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Blocking provisions: pitfalls to collecting evidence in Switzerland

Saverio Lembo and Aurélie Conrad Hari

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Bär & Karrer

Proceedings involving a multi-jurisdictional or cross-border element often require the parties to collect evidence from foreign jurisdictions. This is particularly true where a multinational company is a party to the proceedings, or if evidence is in the hands of a third party residing abroad.

In common law jurisdictions such as the US, the gathering of evidence can occur prior to the trial or at an early stage through pre-trial discovery. However, certain states have enacted provisions known as “blocking statutes”, which may prevent or at least hinder the collection of evidence within that country’s jurisdiction. These blocking statutes can be triggered when a party performs certain acts during the process of gathering evidence.

In Switzerland, Article 271 of the Swiss Criminal Code (Article 271) prevents an “official act” from being performed on behalf of a foreign authority on Swiss soil. This can have the effect of blocking the collection of evidence located in Switzerland, which is intended for use in foreign proceedings. This provision was introduced to protect Switzerland’s sovereignty.

Particular caution must be paid to this provision, as breaching it constitutes a criminal offence. In fact, foreign parties (such as bankruptcy receivers or investigation companies) often underestimate the difficulties that Article 271 will cause when attempting to gather evidence in Switzerland. Unfortunately, as this article will demonstrate, it is often difficult to be certain whether a particular situation will breach or be in accordance with Article 271.

Against this backdrop, this article:

- Summarises the history of Article 271.
- Provides a summary for when Article 271 applies.
- Considers the possible sanctions that those breaching Article 271 may incur.
- Highlights the circumstances in which it is possible to breach Article 271 in the context of the gathering of evidence.
- Addresses how parties outside Switzerland can avoid risking infringing Article 271 when gathering evidence in Switzerland during multi-jurisdictional proceedings or investigations.

HISTORY OF ARTICLE 271

Article 271 was introduced to protect the sovereignty of Switzerland by preventing actions that are reserved for a Swiss public authority from being performed on behalf of a foreign state on Swiss territory without authorisation.

Article 271 derives from provisions first enacted in 1914 and 1937 during periods of particular political tensions. The original provisions were intended to reinforce the sovereignty of the state against threats from abroad. Although Article 271 may appear obsolete in the current circumstances, the provision is still in force. Indeed, although the precedents are rather limited, the Swiss Supreme Court has strictly applied Article 271, and it can frequently come into play when a request is made from another jurisdiction for the collection of evidence in Switzerland.

A motion was recently submitted before the Swiss Parliament to reinforce the effect of Article 271 (*Motion No. 11.3120 filed before the Swiss Parliament on March 16, 2011 and admitted by the Swiss Federal Council on June 17, 2011*) (see www.parlament.ch/e/suche/pages/geschaefte.aspx?gesch_id=20113120). The motion demonstrates that Article 271 is not out of date but is likely to be reinforced at some point in the near future.

REQUIREMENTS OF ARTICLE 271

Article 271 provides that anyone can be punished by criminal sanctions if they take or facilitate an act, which is reserved to the Swiss public authorities:

- On Swiss territory without authorisation for a foreign state.
- When acting on behalf of a foreign party or foreign organisation.

See www.admin.ch/ch/e/rs/311_0/a271.html.

Precedents have interpreted Article 271 to establish that for an act to be illegal it must satisfy all of the following requirements:

- The act falls within the competence of a public authority.
- The act is made in favour of a foreign state.
- The act is made without authorisation.
- The act occurs on Swiss territory.

Each of these requirements is considered in turn.

Act falling within the competence of a public authority

The Swiss Supreme Court has decided, in a landmark case, that whether an act falls within the competence of a public authority or whether the person is a public official is assessed under Swiss law (*Decision of the Swiss Supreme Court (FTD) 65 I 39 E. 2; FTD 114 IV 130 E. 2c*) (Competence of a Public Authority Case). We will discuss the following: the nature of the act, and a person that can be caught by the application of Article 271.



Nature of the act. Under Swiss law, whether a person is actually a public official or whether he performs a public act under the law applicable to the foreign authority is irrelevant. The sole consideration is the nature of the act performed. This means that any act that can be performed by a public official or that falls within the responsibility of a public authority can potentially trigger Article 271. Therefore, Article 271 includes acts relating to the (*Competence of a Public Authority Case*):

- Gathering of evidence by a judge or other (administrative) authority.
- Collection of evidence in view of filing in foreign proceedings.
- Taking of depositions.

See below, *Problem scenarios for gathering evidence in Switzerland*.

Person subject to Article 271. A person that is subject to Article 271 is a person who either:

- Performs the act on behalf of the foreign authority.
- Assumes the function characterised as public under Swiss law.

Article 271 also prohibits the aiding or assisting of illegal acts in favour of a foreign state. The Swiss Supreme Court held in the *Competence of a Public Authority Case* that any activity which encourages illegal acts in favour of a foreign state (including aid, support or preparation) is considered to be forbidden aiding or illegal acts contemplated by the Article. On the facts, the Swiss Supreme Court held that a Swiss attorney acted in breach of Article 271 by assisting a colleague of the same firm in preparing notes related to interviews with bank employees with the knowledge that the notes would be used in pending proceedings in Australia. The Swiss attorney was convicted under the aiding and abetting clause of Article 271. Therefore, it is not only the person performing the official act who can commit the offence, but any third party who aids or favours the performance of that act.

Consent of private persons. Since Article 271 is intended to protect Swiss sovereignty, the consent of private persons cannot exempt the person performing the act in favour of a foreign state from conviction (*Competence of a Public Authority Case*).

Made in favour of a foreign state

Article 271 is only triggered if the act is performed in favour of a foreign state, that is, performed in the interests of a foreign public authority or in connection with proceedings conducted by or on behalf of such an institution. A foreign public authority includes a foreign court, government body, public official acting on behalf of a public authority, a bankruptcy trustee, and so on (*Competence of a Public Authority Case*).

It is not necessary for the act to be directly or expressly requested by the foreign public authority to trigger Article 271. To fall within the scope of the Article, it is sufficient that the act, even if it is requested by a third party and not the foreign authority itself, may eventually assist the authority, or be used before or by the authority.

Made without authorisation

Acts performed in favour of a foreign state are prohibited unless authorised by a competent Swiss authority. Generally, authorisation

is only given when the requirements for granting international mutual assistance are fulfilled pursuant to the mutual assistance treaty applying between Switzerland and the foreign state at stake (for example, Convention on the taking of evidence abroad in civil or commercial matters, mutual legal assistance in criminal matters between Switzerland and the United States 1970).

However, Swiss authorities have been very reluctant to grant authorisation in practice. In particular, the competent Swiss authority will not usually grant any individual authorisation if international mutual legal assistance proceedings are available as an alternative. Therefore, the competent Swiss authority basically urges the requesting party to proceed through the mutual assistance channel and will only grant an authorisation when particular circumstances would legitimate it, notably if there is no mutual assistance channel that can be followed (*Guidelines on International Judicial Assistance in Civil Matters*) (Guidelines).

In addition to individual authorisation, the authorisation required under Article 271 can also be implemented automatically by Swiss legislation or international treaties to which Switzerland is a party (*BSK Strafrecht II-Hopf, Art. 271 N 18*). Typically, this is the case for international mutual assistance treaties which contain specific provisions related to the taking of evidence in foreign jurisdictions, notably Switzerland, to which Switzerland is a party. Therefore, an act performed by a foreign state in compliance with the requirements set out in such a treaty would not trigger Article 271, as the act would be deemed to be authorised through the compliance with the convention.

Occurs on Swiss territory

Article 271 applies to forbidden acts performed on Swiss territory. However, it is also possible for an act to be caught by Article 271 even if only partially performed in Switzerland (*BSK Strafrecht II-Hopf, Art. 271 N 17*). While Article 271 of the Swiss Criminal Code stipulates that the forbidden act must occur on Swiss soil, Article 4 provides that “any person who commits a felony or misdemeanour against the state or its national security (Article 265 to 278)” is subject to the Swiss Criminal Code and can therefore be prosecuted in Switzerland. This means that a foreign lawyer conducting an investigation by taking deposition of witnesses located in Switzerland would be subject to conviction under Article 271 even if the lawyer is operating from abroad (see below, *Problem scenarios for gathering evidence in Switzerland, Hearing witnesses: Taking depositions*). However, there would be practical difficulties in convicting the lawyer for breaching Article 271 as long as he is located abroad and not within Switzerland's jurisdiction. In such a case, Article 271 could be avoided by ensuring that the witness' deposition does not take place in Switzerland, but in another jurisdiction.

SANCTIONS

Any person who commits an offence under Article 271 is liable to either a monetary penalty or a custodial sentence of up to three years. In serious cases, the offence may be punishable by a custodial sentence of a minimum of one year and up to 20 years. However, from a practical standpoint, the convictions pronounced by Swiss courts for offences under Article 271 are usually short custodial sentences ordered as a suspended sentence.



PROBLEM SCENARIOS FOR GATHERING EVIDENCE IN SWITZERLAND

This section considers the most common “problem scenarios” for Article 271, and sets out:

- Whether or not these are likely to fall within the scope of Article 271.
- How the violation of this provision could be avoided (where appropriate).

Gathering evidence in Switzerland

Unlike common law jurisdictions, the gathering of evidence in Switzerland is a judicial function and is primarily the duty of the judge, who leads the process and can request the mutual co-operation of the parties (*Article 160, Swiss Code on Civil Proceedings*). Therefore, any act related to the collection of evidence in Switzerland is highly likely to fall under Article 271, as it will be considered an act within the competence of a public authority (that is, by the judge). Consequently, the following actions are likely to constitute an “official act” that must be performed pursuant to international assistance rules (and are therefore caught by Article 271) (*Guidelines*):

- Any act of a foreign judge.
- Any act of a person appointed by a foreign judge.
- Any act of a representative from one of the parties liaising with a Swiss authority.
- Any act addressing a request to a person based in Switzerland to carry out legal procedures.

Pre-trial discovery/request for information

Would the collection of evidence, occurring within the course of a pre-trial discovery process that only aims at assessing the chances of success of a party or prepares them for future litigation but not be used in subsequent proceedings, trigger the effects of Article 271?

Some take the view that the assessment of any potential infringement for the collection of documents should be based on the purpose of the collection and therefore in this scenario, Article 271 would not be triggered.

However, this is arguable. From a practical standpoint, the documents that will initially be reviewed to assess the chance of success or prepare the litigation are highly likely to be the same documents that will be used (at least in part) in any subsequent proceedings. When the parties receive the relevant documents for their case, they can certainly not be sure that they will not subsequently use them in future proceedings. Consequently, the collection of documents in Switzerland in view of preparing a future trial could at least lead to an infringement of Article 271 by indirect intention (*dolus eventualis*).

On the other hand, a collection of evidence prohibited by Article 271 can be distinguished from a mere request for information addressed to a non-litigant person based in Switzerland to obtain information or confirmation in relation to the position of a party. These types of situations could include:

- Contact with a third party to determine whether it can be included on a witness list.
- Contact initiated with individuals located in Switzerland to get further details on a dispute.

In these circumstances the addressee of the request is free to decide whether or not to collaborate and will not suffer any legal detriment by agreeing or refusing to reply to the information request.

These examples make clear that a distinguishing factor on whether Article 271 could be triggered is the amount of coercion used when making the request. As long as the addressee is free to collaborate without any impact on its legal situation, the request should not be deemed an official act falling within the scope of Article 271, provided the request relates to a mere request for information and not to collection of proper evidence.

Potentially infringing parties

A Swiss-based party to foreign proceedings can freely review and collect its own documents even if they are intended for use in foreign proceedings, as the collection of evidence by a Swiss party does not fall within the ambit of Article 271. However, other parties are more likely to trigger the affects of Article 271 when gathering evidence, such as:

- **Makers of a request for collection.** A request for the review and/or collection of documents on Swiss territory by or on behalf of a foreign authority, or by a foreign lawyer acting as a representative of an opposing party, is considered to fall under Article 271 as an official act.
- **Foreign bankruptcy receivers.** The activity of a receiver in the course of the liquidation or winding up of a foreign company would be deemed public under Swiss law, as the liquidation of an insolvent company is conducted by a public official under Swiss law (*BSK Strafrecht II-Hopf, Art. 271 N 9*). Therefore, any act undertaken by a foreign receiver in Switzerland (such as requesting documents) could trigger Article 271 if performed on Swiss territory and if no authorisation is given.

When a foreign receiver is appointed abroad to liquidate a multinational group of companies, it will not be authorised to collect documents from the Swiss-based entities of the group if those documents are to be transferred abroad. The Swiss Department of Justice even considered in a ruling that was requested from it that foreign liquidators are not entitled to collect documents from a Swiss subsidiary of a bankrupt foreign parent company. Where foreign liquidators require documents from a Swiss entity, the Swiss Department of Justice requests that they proceed through an international mutual assistance request, under the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters.

Since the receiver is deemed a public official under Swiss law but not an internal representative of the company, its acts cannot be interpreted as the act of the bankrupt company. Therefore, the receiver must demonstrate significant caution in undertaking any act concerning Swiss-based entities to avoid any issue relating to Article 271. Indeed, in light of the restrictive approach taken



by Swiss authorities concerning the interpretation of Article 271, even a collection of documents related to a Swiss-based entity that is legally the same (such as a branch) as the foreign bankrupt entity could fall within Article 271.

This is also likely to apply to a request sent by the foreign receiver to a Swiss bank for information related to the assets of the foreign bankrupt company. Although the bank would certainly have a duty to provide its client (the foreign bankrupt entity) with information related to its accounts, the request addressed by the receiver would be deemed an official act not performed by a party.

Collection of documents within a multinational group

Typically, issues related to Article 271 may be triggered, despite no Swiss-based entity being party to the foreign litigation, where an entity of a multinational group of companies is located in Switzerland (Company S).

For example: another entity of the multinational group located in the UK (Company A) is party to US litigation. During the course of the US proceedings, Company A is ordered to collect evidence. However, the documents it is to collect are located in Company S's premises. As the order is addressed to Company A, which is located outside of Switzerland, the requesting party does not infringe Article 271.

Is Company A authorised to collect evidence from Company S? The outcome depends on the link between both entities of the group. If Company S is a mere branch of Company A, it is entitled to receive any document from its branch, as both entities are the same legal person. However, the answer would probably differ if the Swiss-based entity is legally independent from Company A, despite being part of the same company group. In this situation, Company A may infringe Article 271 if it requests the collection of evidence from the Swiss entity, as this could be interpreted as a request made to a third party to the proceedings and therefore trigger issues related to Article 271. This will be particularly true if Company A further proceeds its investigation within the Swiss entity or if the request contains a coercive measure.

Filing evidence

The filing of documents before a foreign court will not trigger the application of Article 271 if the documents are produced by a party to the foreign proceedings either voluntarily or involuntarily (that is, further to an official order rendered by a foreign authority). In that case, the purpose of the production of documents by the party is to support its allegation in the proceedings and cannot be deemed an "official act" if filing does not involve prior investigations or the co-operation of third parties in Switzerland. Therefore, a transferring person who is a party to the proceedings will not violate Article 271, as long as he files documents that were in his possession. On the other hand, the addressor of the request in case of an involuntary transfer could be liable under Article 271, as the addressor performs an "official act" by being involved in the taking of evidence.

The production of documents by a person that is not a party to foreign proceedings (transferring person) raises delicate issues. If a production order is addressed to a non-litigant based in Switzerland, the maker of the request would also incur liability under Article 271, especially if coercive measures are used if the

recipient refuses to comply with the order (*Guidelines*). It has been argued that, in these circumstances the transferring person should not fall within the scope of Article 271 because the person either would not share any criminal intent or should be deemed a necessary participant to the commission of the offence (that is, a Swiss legal concept meaning that without the act of such "necessary participant" the offence cannot occur). However, a distinction should be made depending on whether the act performed by the transferring person is voluntary or involuntary. If the Swiss-based non-litigant produces documents on a voluntary basis, on its own initiative or in collaboration with a person performing an official act but is not the specific recipient of the order, the act performed by the non-litigant could at least fall within the scope of the aiding and abetting clause of Article 271. Conversely, if the non-litigant performs the act further to an order (that is, on an involuntary basis) it should not be liable under Article 271. In this case, the addressee would be deemed a necessary participant to the commission of the offence and is therefore not subject to criminal conviction.

Hearing witnesses

Hearing witnesses within foreign proceedings. If a foreign authority or lawyer conducts the hearing of a witness on Swiss soil, Article 271 will be triggered and the hearing will be illegal unless authorised. Such a hearing is deemed to occur in Switzerland if the witness is physically located in Switzerland, regardless of whether the public official carries out the hearing on Swiss soil or via video or telephone conference.

The conduct of such a hearing is therefore subject to prior authorisation which must be carried out through rogatory commissions. For that procedure, the foreign authority must send a letter of request to the Federal Office of Justice, although in certain specific situations, the parties or their representatives can file the request directly by attaching the relevant decision of the court (*Article 17, HCCH Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970*) (Hague Evidence Convention). In its request, the foreign authority can request authorisation for its court officers to witness the execution of the letter of request and therefore attend the hearing of witnesses occurring on the Swiss territory (*Article 8 and Article 35(2)(c), Hague Evidence Convention*). In such a case, the parties and their representatives may also be authorised to witness the hearing (*Article 7, Hague Evidence Convention*).

Despite the possibility of the foreign authority attending, the Swiss judge executing the request remains the master of the proceedings and is the only person entitled to take coercive measures against the person addressed by the letter of request (*Guidelines*).

Taking depositions. The taking of depositions is a specific form of collecting evidence applicable to common law systems. The taking of depositions can be defined as a private hearing of witnesses and can occur in all types of proceedings, whether civil, criminal or administrative. Instead of being conducted by the judge, the deposition is conducted by a party to the proceedings or its representative. Depositions usually occur before a court reporter with authority to take depositions under oath. In common law jurisdictions, depositions can be requested by a party to assess the chance of success of its claim and may also be subsequently filed in foreign proceedings.



It could be argued that formally such acts are not performed in favour of a foreign state but of a private party, who may then use the depositions before a court. However, considering the restrictive approach taken by the Swiss courts, it is doubtful that a court would accept this defence. At a minimum, when the taking of depositions is made with the view to subsequently file it in foreign proceedings, this act clearly falls within the scope of Article 271 and is prohibited. In the *Competence of a Public Authority Case* the Swiss Supreme Court held that a Swiss attorney had infringed this provision by taking a deposition from a witness in Switzerland with the intention of filing the deposition in a criminal procedure initiated in Australia. In its decision, the Swiss Supreme Court ruled that hearing witnesses with a view to filing the deposition before a foreign authority that would rule over the case related to public acts and was therefore prohibited by Article 271.

One could question the public nature of that act if the intent is only to assess the chance of success of its claim in the proceedings, as this is permitted during pre-trial discovery in US civil proceedings. If this is the case, such an act should not generally infringe Article 271, provided:

- The purpose of the depositions is clearly stated at the beginning of its performance.
- There is no intention to use the deposition in proceedings.
- The deposition will never be used before a foreign authority.

However a very cautious approach is recommended when using depositions in this way. Moreover, as soon as foreign proceedings are pending, depositions should not be taken outside the scope of international mutual assistance, as it would be particularly difficult to demonstrate a lack of intent to use the depositions in the pending foreign proceedings.

Finally, the person taking the deposition or performing the hearing can incur liability under Article 271. However, the witness providing the deposition is deemed a necessary participant to the commission of the offence and therefore cannot be subject to criminal conviction (*Leading Case*).

CONTRIBUTOR DETAILS



SAVERIO LEMBO

Bär & Karrer SA

T +41 58 261 57 00

F +41 58 261 57 01

E saverio.lembo@baerkarrer.ch

W www.baerkarrer.ch



AURÉLIE CONRAD HARI

Bär & Karrer SA

T +41 58 261 57 00

F +41 58 261 57 01

E aurelie.conradhari@baerkarrer.ch

W www.baerkarrer.ch

Qualified. Switzerland, 1995

Areas of practice. Litigation and arbitration; reorganisation and insolvency; media, entertainment and sports; internal investigation and cross-border proceedings; employment, migration and social security.

Recent transactions

- Representing a major Swiss bank in two multi million Euro fraud cases committed by individuals inside and outside the bank; obtaining the arrest of the perpetrators and freezing the substantial assets transferred by them outside the bank.
- Successfully assisting UEFA in a CAS arbitration case against the FC Sion.
- Successfully assisting TeliaSonera in an ICC arbitration case and in subsequent Supreme Federal Court proceedings.

Qualified. Switzerland, 2005

Areas of practice. Litigation and arbitration; internal investigation and cross-border proceedings; banking and finance.

Recent transactions

- Representing a major Swiss bank in a multi million Euro fraud case committed by individuals outside the bank; obtaining the freezing of substantial assets transferred by them outside the bank.
- Successfully assisting a multinational company in a multi million US\$ ICC arbitration case.