no longer have legal personality, article 16 of the European Convention on State Immunity applies (RS 0.273.1). Under paragraph 4 of this provision, the periods for entering into the proceedings and the methods of appeal against a judgment by default begin to run two months after the service of the document or the judgment with the department of foreign affairs of the state addressed. In addition, the courts having jurisdiction may not assign a period shorter than two months from the receipt of the documents by the department of foreign affairs (art. 16, para. 5). These rules, which are in keeping with the normal practices, should also be respected outside the scope of application of the said Convention.

2. Service of Summons and Recognition of Judgments

The Hague Conventions do not regulate the effects of service.

In addition, the regulations that govern service in relation to the main proceedings are not necessarily the same as those applied in relation to the recognition procedure at the time of checking the admissibility of the service of the summons as they are a condition for the recognition of a judgment (see e.g.. art. 27 para. 2 lit. a Federal Act on Private International Law [RS 272] ; art. 27 ch. 2 of the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters [RS 0.275.11]). Thus, as we have already indicated, although the USA does not object to the service of documents on its territory by diplomatic agents, the subsequent judgment will not necessarily be recognised, for example, when the documents have been served in a language that the addressee did not understand (see II.E.1.1, p. 16). For the precedents and doctrine relating to these questions in Switzerland, which is not always consistent, see for example DUTOIT, Commentaire de la loi fédérale du 18 décembre 1987, 4th ed., Bâle 2005, n. 8 ad art. 27 ; HONSEL/VOGT/SCHNYDER (edit.), Kommentar zum Schweizerischen Privatrecht, Internationales Privatrecht, Bâle 1996, n. 9 ss ad art. 27 ; GIRSBERGER/HEINI/KELLER/KOSTKIEWICZSIEHR/VISCHER/VOLKEN (edit.), Zürcher Kommentar zum IPRG, 2nd ed., Zurich 2004, n. 74 ss ad art. 27 ; ATF 122 III 439 (447 s) also published in RSDIE 1998, p. 441 with a commentary by I. SCHWANDER ; OG Argovie, 17.12.1999, RSDIE 2001, p. 224.

3. Address of Recipient unknown – Service by Public Notice

When the address of the recipient of service is unknown, the Hague Conventions do not apply (art. 1 para. 2 Hague Service Convention; art. 1 para. 1 1954 Hague Convention). Therefore, when an authority wishes to proceed with service by means of public notice in a foreign country, it is recommended in principle to follow diplomatic channels. In addition, as the obligation to grant assistance no longer follows from a convention, the state requested is free to decide whether it cooperates or not. It should be noted here that certain cantonal procedural codes permit the authorities to proceed with a public notice in Switzerland when the address of the recipient is unknown.

To the knowledge of the FOJ, the central cantonal authorities do not automatically refuse to proceed with publication in response to a request from a foreign authority when the address of the recipient is unknown, but prefer to investigate the matter. Furthermore, in general, the Swiss authorities do not reject requests that have not followed diplomatic channels, but which have followed a channel provided for by the conventions.

In the opinion of the FOJ, a Swiss or a foreign authority may proceed with the publication of notices addressed to an indeterminate number of persons whose identities are unknown (notice to creditors, appeal for beneficiaries of a will) by addressing their request to their representation in the country of publication. The representation is then charged with arranging publication.

4. Agreement between the European Community and Switzerland relating to the Free Movement of Persons, Federal Act on the Free Movement of Lawyers and Assistance

With the entry into force on 1 June 2002 of the Agreement between Switzerland on the one hand, and the European Community and its member states on the other relating to the free movement of persons (RS 0.142.112.681) and the Federal Act on the Free Movement of Lawyers (RS 935.61; Lawyers' Act), a lawyer domiciled in the territory of the European Union may, under certain conditions, represent clients in Switzerland. Against this background, several judicial authorities have asked the FOJ whether the new law permits them to effect service without using the assistance channels.

First of all, it should be noted that the new legislation does not regulate questions of assistance. Moreover, a number of cantonal procedural codes impose an obligation on the parties to appoint an agent for receiving future court documents in Switzerland. These provisions have not been superseded by the entry into force of the Lawyers' Act.

In those cantons that do not impose such an obligation on the parties, it is important to draw a distinction between the case where the party represented in a Swiss court by a lawyer whose firm is located on EU territory is domiciled in Switzerland and the case where the party and his legal representative are both domiciled on EU territory. In the first case, the assistance channels do not, in the opinion of the FOJ, have to be followed. Indeed, due to the fact that the party concerned by service is domiciled in Switzerland, service has no effect abroad and consequently is not capable of undermining the sovereignty of the state in which the lawyer has his firm. Postal service to the lawyer for the parties is, as a result, permissible in such a case.

In the second case, due to the fact that the party is domiciled abroad, service has legal effects abroad and is, as a result, capable of undermining the sovereignty of the state involved. It is advisable, therefore, to follow the assistance channels. It should be recalled that there are bilateral agreements between Switzerland and the countries bordering it that permit direct correspondence between authorities (see I.C.2, p. 8).

III. OBTAINING EVIDENCE

A. Foreword

1. Overview

In addition to requests for service of documents, which in practice account for two thirds of all applications, judicial assistance in civil proceedings also includes requests made in order to obtain evidence (letters of request). The object of such applications is for example to obtain statements from witnesses, the production of documents, or an expert opinion.

The 1954 Hague Convention deals with requests relating to obtaining evidence in chapter II: "Letters of request". The Hague Evidence Convention is devoted exclusively to this subject. It makes provision for obtaining evidence by means of letters of

request (Chapter I), on the one hand, and through diplomatic or consular officers and through commissioners (Chapter II), on the other.

2. Cases in which the procedures for assistance need not be followed

According to international law, each state is obliged to respect the territorial sovereignty of other states. The territorial sovereignty of a state can, however, occasionally come into conflict with the judicial jurisdiction of the court in another state. It is generally accepted that a party domiciled in one state may come under the jurisdiction of another state. In relation to obtaining evidence, taking account of the judicial jurisdiction of a foreign court has, depending on the scenario, the following consequences.

The act of a foreign judge or a person appointed by him or, as permitted under the common law system, of the representatives of the parties coming to Switzerland to carry out legal procedures *always* constitutes an official act that may only be carried out in accordance with the rules relating to judicial assistance. Failing to do so is regarded as a violation of Swiss sovereignty whether or not the persons affected by these legal procedures are willing to cooperate.

In cases where a foreign judge or a person appointed by him or the representatives of the parties in common law systems do not come to Switzerland, but require one of the *parties* to provide evidence (see for the limits ATF 114 IV 128), to fill in a questionnaire, or to appear before a foreign court, the submission of a letter of request to the Swiss authorities is not necessarily required. Letters of request are therefore not necessary in the event that a refusal to cooperate leads only to consequences of a procedural nature (e.g. a factual claim of the other party is accepted as true or the loss of the right to prove the claim at a later stage). The party concerned is free to cooperate. The *service* of this type of invitation must, however, be carried out according to the proper procedure for judicial assistance.

Where non compliance by a party to the proceedings leads to sanctions that are not of a procedural nature (e.g. the criminal offence of *contempt of court*) the procedure for judicial assistance should be followed and thus a letter of request is required. The reason for that is that only Swiss authorities may apply coercive measures on Swiss territory.

In the event that the person to whom the invitation is directed is *not a litigant*, but a *third party* (witness, expert), he or she may not be regarded as being subject to the judicial jurisdiction of the court involved. In such cases, the legal proceedings must be carried out according to the proper procedure for judicial assistance. The mere invitation to come to Switzerland must not follow such procedure, provided, however, that it is not accompanied by any kind of coercive measure or that such a measure will not automatically result in the event of a refusal.

B. The competent authorities and transmission procedures

1. Hague Evidence Convention

1.1 Under Chapter I of the Hague Evidence Convention

In Chapter I, which governs letters of request, article 1 paragraph 1 of the Hague Evidence Convention provides that the “judiciary” of a contracting state may request by letters of request the competent authority of another state to perform any judicial

act. The FOJ is of the opinion that the application for judicial assistance must in fact be issued by an *authority* and not by a private person, such as a lawyer. This interpretation follows from the text of the Convention¹². It also provides for the limitation of any possible abuse by those receiving a request to the extent that the authority in question may proceed to filter the evidence required according to its relevance to the case at issue. Swiss authorities may only refuse an application within the limits of article 12 Hague Evidence Convention.

The request for judicial assistance is sent to the Central Authority of the state addressed (the receiving authority), where applicable, via the Central Authority of the requesting state¹³. The central cantonal authority of the place of performance of the request is therefore the receiving authority when the application comes from a foreign country. Such applications may, however, be lodged with the FOJ, which will transfer them to the competent central cantonal authority.

Swiss applications are transferred to the Central Authority designated by the state addressed

(see the Guide on Judicial Assistance, <http://www.rhf.admin.ch/rhf/de/home/rhf.html>) or directly to the executing authority if there is a bilateral agreement allowing direct communication between authorities (see I.C.2, p. 8).

In the event that an authority receives an application for the execution of which it is not competent, it is required under article 6 of the Hague Evidence Convention to forward the application without delay to the competent authority.

1.2 Under Chapter II Hague Evidence Convention

The requesting authority will generally be the authority dealing with the case in the requesting state. Under article 17 of the Hague Evidence Convention, however, it is sometimes the parties or their representatives who file the request by attaching the relevant decision of the court relating to the appointment of a commissioner to take evidence.

As under chapter I of Hague Evidence Convention, the application for judicial assistance shall be sent to the Central Authority of the state addressed (receiving authority) if applicable via the Central Authority of the requesting state¹⁴. The central cantonal authority of the place of performance of the request is therefore the receiving authority when the application comes from a foreign country. Such applications may, however, be lodged with the FOJ, which will transfer them to the competent central cantonal authority. Under articles 15 to 17 of the Hague Evidence Convention, where FDJP authorisation is necessary, we recommend sending a copy of the application to the FOJ in order to accelerate the decision process (see III.C.1.2, p. 30).

Swiss applications are transferred to the Central Authority designated by the state addressed

¹² In contrast to the Hague Service Convention, the Hague Evidence Convention does not mention “judicial officers”.

¹³ In Switzerland, the following cantons require that requests be filed via the central cantonal authority: AI, FR, GR, JU, NE, SZ, TI and ZH.

¹⁴ See note 13.

(see the Guide on Judicial Assistance, <http://www.rhf.admin.ch/rhf/de/home/rhf.html>) or directly to the executing authority if there is a bilateral agreement allowing direct communication between authorities (see I.C.2, p. 8).

In the event that an authority receives an application for the execution of which it is not competent, it is required under article 6 Hague Evidence Convention to forward the application without delay to the competent authority.

2. 1954 Hague Convention

Letters of request must be issued by a *judicial authority*, in the same way as stipulated in the Hague Evidence Convention.

The foreign judicial authority must send its application to the diplomatic representation of its nation in Switzerland. The diplomatic representation will send the application to the FOJ, which, in turn, will send it to the competent cantonal authority.

A Swiss request must be sent to the FOJ, which will send it to the competent Swiss diplomatic representation of the state addressed, which, in turn, will send it to the authority designated as being competent by the state addressed in accordance with article 9 of the 1954 Hague Convention. For detailed information, see the Guide on Judicial Assistance, <http://www.rhf.admin.ch/rhf/de/home/rhf.html>.

3. Absence of a Treaty

In the event there is no applicable treaty, Switzerland applies the 1954 Hague Convention by analogy to foreign requests.

Swiss requests, if there is not a contrary custom, follow diplomatic channels (see, II.D.2.2, p. 15).

See the Guide on Judicial Assistance, <http://www.rhf.admin.ch/rhf/de/home/rhf.html>.

4. Other channels of transmission

See II.D.4, p. 15.

C. Requirements for the Application

1. Hague Evidence Convention

1.1 Application under Chapter I

1.1.1 Form

The Hague Evidence Convention does not require the use of a standard form for the application. In order to avoid omitting any information in the application, it is, however, recommended to use the example provided on our Website (<http://www.rhf.admin.ch/etc/medialib/data/rhf/form.Par.0018.File.tmp/form-HBewUe70-d.doc>) based on the model proposed by the Hague Conference on Private International Law (see Practical Handbook on the operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial

Matter, Antwerp – Apeldoorn 1984 [hereinafter: Practical Handbook Evidence Convention 70], p. 69 s.¹⁵).

1.1.2 Contents (art. 3 Hague Evidence Convention)

In accordance with article 3 of the Hague Evidence Convention, the letter of request must specify the following:

- The requesting authority and, if possible, the requested authority;
- The names and addresses of the parties, and, if applicable, of their representatives;
- The nature and the purpose of the proceedings, and a summary of the case;
- The evidence to be obtained or the other judicial acts to be performed.

If appropriate, the letters of request shall also specify:

- The names and addresses of the persons to be examined;
- The questions to be put to the persons to be examined, or a statement of the subject matter about which the persons are to be examined;
- The documents or other property to be inspected;
- Any request for the evidence to be given on oath or affirmation and, if necessary, any special form to be used;
- Any special procedures required in accordance with article 9;
- Any additional indications based on the model available on the Internet (<http://www.rhf.admin.ch/etc/medialib/data/rhf/form.Par.0018.File.tmp/form-HBewUe70-d.doc>) following the model proposed by the Hague Conference on Private International Law (see the User's Guide 1970, p. 69 s.).

No legalisation or analogous formality is required.

1.1.3 Language and translations (art. 4 Hague Evidence Convention)

Each contracting state must accept letters of request written in French or in English, or with an attached translation in one of these languages, unless a reservation prevents it from doing so.

Switzerland issued a reservation in accordance with which the letters of request and their annexes must be written in German, French or Italian or translated into one of these languages based on the place of performance of the request.

For letters of request intended for a foreign country, please refer to the Guide on Judicial Assistance (<http://www.rhf.admin.ch/rhf/de/home/rhf.html>).

1.1.4 Execution

a. *Applicable Law (art. 9 Hague Evidence Convention)*

In general, the execution of a letter of request is carried out in accordance with the law of the authorities required to execute it. In Switzerland this means the laws on the

¹⁵ See note 2.

administration of justice or the civil procedure code in the canton concerned, in accordance with article 122 paragraph 2 of the Federal Constitution.

The requested court shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by authorities of its own country or of requests made by parties in internal proceedings (art. 10 Hague Evidence Convention).

When the application of the law of the requesting state is requested (art. 9 para. 2 Hague Evidence Convention), the requested authority will follow that request unless the form is incompatible with the law of the state addressed or if its application is not possible due to practical difficulties.

This makes the approval of affidavits, written declarations annexed to the statement that Americans often require to constitute a sworn statement, an easy matter. It is noteworthy that according to some cantonal civil procedure codes, the witness must consent to taking an oath. In the event that the witness refuses to take an oath, he cannot be forced to do so.

Cross-examination may also be admissible. In such cases, however, the Swiss judge remains in control of the questioning and must intervene when he considers it necessary. It is in particular the judge's responsibility to inform the witness of the right to refuse to give evidence or of prohibitions to give evidence. The judge is also the only person authorised to use coercive measures against the witness.

When, on request of the requesting state, a special form is used, the said state must meet the expenses thereof (art. 14 al. 2 Hague Evidence Convention).

b. Obtaining evidence via a person appointed by the authorities addressed (art. 14 al. 3 Hague Evidence Convention)

Authorities that receive but are not in a position to execute a letter of request may instruct an authorised person to do so. In particular, when a request is sent to Anglo-American countries, the requested court may be unable to execute the letter of request by itself because, according to its procedural rules, it is the parties' responsibility to gather the evidence.

In accordance with article 14 paragraph 3 Hague Evidence Convention, the requested authorities may, in such a situation, authorise a qualified person to execute the letter of request if the requesting authority agrees. By giving its consent, the requesting authority declares itself willing to meet the ensuing costs (see III.C.1.1.4f, p. 29).

c. The right to refuse to testify / Banking secrecy

The person to be questioned or who is requested to produce documents may claim to be exempt or prohibited from providing evidence, either on the basis of the law of the state addressed, or of the law of the requesting state (art. 11 Hague Evidence Convention).

It should be noted that article 47 paragraph 4 of the Federal Act of 8 November 1934 on Banks and Saving Banks (RS 952.0) makes a reservation in favour of cantonal

provisions relating to the duty to inform the authority and to testify in court¹⁶. This means that banking secrecy can be lifted if the applicable procedural code obliges the banker to give evidence. A request may therefore have a different outcome depending on the place of execution. It is even plausible that for foreign proceedings requiring investigations in several cantons, the lifting of banking secrecy is accepted in some, but refused in others.

d. Participation of the members of the court of the requesting authority (art. 8 Hague Evidence Convention) and/or of the parties or of their representatives (art. 7 Hague Evidence Convention)

If the requesting authority wishes that certain of its court officers witness the execution of a letter of request, it must ask the authority in charge of the execution for preliminary authorisation (art. 8 together with art. 35 para. 2 lit. c Hague Evidence Convention; reservation by Switzerland). The parties and/or their representatives may also witness the execution of the letter of request if they request it (art. 7 Hague Evidence Convention).

In our view, in such cases the foreign requesting authority and/or the parties and/or their representatives must be able to intervene if they so desire. The Swiss judge, however, remains the master of the proceedings and the only person authorised to take coercive measures against the person addressed by the letter of request. He may furthermore remind the witness of his/her right to refuse to give evidence or that he/she is forbidden to give evidence.

e. Grounds for refusal

The authorities addressed may only refuse a request in the following cases:

- Where the case is not civil or commercial in nature (see I.D, p. 9);
- If the application does not fulfil the formal requirements (art. 3 Hague Evidence Convention) or was not sent with the required translation (art. 4 Hague Evidence Convention). In this case, the requesting authority should first of all be asked to complete its application (art. 5 Hague Evidence Convention);
- If the authenticity of the application is unclear (generally, the fact that the application has been sent through the proper channels is sufficient proof of its authenticity; see also the different agreements on the abolition of legalisation on foreign public documents that have been ratified by Switzerland; RS 0.172.030.3/.037.43);
- If the execution of the application is not within the jurisdiction of the courts (art. 12 al. 1 lit. a Hague Evidence Convention; e.g. in the event that an amount of money needs to be collected in Switzerland and that the parties themselves have to act by way of forcible execution);
- If the state addressed is of the opinion that the execution of the application is liable to violate its sovereignty (e.g. coercive measures ordered in support of

¹⁶ Certain cantons, such as Bern, Geneva, and Vaud relieve all persons subject to professional secrecy (thus including bankers) of the obligation to give evidence. In other cantons, such as Zurich, Zug, Ticino and Fribourg, the court weighs the opposing interests and decides on a case-by-case basis whether the obligation to give evidence outweighs the obligation to maintain professional secrecy. Finally, in a third group of cantons, including Basel Land, Basel Stadt and Schwyz, bankers do not have the right to refuse to give evidence.

foreign decisions that influence the proceedings) or its security (art. 12 al. 1 lit. b Hague Evidence Convention);

- If the requested form of execution of the application is contrary to the legislation of the state addressed (before finally refusing the application, the foreign country should be asked if the requesting court accepts the execution being carried out in the forms authorised by the laws of the state addressed; art. 9 Hague Evidence Convention).

f. Costs

It is not possible in principle to charge any costs for the services carried out to the requesting state (art. 14 para. 1 Hague Evidence Convention). The state addressed, however, may claim the reimbursement of compensation paid to experts and interpreters, and of costs ensuing from the enforcement of a special procedure called for by the requesting state, in accordance with article 9 paragraph 2 Hague Evidence Convention.

Once the authority addressed has authorised a person to initiate the obtaining of evidence according to article 14 paragraph 3 Hague Evidence Convention (see III.C.1.1.4b, p. 27), and has obtained consent of the requesting authority after indicating the approximate amount of the costs, it has the right to charge the requesting authority for the costs engendered. The consent of the requesting authority implies an obligation to reimburse the costs that result from using the services of a third party. If the requesting authority does not give its consent, it will not be liable for these costs. It is provided in article 26 Hague Evidence Convention that each contracting state may, in the event that it is so liable in terms of its constitution, invite the requesting state to reimburse the execution costs of the letter of request, and in relation to the summons, the expenses due to the person who gives evidence and who makes a record of the judicial enquiries. When a state makes use of this provision, any other contracting state can invite this state to reimburse the aforementioned costs.

It should be emphasized that the aforementioned provision must be regarded as an exception. As a rule, the costs are settled as indicated above, in accordance with the provisions of article 14 Hague Evidence Convention.

In relation to Switzerland, the special terms of article 26 Hague Evidence Convention are not applicable, as there is no corresponding constitutional provision. In the event that another contracting state relies on article 26 Hague Evidence Convention, it must first indicate its pertinent constitutional provision. Switzerland could, in this case, demand reciprocity.

1.1.5 Letter of request relating to “*pre-trial discovery*” proceedings

Most cantonal civil procedure codes impose an obligation to produce exhibits that, according to the solemn declaration of the parties, are likely to be relevant to the case. The persons who are not party to the proceedings may be exempt from this obligation provided they can claim the right to refuse to give evidence. It is incumbent upon the judge to decide which documents need to be produced.

The states with an Anglo-American legal system have a stage in the proceedings called “*pre-trial discovery*”, which takes place after the commencement of the action but before the main hearing. According to the American “discovery” system, each

party has the obligation to inform the opposing party of all information that is relevant to the case, the concept of relevance being interpreted in the broadest sense. This stage of the proceedings is conducted largely without judicial intervention. The judge only intervenes if the parties fail to reach an agreement, in particular if one of the parties fails to collaborate. He may, in this case, use coercive measures.

For the majority of countries in Europe, including Switzerland, the relevance and the specification of the facts to be established in civil proceedings must meet very demanding requirements. This is why article 23 of the Hague Evidence Convention makes it possible for contracting states to declare that they will not execute a letter of request filed by states governed by “*common law*” that has the aim of having a “*pre-trial discovery of documents*” carried out. Switzerland, without completely excluding assistance in the context of a “*pre-trial discovery*”, reserves the right to refuse, according to the conditions established below, requests for assistance that have such proceedings as their objective.

Switzerland therefore executes applications by foreign countries for judicial assistance formulated in the framework of “*pre-trial discovery*”, but always requires i) that applications be sent to Switzerland by a competent foreign court and not directly by the parties concerned, and ii) that applications precisely describe the evidence required and the purpose for which it is requested. Requests that are formulated in general terms and require the opposing party to indicate the documents in his/her possession with the aim of obtaining information that bears no relation to the case or to attempt to discover evidence to substantiate a claim (“*fishing expeditions*”) are rejected. In other words, this means that applications by foreign countries for judicial assistance relating to “*pre-trial discovery*” are dealt with in the same way as internal Swiss applications for the production of documents.

A direct and necessary relationship therefore needs to exist between the request and the proceedings pending abroad. The letter of request must prove to be sufficiently relevant on a factual level.

The request will be refused if a person is asked to indicate the exhibits relating to the case that are or were in his or her possession or care, or over which he or she has or had a power of disposal. The same holds true when a person is expected to submit any document other than those stated in the application for judicial assistance. The aim is to prevent the party who bears the burden of proof to shift his or her obligation to the opposing party, or even to a third party.

Such letters of request must not, however, damage the interests of the persons concerned that are worthy of protection. This provision, which is a general clause in itself, is intended to take the banking and professional secrecy that is characteristic of Swiss law into consideration, without however leading to an automatic refusal of applications for judicial assistance based on a “*pre-trial discovery*” procedure.

1.2 Request under Chapter II of the Hague Evidence Convention (art. 15 to 22 Hague Convention 70)

1.2.1 General

As mentioned above, in accordance with article 271 paragraph 1 CP, those persons who carry out acts without authorisation on Swiss territory that are regarded as an exercise of public powers on behalf of a foreign state are committing an offence (see I.B, p. 7). Thus, unless they have authorisation, foreign parties who proceed with the

hearing of witnesses or obtaining evidence on their own initiative in Switzerland are liable to be punished (the ordinary preparation of a case¹⁷ by a lawyer has, however, always been possible without authorisation). This situation presents certain disadvantages for countries, such as the United States, which consider that the parties have authority to obtain evidence.

The Hague Evidence Convention compensates for this disadvantage by providing in its Articles 15, 16, and 17 that diplomatic or consular officials and court-appointed commissioners may take procedural steps in preparation for a trial, subject to certain conditions (art. 21 Hague Evidence Convention). In conformity with these provisions, Switzerland has made use of its right to issue a reservation in relation to this provision whereby the aforementioned persons need to obtain authorisation with the Federal Department of Justice and Police before executing procedural steps in preparation for a trial.

1.2.2 Conditions laid down in article 21 Hague Evidence Convention – Procedural safeguards

Article 21 of the Hague Evidence Convention imposes the following conditions:

- The consular representative or commissioner can take any evidence insofar as the procedural steps considered are compatible with the law of the state of execution and accord with the authorisation granted (for foreign applications relating to this issue, see III.C.1.2.3, p. 32). Under the same conditions, he may also examine a witness under oath or solemn declaration (art. 21 lit. a Hague Evidence Convention).
- With the exception of the cases in which the person specified by the procedural measure is a national of the state in which the proceedings have begun, any summons to appear in court or to cooperate in the taking of evidence must be written in the language of the place where the procedural steps are taken, or include a translation of the foreign language (art. 21 lit. b Hague Convention 70).
- The summons must indicate the fact that the person concerned may be assisted by his counsel, and that he is not obliged to appear or to participate in the evidence-taking. The person in question is therefore free not to cooperate at all or to interrupt the taking of evidence (art. 21 lit. c Hague Convention 70). The consular or diplomatic official or the commissioner may not take any coercive measures against the witness. Article 18 Hague Evidence Convention, however, provides that states may declare that foreign persons authorised to take evidence may apply to the competent authority to obtain the assistance required to carry out such acts by using coercive measures. Switzerland has made no declaration in relation to this subject, which makes it impossible to force the persons specified by the procedural steps to collaborate in terms of Chapter II of Hague Evidence Convention. In the event of a refusal to collaborate, the only available procedure is the one provided for in Chapter I of the Hague Evidence Convention.

¹⁷ Obtaining of evidence taken into consideration in terms of the place of residence of the witnesses, etc.

- In contrast to the proceedings under Chapter I of the Hague Evidence Convention, the evidence is to be taken, as a rule, according to the procedures provided for by the law of the requesting court. However, if the specified procedures are against the law of the state of execution, they may not be used.
- Cross-examination is also authorised, during which the witness is examined by the lawyers of both parties (art. 21 lit. d Hague Evidence Convention). For applications sent to Swiss authorities, see III.C.1.2.3, p. 32.
- The person to be heard may invoke, as in the context of a letter of request according to chapter I of the Hague Evidence Convention, a privilege (art. 21 lit. e, together with art. 11 Hague Convention 70).

1.2.3 Authorisation procedure before the Swiss authorities, and content of the application

In Switzerland, a foreign request for obtaining evidence is subject to prior authorisation by the FDJP (see the Swiss reservation in this respect as well as our [Fact sheet](#), according to articles 15 to 17 Hague Evidence Convention).

Foreign applications must, however, first be addressed to the Central Authority of the canton where the evidence-taking will be executed (see the Swiss reservation). To speed up the procedure, we recommend you send a copy at the same time to the Federal Office of Justice FOJ, Section for Private International Law, 3003 Bern. After examining the request, the central cantonal authority forwards the application to the FOJ, indicating, if need be, whether it is opposed to granting the authorisation or if it would like the authorisation to have certain accompanying conditions. When the procedural conditions and safeguards according to article 21 Hague Evidence Convention are met, the FDJP grants the authorisation. An advance of fees will, however, be necessary beforehand (art. 5 and 13 of the Ordinance on Costs and Remuneration in Administrative Proceedings [RS 172.041.0]; 100 to 5000 Swiss Francs).

If cross-examination is intended, there are two possible approaches. First, a sole commissioner can be appointed – for example, a neutral person – who will chair the taking of evidence and will see to it that the examination by the lawyers of the parties is conducted in accordance with Swiss law (no coercion, reminder of exemptions or any prohibition from giving evidence). In this case only one authorisation will be given. Second, it is also possible that each agent is appointed commissioner. In this case, authorisation will be granted to each person to conduct the examination.

The application for authorisation must:

- Briefly describe the nature and subject matter of the proceedings;
- Indicate the amount in controversy; this is necessary in order to fix the amount of the advance on procedural costs. The decision on the authorisation will be taken only after payment of the advance on procedural costs.
- Indicate the identity and the address (fax number included) of the litigants;
- Indicate the identity and the address (fax number included) of the counsels of the litigants;
- Indicate the form of, and the grounds for, the intended procedural formalities; it is recommended to describe in sufficient detail the modalities of the procedural formalities to insure that the authorisation will cover all the procedural formalities en-

visaged. If possible, the name and address of all participants in the procedural formalities should figure in the application;

- Indicate the name and address of the persons involved in the intended procedural formalities;
- Indicate the name and address of the person or persons who are to supervise the evidentiary proceedings if the application is one under [article 17](#) of the Hague Evidence Convention. Under [articles 15 and 16](#), on the other hand, all consular or diplomatic officials in the relevant embassy or consular agency will be given an authorization to supervise the taking of evidence;
- Propose a date for the intended taking of evidence. The request should be filed two months before the proposed date.

In addition, the application has to include a copy of the court decision appointing the commissioner.

Before sending the application, it is recommended that written confirmation is requested from the prospective witness to the effect that he is cooperating of his own accord, that he knows he cannot be subjected to any coercive measures, that he cannot be forced to participate or to appear and that he has the right to refuse to give evidence on the basis of privileges both under the law of the State addressed and of the State of origin (Art. 21 Hague Evidence Convention). In the event that the person concerned subsequently does not wish to cooperate, the entire procedure will have been unnecessary while having generated costs.

Finally, the application need not be made by the foreign court; it may be made by a party or its attorney. The application should then be accompanied by a power of attorney or by an authorization of the foreign court. As mentioned, the application needs to be accompanied by the court decision appointing the commissioner.

The Federal Department of Justice and Police will need to serve the authorization. In order for this service to be made in time it is suggested that the applicant designate a person in Switzerland who will accept service of the authorization. In the absence of such an agent for service, the authorization will have to be served through the channels of judicial cooperation, which unavoidably prolongs the proceedings.

1.2.4 Swiss applications to a foreign country

The FOJ refers to the declarations made by the Contracting States. It is willing to provide assistance when the procedures to be followed are unclear from such declarations.

Generally speaking, the Swiss embassies and consulates may take evidence in civil and commercial matters from Swiss citizens and other individuals they represent if the host country permits.

The taking of evidence in civil and commercial matters from one's own citizens as well as from citizens of other countries is only permitted, however, if the competent authorities of the host state so allow, unless the host state has made a blanket statement allowing such measures.

2. 1954 Hague Convention

2.1 *Basis*

Chapter II of the 1954 Hague Convention served as the basis for chapter I of the Hague Evidence Convention, which is why only the differences between the two conventions will be dealt with below. For further information see III.C.1.1.1 - 1.1.4, p. 25 et seq.

Chapter II of the Hague Service Convention is new. There is no corresponding chapter in the 1954 Hague Convention. For the obtaining of evidence by private persons or by diplomatic officers and consular agents in the context of the 1954 Hague Convention, see III.D, p. 35.

2.2 *Form and content*

As in the case of the Hague Evidence Convention, no form is provided by the 1954 Hague Convention. Furthermore, the 1954 Hague Convention does not indicate what information is required for the application. We recommend using the model on our Web site for the Hague Evidence Convention (<http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0039.File.tmp/must-HUe54-d.pdf>) based on the model used by the Hague Conference on Private International Law (see <http://www.rhf.admin.ch/etc/medialib/data/rhf/form.Par.0018.File.tmp/form-HBewUe70-d.doc>; see also Practical Handbook Evidence Convention 1970, p. 69 et seq.).

2.3 *Language and translation*

Requests for judicial assistance are in principle to be made in the language of the authority (i.e. the court) requested to execute them, or must be accompanied by a certified translation in that language (art. 1954 Hague Convention). Unless otherwise stated by a bilateral agreement (see I.C.2, p. 8), foreign applications must be in the language of the canton executing the request. Unlike article 4 para. 3 of the Hague Evidence Convention, article 10 of the 1954 Hague convention does not invite a Contracting State which has more than one official language to specify by declaration the language in which the request or the translation thereof shall be expressed for execution in the specified part of its territory. Switzerland has thus made no declaration; Swiss authorities consequently receive from time to time letters written in one of the Swiss official languages, but not in the one of place of execution. In such cases, the FOJ recommend to execute all the same the request, if possible, and to invite the requesting authority to draw its request in the future in the official language of the place of execution. In the case of Swiss requests to a foreign country, please consult the Guide on Judicial Assistance (<http://www.rhf.admin.ch/rhf/de/home/rhf.html>).

2.4 *Applicable law*

In accordance with article 14 paragraph 1 of the 1954 Hague Convention, the authorities addressed apply their own law. When the requesting state calls for the request to be executed in accordance with its own law, its request will only be rejected if the required form is contrary to the legislation of the state addressed.

2.5 *Grounds for refusal*

These are the same as those indicated in the Hague Evidence Convention (see III.C.1.1.4e, p. 28).

2.6 *Costs*

As a rule, judicial assistance is free of charge. However, contrary to what is established by the Hague Evidence Convention, expenses paid to witnesses as well as costs due to the appearance of a witness can be charged. Furthermore, as in the Hague Evidence Convention, expenses paid to experts as well as costs resulting from the application of foreign law to execution are subject to reimbursement (art. 16 para. 2 1954 Hague Convention; however, for Austria, see the supplementary agreement of 26. August 1968; RS 0.274.181.631, art. 7 para. 2).

D. Obtaining evidence directly by the parties or the diplomatic officers or consular agents in Switzerland under the 1954 Hague Convention

1. Acts carried out by the parties and article 271 PC

The taking of evidence by a commissioner is one of the main innovations of the Hague Evidence Convention. The 1954 Hague Convention, on the other hand, does not authorise this. Consequently, article 271 PC remains fully applicable.

Authorisations under article 271 PC are granted only in exceptional cases. Authorisation is not granted unless judicial cooperation is theoretically possible (i.e. when there is no ground for refusal) and in the event that it appears practically impossible, or even absurd to require Switzerland's public authorities to assist in the matter (see JAAC 1997 [61/82], p. 789 s.)¹⁸.

2. Acts carried out by diplomatic officers or consular agents

Article 15 of the 1954 Hague Convention authorises foreign requesting authorities to have their requests executed directly by diplomatic officers or consular agents in the state of execution if an agreement between the interested states expressly permits this or if the state in the territory where the letters of request are to be executed does not object. Switzerland has not entered into an agreement of this type and does not, as a general rule, accept diplomatic officers or consular agents obtaining evidence on its territory (JAAC 1968-1969 [34/15], p. 31).

In those countries in which procedural actions are to be taken by the parties rather than by the court, the Swiss Embassies and Consulates may, with the consent of the host country, invite Swiss and foreign nationals to appear for questioning or may go question those individuals at their homes. The diplomatic and consular officers of Switzerland must not, however, use coercive measures.

E. Obtaining Evidence in the absence of a Treaty

In the absence of a treaty, the Swiss authorities apply the 1954 Hague Convention by analogy to foreign requests. However, the additional grounds for refusal provided in

¹⁸ For example, if a foreign court requests an on-site inspection.

the procedural code of the canton concerned may be added to those contained in the 1954 Hague Convention (e.g. reciprocity in the matter of bonds and of judicial assistance, public policy).

As a general rule, requests must be translated.

In the absence of a treaty, all the costs can in principle be charged. In practice, however, the Swiss authorities require the refunding of costs and other charges only if the amounts are substantial and if the requesting state is not in the habit of complying with Swiss requests free of charge. In relation to Swiss requests to other countries, the FOJ for the countries where there is no agreement in relation to this matter will request a guarantee from the Swiss authority that any costs that are charged will be reimbursed¹⁹.

In the absence of contrary practices or agreements, Swiss requests made to foreign countries follow diplomatic channels (see II.D.2.2, p.14). For information on the position in specific countries, reference is made to the Guide on Judicial Assistance, <http://www.rhf.admin.ch/rhf/de/home/rhf.html>).

F. Special Issues

1. Hearing by Videoconference

The conduct of a hearing by a foreign authority or foreign lawyers by videoconference of witnesses or parties who are physically²⁰ located in Switzerland constitutes an act by a public authority on Swiss territory, and as such is therefore illegal unless authorized.

Under the Hague Evidence Convention, several case scenarios can be envisaged.

First, one can imagine the participation of the authorities and the agents for the parties at a hearing of the party and/or third parties that is conducted by a Swiss judge (art. 7 and 8 Hague Evidence Convention). Such participation is possible under the same conditions as when the authority and/or the agents for the parties are physically present in Switzerland (see III.C.1.1.4d, p. 28). In particular, the Swiss judge remains master of the proceedings and is the only person with the authority to order coercive measures.

One can equally imagine recourse to videoconference techniques in terms of Chapter II of the Hague Evidence Convention. Authorisation is in this case subject to the same conditions as in the “traditional” cases of authorisation (see III.C.1.2, p. 30). However, the fact that the persons are not in the same location suggests that an identification procedure is required. This procedure will be described in the decision.

The costs related to a hearing by videoconference can be charged to the requesting state (art. 9 para. 2, art. 14 para. 2 Hague Evidence Convention).

¹⁹ The entry “Kostengutsprache nötig” in the Guide indicates that such a guarantee will need to be obtained.

²⁰ Unlike the case where the parties are required to fill in a questionnaire, a hearing by videoconference is interactive. The questions asked and the answers given are therefore to be regarded as a whole and consideration should be given to the location of the persons concerned (see Alexander R. Markus, *Neue Entwicklungen bei der internationalen Rechtshilfe in Zivil- und Handelssachen*, RSDA 2002, p. 65 et seq., who deals with the problem of hearings by videoconference and by telephone).

Outside of the framework of the Hague Evidence Convention, i.e. if the procedure takes place in a state that is not a party to that Convention, the FOJ is of the opinion that a hearing by video conference is not possible, other than in exceptional circumstances. Firstly, the 1954 Hague Convention – which Switzerland not only applies in its relations with contracting states but also by analogy in the absence of an agreement – neither provides for the possibility of a foreign judge participating in the hearing nor for the possibility of consular or diplomatic agents or of a commissioner carrying out a hearing. Secondly, as authorisation in terms of article 271 of the Swiss Penal Code is granted only in the event that the ordinary channels do not allow satisfactory results to be achieved, it will be possible to grant authorisation on this basis only in cases that are highly exceptional.

2. Hearing by Telephone

Under the Hague Evidence Convention, a hearing by telephone is conceivable under the same conditions as a hearing by videoconference. However, the problem of identifying the parties is even more pronounced in the case of a telephone hearing than in the case of a videoconference hearing. In addition, the formal aspect of a normal hearing, which encourages the witness to respond carefully to the questions asked, is lacking in the case of a telephone hearing.

CONTACTS

If you have any questions, please contact:

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