

Incoming Requests: The Swiss Perspective

- Swiss view: priority of Hague Evidence Convention
- Request to Swiss authority to obtain evidence
- Presence of judicial personnel of the requesting authority (subject to authorization by executing authority)
- Taking of evidence by diplomatic officers and consular agents (no compulsion, only nationals of requesting state, prior authorization by FDJP)
- Taking of evidence by commissioners (no compulsion, prior authorization by FDJP)

“With regard to Article 1, Switzerland takes the view that the Convention applies exclusively to the Contracting States. [...] Switzerland believes that, whatever the opinion of the Contracting States on the exclusive application of the Convention, priority should in any event be given to the procedures provided for in the Convention regarding requests for the taking of evidence abroad.”

Outgoing Requests: Hague Evidence Convention vs. 28 U.S.C. § 1782

- Requests by a Swiss Court
- Requests by a party to Swiss proceedings
 - *requests made by a party directly to a foreign court are outside the scope of the Hague Evidence Convention*

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Using evidence obtained under 28 U.S.C. § 1782 in Swiss proceedings

- documentary evidence
- witness depositions
 - as witness statements?
 - Articles 169 ff. CPC: witnesses to be summoned by the court (and examined primarily by the court)
 - as written disclosure (*schriftliche Auskunft*)?
 - Article 190 CPC: to be ordered by the trial court
 - as documentary evidence?
 - possibly reduced probatory value (but: principle of free evaluation of evidence)

Possible grounds for disallowing evidence obtained under 28 U.S.C. § 1782

- Article 27 PILA?
 - not applicable, evidence obtained abroad is not a judgment and not comparable to a judgment
(*contra: Markus Müller-Chen – possible application of Article 27 PILA by way of analogy*)
- Article 152(2) CCP (illegally obtained evidence)?
 - evidence obtained in violation of Swiss sovereignty
 - evidence obtained in violation of basic principles of Swiss civil procedure
 - *nb:* even where evidence was obtained illegally, balancing of interests (interests protected by the violated norm vs. interest in finding the truth)

“In accordance with Article 23, Switzerland declares that Letters of Request issued for the purpose of obtaining pre-trial discovery of documents will not be executed if:

- a) the request has no direct and necessary link with the proceedings in question; or
- b) a person is required to indicate what documents relating to the case are or were in his/her possession or keeping or at his/her disposal; or
- c) a person is required to produce documents other than those mentioned in the request for legal assistance, which are probably in his/her possession or keeping or at his/her disposal; or
- d) interests worthy of protection of the concerned persons are endangered.”