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***"Show me the money, honey"***

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**Gathering of Evidence and Attachment of Assets  
in Switzerland**

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## **A Introduction**

- 1 Switzerland has with 52% one of the highest divorce rates in Europe. During the last years, half of the divorces in Switzerland involved international couples. Provided both spouses consent to the divorce and agree about the financial and other consequences, divorce proceedings may indeed only last a couple of months in Switzerland. The Swiss system is not fault-based. A spouse may file for divorce in Switzerland after two years of separation regardless whether the spouse left the family or whether he or she is to be blamed for the break-down of the marriage.
- 2 Switzerland has not the same generous divorce system like e.g. the UK as only marital assets are divided and maintenance is limited to a couple of years and in principle awarded for an amount corresponding to the claiming party's needs. However, divorce in Switzerland may nevertheless be expensive, in particular, if the whole wealth was generated by one spouse during marriage.
- 3 This paper deals with the processes available in Switzerland for the gathering of documents located in Switzerland– be it by a party to the proceedings or by third parties – as well as the interrogation of witnesses residing in Switzerland in aid of foreign divorce proceedings. Likewise, the attachment of Swiss assets will also be addressed.

## **B Swiss Law of Evidence**

- 4 Contrary to the Anglo-Saxon evidence-gathering procedures, which extend well beyond the concept of fact finding known in Switzerland, Swiss law does, in principle, not provide for pre-trial discovery of evidence in civil cases. Parties bring civil action on the basis of evidence available to them at the time of filing suit. There is a requirement to prove alleged facts and circumstances, unless otherwise provided by law,<sup>1</sup> and to substantiate claims in the complaint – without any opportunity to conduct pre-trial discovery.
- 5 If a party fails to produce sufficient evidence for its position, it must bear the consequences resulting from the respective lack of evidence. However, a party knowing that evidence exists, may request production of such evidence by sufficiently specifying the document in question and its relevance to the case. The court will then decide, at a comparably advanced stage of the proceedings, i.e. after an exchange of oral or written pleadings by the parties, whether it deems the requested document as relevant and whether or not the document must be produced. Otherwise, each party must only provide evidence which is conducive for its position. Evidence which could compromise a party's case does not have to be submitted by that party voluntarily.
- 6 Similar principles apply to the interrogation of witnesses. Such interrogation has to be based on a court order and is not conducted by the parties or their counsel but by the competent court.

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<sup>1</sup> Article 8 Swiss Civil Code.

- 7 Only in certain fields of law, Swiss law provides for statutory obligations to submit evidence. For example, according to article 170 Swiss Civil Code (CC) each spouse has the right – during the marriage as well as in the course of divorce proceedings – to request information, including the production of documents, pertaining to the other spouse's income, assets and acquired debts. Where such statutory obligation to provide information exists, the competent court may not only issue an order to compel production of the relevant documents but also impose a fine for non-adherence.
- 8 Finally, in certain areas, for example, in divorce proceedings as far as child custody issues are concerned, the so called principle of investigation ("*Untersuchungsmaxime*"), applies, according to which the court must establish the relevant facts and may therefore order the production of additional evidence regardless of the parties' own document production or witness requests.
- 9 In summary, unlike in most common law jurisdictions, the process of gathering evidence is left to the judiciary under Swiss law. Anglo-Saxon style evidence-gathering procedures are unknown in Switzerland and the use of such procedures on Swiss territory may constitute an infringement of Swiss (criminal law) and foreclose the use of the evidence obtained by such means.

## **C Gathering of Evidence in Aid of Foreign Proceedings**

### **I Conflict of Systems**

- 10 The fundamental differences between the rules applicable to evidence gathering in Switzerland and the relevant procedures in most common law jurisdictions materialize in cases when a Swiss resident becomes the target of evidence discovery requests that expand, in their effects, into the territory of Switzerland, or affect legitimate interests protected by Swiss law. The disclosure of information and/or documents in proceedings before a foreign court by a person/entity residing in Switzerland is namely subject to various restrictions according to Swiss law.
- 11 There are, in particular, two areas of concern arising that limit the freedom of a Swiss resident/party to comply with requests of a foreign court for the disclosure of information:
  - i) First, the taking of evidence in Switzerland in connection with foreign proceedings is not left to the discretion of the parties: Parties seeking to obtain evidence located in Switzerland in connection with foreign proceedings need to proceed through the competent Swiss authorities in accordance with the rules of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters (the "Hague Convention"). As article 271 para 1 of the Swiss Penal Code ("PC") prohibits the performance of actions for a foreign state on Swiss territory, which are reserved to the Swiss authorities, non-adherence to the Hague Convention can entail criminal prosecution.

- ii) Second, the Swiss party who is sought to provide information in aid of foreign proceedings may be subject to provisions of Swiss law which prohibit, under penalty of law, the disclosure of certain sensitive information (e.g. secrecy duty of professionals such as lawyers or auditors).

12 While the principal purpose of article 271 PC is the safeguard of public interests, secrecy duties are designed to protect private parties against the violation of secrecy duties.

## **II Art. 271 Swiss Penal Code**

13 Article 271 PC is designed to protect the sovereignty of the Swiss territory and to prevent other States from performing acts on Swiss territory which might infringe this sovereignty. It prohibits the performance of acts for a foreign state in Switzerland that are reserved to Swiss authorities.<sup>2</sup>

14 As described above, Switzerland subscribes to the typical civil law view that the taking of evidence is a judicial function left within the exclusive competence of the public authorities. This general rule applies to proceedings before Swiss civil, criminal and administrative courts and other authorities, but equally in case that a foreign court or other authority exercises its jurisdiction over a party domiciled in Switzerland, if the evidence sought for production in the foreign proceedings is located in Switzerland. Thus, the taking of depositions and the conducting of fact finding efforts (such as investigations aiming at collecting information) on Swiss territory without proper authorization infringes article 271 PC. Similarly, the direct submission of summons, subpoenas etc. to Swiss residents/entities by a foreign court would infringe article 271 PC. As the taking of evidence in Switzerland is an act reserved to Swiss authorities, evidence for foreign proceedings may only be taken on Swiss territory if performed (or authorized) by the competent Swiss authorities.<sup>3</sup> Consequently, the production of documents located in Switzerland based on an order issued by a foreign authority may constitute an infringement of article 271 PC unless the applicable legal/administrative assistance procedures are followed.

15 In case documents located in Switzerland are produced by a party to foreign proceedings under the threat of sanctions and/or coercive procedural measures by the foreign court, the Swiss authorities determine the applicability of article 271 PC on the basis of an analysis of the sanctions threatened in case of a failure to comply with an order compelling discovery. According to the Swiss authorities, article 271 PC only applies if a party produces documents under the threat of sanctions of a direct nature such as criminal sanctions ("contempt of court") by the foreign court. The reason for that is that only Swiss authorities may apply such coercive measures on Swiss territory.

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<sup>2</sup> Article 271 para 1 PC reads as follows (unofficial translation): "Whoever, without being authorized, performs acts for a foreign state on Swiss territory that are reserved to an authority or an official, whoever performs such acts for a foreign party or another foreign organization, whoever aids and abets such acts, shall be punished with imprisonment and, in serious cases, sentenced to the penitentiary."

<sup>3</sup> However, article 271 para 1 PC is not applicable to the taking of evidence in connection with foreign arbitral proceedings as such proceedings are not considered state proceedings and the gathering of evidence in connection with such proceedings is thus not deemed to be an act for a foreign state.

- 16 If the sanctions contain indirect coercion (the party in default suffers procedural disadvantages) such as precluding the disobedient party from introducing evidence on certain matters, deeming certain facts as established, striking certain parts of the pleadings, entering of a default judgment, etc. such sanctions are not considered to be within the scope of article 271 PC. The party concerned is free to cooperate. The service of such an order must, however, be carried out according to the proper procedure for judicial assistance.<sup>4</sup>
- 17 In general, the voluntary<sup>5</sup> submission of documents to support one's position in proceedings (including document production during pre-trial discovery under US law) is not considered an action reserved to the Swiss authorities. A Swiss person/entity that is a *party to foreign proceedings* (and has been properly served) may therefore voluntarily submit documents to support its own position in such proceedings and produce all documents over which it has the right to dispose, be it that the documents are in the possession of the party or that it has the legal control and authority over it. This includes documents which a third party stores, processes or otherwise keeps for the party, to the extent that the party has a contractual right to request the return of such documents under the terms of the storage agreement. Therefore, documents which are e.g. stored on a server of an external service provider or another affiliated company are considered to 'belong' to the party as if these documents were in such party's direct possession, and these documents therefore may lawfully be disclosed by such party .
- 18 Problems with regard to article 271 PC may arise if the documents need to be obtained from a *third party*. Some members of the legal doctrine take the view that any gathering of documents and information from a third party is an infringement of article 271 PC. Another opinion in Swiss legal doctrine distinguishes whether the gathering of information and documents for a foreign proceeding were permissible if made within Swiss proceedings. This is based upon the rationale that it cannot be that article 271 PC prohibits activities with regard to a foreign proceeding which are allowed under the rules applicable to a domestic proceeding. However, the submission of documents by a third party to a proceeding before a foreign court is in any event punishable under article 271 PC if performed under the threat of sanctions by the foreign court, regardless of their nature, since the third party is not regarded as being subject to the jurisdiction of the court involved. In such cases, the production of documents must be carried out according to the proper procedure for legal assistance.
- 19 Article 271 PC also applies if only part of the unauthorized collection of evidence takes place in Switzerland. To avoid a violation of article 271 PC, the respective act of evidence collection must entirely take place outside of Switzerland. Finally, whoever facilitates the execution of an action within the scope of article 271 PC is subject to the same punishment as the person performing it. Sending documents abroad, for example, solely to avoid coverage of article 271 PC could be viewed by the Swiss authorities as aiding and abetting the violation of the statute.

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<sup>4</sup> See Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

<sup>5</sup> For example, a document production during pre-trial discovery under US procedural laws is considered a voluntary submission. By contrast, a document production after the court issued a subpoena is no more deemed to be voluntary.

### **III Secrecy Obligations - Privileges**

#### **1 General Remarks**

- 20 Privilege issues arise less frequently in Swiss civil proceedings than in common law jurisdictions as the gathering of evidence is, unlike in common law jurisdictions, left to the judiciary, i.e. witness examinations are conducted by the court and it is for the court to order a party or a third party possessor of documents to produce evidence to the court.
- 21 In general, any individual residing in Switzerland has the obligation to testify if called to the stand by a court. However, third parties are allowed to refuse testimony or the production of documents in their possession under specific circumstances. For example, if a witness is closely related to one of the parties, such witness does not have to comply with the general obligation to testify. Also, if a witness is subject to professional secrecy obligations or if a specific privilege applies, the witness may refuse testimony or the production of documents. As a rule, lawyers have an absolute right to refuse to testify, doctors have a near absolute right to refuse, and members of other professions underlying a statutory obligation of secrecy, such as banks, are in general subject to a weighing of interests (see 3. below).

#### **2 Legal Privilege<sup>6</sup>**

- 22 The privilege available to lawyers under Swiss law is based on the lawyer's secrecy obligations owed to the client. The privilege grants the lawyer an absolute right of refusal to give evidence in a procedural context. The scope of a lawyer's secrecy obligations under Swiss law and the corresponding legal privilege is very broad and includes everything that is confined to a lawyer in connection with an existing or prospective mandate, regardless of the nature or content of the information, whether it is accurate, its source or timing.
- 23 The privilege rule is mitigated by the fact that a lawyer may not aid a client to commit a felony and the privilege does not extend to cases where the communications sought to be protected were intended to further criminal or fraudulent purposes. Obviously, a lawyer cannot rely on the privilege if criminal charges are brought against him or her. Finally, legal privilege cannot be relied on as a blanket defense to disclosure nor does it prevent the lawyer from appearing as a witness before court. Objections must be raised before the court and considered on a case-by-case basis and the privilege must be claimed with respect to each specific communication at issue.
- 24 A lawyer may be released from his or her secrecy obligations by the competent supervisory authority at the lawyer's place of business provided the client refuses to waive the privilege or the client's approval cannot be obtained and there is a prevailing interest justifying the disclosure sought.

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<sup>6</sup> See also WÜSTEMANN, Legal Privilege in Switzerland, IADC Multinational Legal Privilege Survey, 2011.

### 3 Banking Secrecy

- 25 While clients of Swiss banks are protected by Swiss banking secrecy law (breach of which carries criminal sanctions), Article 47 para 5 of the Swiss Federal Bank Act ("Bank Act") expressly reserves duties of information to authorities and to testify in front of Cantonal and Federal Authorities. Therefore, where Swiss law provides for a duty to disclose information or to testify, Swiss banks are entitled to provide information and are actually required to do so. In addition to criminal law protection under the Bank Act, Swiss banking secrecy is also protected by the right of the individual to protect its private sphere under Art. 28 CC. This right may be limited by statute, or if the client consents to disclosure, or if a predominant private or public interest outweighs the client's interest in privacy. Furthermore, even if a client's contract with a Swiss bank does not explicitly stipulate a banking secrecy obligation, the bank is under a contractual obligation to keep information about its clients secret based on the Swiss Code of Obligations. Finally, Swiss banking secrecy is protected by federal and cantonal data protection statutes, but such protection may be lifted under the same conditions as the rights under Art. 28 CC, in particular if the interests of the bank to disclose outweigh the interests of its clients to secrecy.
- 26 Generally, since 1 January 2011, when the new Swiss Code of Civil Procedure ("CCP") came into force, a Swiss bank has a limited right to refuse to testify in civil proceedings, if it provides *prima facie* evidence that the interests of its clients in relation to banking secrecy outweigh the interests of uncovering the truth. Traditionally, courts in some cantons, such as Geneva, were reluctant to override banking secrecy. However, it remains to be seen how the CCP will affect banking secrecy protection.
- 27 In cases where a Swiss bank is entitled to refuse to testify, it is neither entitled nor required to testify. On the other hand, where banking secrecy is lifted by law (e.g. as regards the financial affairs of spouses; see IV below)<sup>7</sup>, the bank in question must provide the necessary information.
- 28 While foreign civil courts cannot directly require Swiss banks to provide information regarding their customers, they may have access to such information by way of a judicial assistance procedure in civil matters (e.g. Hague Convention), as described above. Alternatively, foreign civil courts can summon Swiss bank employees to testify in their jurisdiction, provided the summons is notified through the legal assistance channels. However, Swiss banks will not be entitled under Swiss law to testify on information covered by Swiss banking secrecy although they may be subject to sanctions of such foreign jurisdiction if they do not appear before the foreign court or refuse to testify.

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<sup>7</sup> Swiss Banks are further entitled and required to provide upon request to Swiss debt enforcement authorities information regarding the assets of a person whose assets have been seized or who is in bankruptcy proceedings and, subject to a specific court order, to provide information regarding assets that are subject to an attachment order. An informal request is sufficient, except in connection with an attachment order, where a court order is required.

## **IV Gathering of Evidence in Aid of Foreign Divorce Proceedings**

- 29 In divorce proceedings, a spouse has a statutory duty to fully inform the other spouse about his or her financial situation (Art. 170 CC) and the court can upon request order the other spouse or a third party (e.g. Swiss bank) to provide the requested information; e.g. banking secrecy may not prevent the production of such information. However, in cross-border divorce proceedings, such information needs to be obtained through legal assistance proceedings whereby the Hague Convention does not allow "fishing expeditions".
- 30 The taking of depositions and the conducting of fact finding efforts (such as investigations aiming at collecting information) on Swiss territory infringes article 271 PC. The same applies for interrogations. Similarly, the direct submission of summons, subpoenas etc. to Swiss residents by a foreign divorce court would infringe article 271 PC. Consequently, the production of documents located in Switzerland – except for voluntary submission of such documents by a party to the proceedings - or the interrogation of Swiss resident witnesses in aid of foreign divorce proceedings is only allowed if made in accordance with the legal assistance procedures foreseen under the Hague Convention.
- 31 Whether or not Swiss confidentiality provisions (privileges) apply in a case at hand must be determined on the basis of the relevant facts. If and to the extent a document production requests in aid of foreign divorce proceedings concern information that is protected by Swiss confidentiality provisions, the third parties' consent or a disclosure authorization by the competent public authority is required in order to lawfully comply with the request. Failing such consent or authorization, blanking out protected information or proceeding pursuant to the Hague Convention provides the only practicable alternative to legitimately overcome the hurdles of confidentiality provisions<sup>8</sup>.

## **D Provisional Measures in Aid of Foreign Divorce proceedings**

- 32 In principle, a Swiss judge is not competent to grant provisional measures where foreign divorce proceedings are already pending. However, an exception applies in emergency situations according to Swiss doctrine. A Swiss court may - upon request of a spouse –order provisional measures based on Art. 10 of the Swiss Private International Law (PIL) in aid of pending foreign divorce proceedings if the following conditions are met:
- The law applied by the foreign divorce court does not provide for similar provisional measures as granted in Swiss divorce proceedings (e.g. separation of household, alimony payments for the duration of the divorce proceedings, separation of matrimonial property, seizure of assets/bank account etc.)

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<sup>8</sup> Art. 11 Hague Convention: "In the execution of a Letter of Request, the person concerned may refuse to give evidence in so far as he has a privilege or a duty to refuse to give the evidence – a) under the law of the State of execution; or b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority...".



- Provisional measures of the foreign divorce court cannot be enforced at the Swiss residence of one of the spouse
- The requested provisional measures aim to ensure the enforcement with regard to Swiss assets (e.g. seizure of bank account or information about the wealth of a spouse
- An emergency situation exists
- It cannot be expected that the foreign divorce court will be in a position to render a decision within a reasonable time.

33 In 2007, the Swiss Federal Supreme court confirmed provisional measures ordered by the lower cantonal court with regard to divorce proceedings pending in the Czech Republic, as the husband had stopped paying monthly maintenance payments to the wife since months and the wife could no longer pay the rent. The Swiss court did in this case not even consider whether the Czech court was in a position to render provisional measures in due time but confirmed that the current situation is an emergency situation which justifies that the Swiss judge steps in<sup>9</sup>.

## **E Attachment of Swiss Assets**

### **I Swiss Attachment Order**

34 According to Article 271 para 1 of the Federal Debt Collection and Bankruptcy Act ("BA") a creditor may request the attachment of a debtor's assets provided that his claim is due and unsecured. Further, the creditor must establish on the basis of *prima facie* evidence: (i) the existence of his claim; (ii) the ground for attachment; and (iii) the existence of assets belonging to the debtor in the jurisdiction of the court dealing with application.<sup>10</sup> Strict proof of these three elements is not required.

35 Article 271 para 1 no 1 to 6 BA lists the cases where a ground for attachment exists:

- i) the debtor has no fixed domicile;
- ii) the debtor deliberately evades his obligations, removes his assets, leaves the country or intends to do so;
- iii) the debtor's presence is only transient;
- iv) the debtor has no residence in Switzerland; in that case, if there is no other ground for attachment, the debt must have a *sufficient link with Switzerland* or it must be based on an acknowledgement of indebtedness;

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<sup>9</sup> BGEr, 17.4.2007, 5C.7/2007.

<sup>10</sup> Article 272 para 1 BA.

- v) the creditor has obtained a definitive or provisional certificate of loss against the debtor (insolvency or bankruptcy);
- vi) the creditor holds an enforceable judgment against the debtor.

36 In case of foreign divorce proceedings, it will be difficult to obtain a Swiss attachment order without an enforceable divorce judgment given that the creditor spouse would have to establish a sufficient link to Switzerland for such attachment. The mere existence of assets on Swiss territory or a simple transfer of funds to a Swiss bank account do not constitute a "sufficient link" to Switzerland. Rather, it is e.g. required (and must be established by the creditor spouse) that the debtor transferred assets to Switzerland in order to deprive the creditor spouse of the funds. Also, the creditor's residence in Switzerland may be a sufficient criteria.

37 Alternatively, a spouse may try to seize Swiss assets by applying for provisional measures in Switzerland as set out above.

## **II Enforcement of Foreign Attachment Order**

38 Swiss federal and cantonal civil courts may enforce an attachment order of a foreign court based on Swiss private international law. If the foreign decision is recognizable and enforceable in Switzerland based on an international treaty, e.g. the Lugano Convention, the Swiss civil courts must enforce an order of a foreign court. A definitive foreign order defining the scope of the attachment order is required. Swiss banks must comply with the enforcement order of the Swiss civil court. However, until the order is formally issued, Swiss banks are, in theory, allowed to follow any instruction of the client.

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