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The Use of Evidence Obtained in US-American Discovery in International Civil Procedure Law and Arbitration in Switzerland

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I. Introduction**

A person wishing to assert his or her rights must be able to prove the facts presented at trial. For this purpose, the facts must be known to and be accessible by this party, i.e. they ideally must be retrieved before filing of the lawsuit.[1] The gathering of evidence is often difficult but indispensable.

The Swiss substantive law contains a very small number of rules which grant a right to information.[2] Swiss procedural laws offer few formalized options to obtain pre-trial information from people who do not disclose it freely.

In the US, the parties are responsible for collecting evidence (under the supervision of the courts)[3] and may do so at an early stage of proceedings (so-called *pre-trial discovery*).[4] Therefore parties involved in civil proceedings or arbitration in Switzerland with a link to the US may often consider profiting from the US-American discovery procedure for evidence found in the US.[5] Such situations might, inter alia, concern obtaining

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1 Cf. as to the gathering of evidence before commencing proceedings GESSLER, SJZ 2004 433, 433 ff.

2 E.g. § 170 Swiss Civil Code (CC), § 400 Swiss Code of Obligations (CO), § 65 Para. 2 Swiss Copyright law, § 59 Para. 2 Swiss Trademark Protection law.

3 DAMASKA, 45 Am. J. Comp. L. 839, 841 ff.; VOLKEN, 128, 136 f.; WALTER, 347; regarding the role of the court cf. REDFERN/HUNTER, § 6-62; for the comparative law perspective HUANG, 3 ff.

4 Cf. for the comparative law approach BERNINI, in: The Leading Arbitrators' Guide to International Arbitration, 2004, 269, 271 ff.; VOLKEN, 115 ff.

5 Lately the significance of the support of foreign parties in the gathering of evidence in the US is being discussed to a greater extent, cf. e.g. www.intlawnet.com; ROHNER/BARATZ, Beweis beschaffen wie in den USA, Neue Zürcher Zeitung (NZZ) 13 June 2007.

evidence in disputes with a subsidiary of a multinational corporation[6] or gathering evidence in patent infringement cases.[7]

This paper addresses the legal situation in international proceedings before Swiss state courts as well as arbitration tribunals situated in Switzerland.[8],[9] Hence, the seat, domicile or habitual residence of at least one party is not in Switzerland.[10]

II. US-Discovery based on 28 U.S.C. (United States Code) § 1782

A. Pre-Trial Discovery

The US-American civil procedure is initiated by *pleadings* (claim and counterclaim).[11] The so-called (pre-trial) discovery procedure (Rule 26 ff. F.R.C.P. [Federal Rules of Civil Procedure]) follows.[12] Discovery does not take place before the court – even though it is formally conducted by the court. Rather this process occurs between the parties.[13]

Upon completion of the discovery procedure, the main hearing takes place (often a *trial by jury*, Rule 38 F.R.C.P.), during which the witnesses are

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6 *Marcel Fleischmann, and Eduardo V. Mortari, Jr.* v. *McDonald's Corp.*, 466 F. Supp. 2d 1020 (N.D. Ill. 2006).

7 *In the Matter of the Application of THE PROCTER & GAMBLE COMPANY*, 334 F. Supp. 2d 1112 (E. D. Wis. 2004).

8 In other words this article is not concerned with a proceeding in the US involving foreign parties and the issues of the taking of evidence abroad (Hague Evidence Convention or Federal Rules of Civil Procedure), cf. thereto e.g. TRITTMANN/LEITZEN, IPRax 2003 7, 7 ff.

9 It must be clarified that the internationality of the proceeding is not a prerequisite for the application of the US-American evidence procedure in regard to legal assistance.

10 It is largely acknowledged, despite being controversial, that the procedural law of evidence is governed by the lex fori, i.e. (as yet) Cantonal procedural law (Cf. only VOLKEN, 65 f.; WALTER, 293; VOGEL/SPÜHLER, 271 f.; LEIPOLD, 25; NIGG, 24 ff.; JAECKEL, 27 f.; in contrast critically SCHWANDER, in: Internationales Zivilprozess- und Verfahrensrecht III, 2003, 88; RIXEN, 40 ff.; KOBERG, 97 f.; MEIER, 35). However for international arbitration proceedings in terms of § 176 ff. CPIL (Swiss Code on Private International Law) the law of evidence is primarily determined by the procedural law chosen by the parties (§ 182 Para. 1 CPIL), it the parties have not regulated the procedure, by the procedure fixed by the arbitral tribunal (§ 182 Para. 2 CPIL).

11 Rule 3 in conjunction with Rule 8(a) Federal Rules of Civil Procedure (F.R.C.P.); available on http://www.law.cornell.edu/rules/frcp/index.html, visited on 27 October 2008; s. VOLKEN, 127 ff.

12 RIECKERS, RIW 2005 19, 19 f.; ESCHENFELDER, IPRax 2006 89, 90 f.

13 This can lead to so-called *fishing-expeditions* where the taking of evidence is used to gain access to information without having prior specific indications as to subject matter or person (FCD [Federal Court Decision] 125 II 65, 73 f.).

interrogated (Rule 43 F.R.C.P.) and evidence is presented. The procedure of taking evidence before Federal courts is regulated by the *Federal Rules of Evidence*.[14]

In Switzerland, the Cantonal Codes of Civil Procedure have not integrated a comparable procedure, even if certain analogies to preliminary discovery procedures, such as the preservation of evidence, can be identified (cf. e.g. Code of Civil Procedure of the Canton of Zurich [ZPO-ZH] 231 ff.). Article 155 Para. 1 lit. b of the Draft of the Swiss Code of Civil Procedure (E ZPO-CH 2006)[15] provides that courts may already consider evidence before pending of an action, if the petitioning party credibly demonstrates an interest worthy of protection. According to the legislative materials, the evaluation of the odds of the lawsuit constitutes such an interest.[16]

B. Overview of 28 U.S.C. § 1782

28 U.S.C. § 1782 (*Assistance to Foreign and International Tribunals and to Litigants before such Tribunals*) aims to offer foreign and international tribunals as well as parties efficient access to the discovery procedure.[17] By decree, the responsible (Federal) District Court can order persons or entities to testify or to produce documents, which serve as evidence in foreign proceedings.

Such an order requires that the obligated person resides or is found in the jurisdiction of the District Court; that the discovery is for use in a proceeding before a foreign tribunal; and an application is made by a foreign or international tribunal or any interested person.[18] If these statutory

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[14] Available on http://www.law.cornell.edu/rules/fre/index.html, visited on 27 October 2008.

[15] Draft of the Swiss Code of Civil Procedure (E ZPO-CH 2006), version of the Federal Council of Switzerland of 28 June 2006, BBl 2006, 7413 ff.

[16] Message of the Federal Council of Switzerland on the Draft of the Swiss Code of Civil Procedure of 28 June 2006, BBl 2006, 7221, 7315.

[17] From this it follows that the discovery request is to be granted in case of doubt, cf. *In re Bayer AG*, 146 F. 3d 188, 195 (3d Cir. 1998).

[18] 28 U.S.C. § 1782(a): "The District Court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal (…). The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person (…). To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance to the Federal Rules of Civil Procedure (…). A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege"; CHUKWUMERIJE, 37 Geo. Wash. Int'l L. Rev. 649, 660 ff. (2005); FELLAS, Arb. Int'l 23 (2007), 379, 382 ff.

requirements are fulfilled, then the tribunal has the discretion to grant legal aid pursuant to 28 U.S.C. § 1782.[19]

C. Requirements in Particular

1. Jurisdiction of District Court

The person ordered to give his testimony or statement or to produce documents must reside or be found in the district of the District Court.

In general this requirement is easily satisfied. On one hand, a person can have several residences.[20] On the other hand it is sufficient that a person can be *found* in the relevant district.[21] However, a purely occasional residence (e.g. for business or vacations) in the district without further points of contact is generally not sufficient.[22]

2. Discovery for Use in a Proceeding in a Foreign or International Tribunal

The second requirement is that the evidence sought must be for use in a proceeding in a foreign or international tribunal. The term *tribunal* encompasses any independent state or international civil or criminal court as well as administrative bodies, which can issue binding decisions.[23] State, interstate[24] and — sporadically — private[25] arbitration tribunals are also considered to be tribunals.

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19 *Intel Corp. v. Advanced Micro Devices*, Inc., 542 U.S. 241, 264, 124 S.Ct. 2466, 159 L.Ed. 2d 355 (2004).

20 *Santeez* v. *State Farm Ins. Co.*, 338 N.J. Super. 166, 173 f., 768 A. 2d 269 (N.J. Super. 2000).

21 *In Re Edelmann*, 295 F. 3d 171, 180 (2d Cir. 2002): It is decisive that the affected person is in the US when the order is serviced, even if the discovery order was issued beforehand.

22 *In the Matter of the Application of Igor Kolomoisky*, 2006 U.S. Dist. LEXIS 58591 (S.D. N.Y. 2006): No jurisdiction over Victor Vekselberg, for the only points of contact with New York consisted of a telephone connection in the apartment of his wife as well as a stay in January/February 2006 for ten to twelve days.

23 E.g. competition proceedings before the EU-Commission according to 28 U.S.C. § 1782, cf. *In re Application of Microsoft Corp.*, 428 F. Supp. 2d 188 (S.D. N.Y. 2006).

24 *In Re in the Matter of the Application of Oxus Gold Plc.*, 850 N.E. 2d 647, 653, 817 N.Y.S. 2d 600 (N.J. 2006), aff'd, *In Re in the Matter of the Application of Oxus Gold Plc.*, 2007 U.S. Dist. LEXIS 24061 (N.J. 2007), thereto comment by SHEPPARD, ASA Bull. 2007, 402 ff.

25 Controversial: **Disapproving** e.g. *National Broadcasting Co.* v. *Bear Stearns & Co.*, 165 F. 3d 184 (2d Cir. 1999); *In re: THE APPLICATION OF NATIONAL BROADCASTING COMPANY, INC. and NBC EUROPE, INC.*, 1998 U.S. Dist. LEXIS 385 (S.D. N.Y. 1998); **Affirmative**: *In re Application of Technostroyexport*, 853 F. Supp. 695, 697 (S.D. N.Y. 1994): Although an arbitral tribunal is a tribunal in terms of 28 U.S.C. § 1782, the application of the parties must be accompanied by a corresponding statement of approval by the arbitral tribunal (the latter requirement is probably in contradiction with the wording of § 1782); thereto FELLAS, Arb. Int'l 23 (2007), 379, 391 ff.

Contrary to its wording 28 U.S.C. § 1782 does not require that the foreign proceeding be pending at the time of application; rather it must only be in *reasonable contemplation*.[26] The applicant of a pending proceeding must not await the foreign proceeding's evidence procedure to request discovery in accordance with 28 U.S.C. § 1782.[27]

Furthermore it is not required that the evidence obtained in the discovery procedure be admitted,[28] nor that the discovery procedure be known or admissible in the foreign proceeding.[29] However, this aspect is an important criterion for the court's exercise of discretion (cf. infra II.D.).

3. Application for Discovery Order by Authorized Party

A discovery order can be made at the request of the foreign court or a *tribunal* or on application of *any interested person*. The person must not be litigant.[30] A person merely participating in the proceeding (e.g. the person notifying the authority in a competition proceeding) is considered an interested person.[31] In practice there are few applications by courts, which apparently prefer the procedure of legal assistance pursuant to the Hague Evidence Convention (Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970).[32]

The application must contain a request for discovery. Furthermore the person can merely be compelled *to give its testimony or statement or to produce a document or other thing*.[33] The courts are not in agreement about whether 28 U.S.C. § 1782 can be applied extraterritorially to documents

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26 *In re: Application of Michael Wilson & Partners*, Ltd., 2007 U.S. Dist. LEXIS 54624 (Colo. 2007).

27 *In re the Application of SERVICIO PAN AMERICANO DE PROTECCION, C.A.*, 354 F. Supp. 2d 269 (S.D. N.Y. 2004).

28 *Marcel Fleischmann, and Eduardo V. Mortari, Jr.* v. *McDonald's Corp.*, 466 F. Supp. 2d 1020, 1026 (N.D. Ill. 2006).

29 So-called requirement of *discoverability*: *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 f., 124 S.Ct. 2466, 159 L.Ed. 2d 355 (2004).

30 *In Re in the Matter of the Application of Oxus Gold Plc*, 850 N.E. 2d 647, 653, 817 N.Y.S. 2d 600 (N.J. 2006).

31 *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 255, 124 S.Ct. 2466, 159 L.Ed. 2d 355 (2004).

32 For an exception cf. *In Re: Patricio Clerici*, 481 F. 3d 1324 (11th Cir. 2007).

33 Cf. Rule 26(a)(5) in conjunction with Rule 30, 31, 34 F.R.C.P.

which are not located in the US.[34] The modalities of discovery are governed by Rules 26-37 F.R.C.P.[35]

D. Discretion of the District Court to Grant Discovery

If the statutory requirements are met, the District Courts have broad discretion to issue a discovery order. In its groundbreaking decision *Intel* v. *Advanced Micro Devices, Inc*. the U.S. Supreme Court established the following four criteria as guidelines for the courts:[36] It must consider if the person compelled to give testimony respectively to produce documents is party to the foreign proceedings. In this case discovery is generally not granted because the foreign court already has the authority to order the necessary measures regarding gathering of evidence.[37] The discovery results have to be useful in the foreign proceeding. If the foreign authority objects discovery the application is regularly denied.[38] The court shall further consider whether foreign evidence-gathering restrictions or other policies are circumvented by a request under 28 U.S.C. § 1782.[39,40] The court must finally consider whether the request contains unduly intrusive or burdensome demands. Instead of dismissing the request altogether on the basis of unacceptability, the court may grant relief under certain conditions (e.g. compensation of the witness or reimbursement for copying costs; concealment of the witness' identity etc.).[41]

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[34] **Affirmative**: *In re Application of Gemeinshcaftspraxis Dr. Med. Schottdorf*, 2006 U.S. Dist. LEXIS 94161 (S.D. N.Y. 2006); **disapproving**: *Marcel Fleischmann, and Eduardo V. Mortari, Jr.* v. *McDonald's Corp.*, 466 F. Supp. 2d 1020, 1032 (N.D. Ill. 2006).

[35] *In Re: Patricio Clerici*, 481 F. 3d 1324, 1335 (11th Cir. 2007); to methods of *Discovery* cf. GÖTZ, SJZ 2006 269, 270 f.

[36] *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 262 ff., 124 S.Ct. 2466, 159 L.Ed. 2d 355 (2004); cf. thereto GÖTZ, SJZ 2006 269, 272 ff.; RIECKERS, RIW 2005 19, 20 ff.; out of comprehensive US-American literature s. e.g. PATEL, 18 Fla. J. Int'l L. 301, 302 ff. (2006).

[37] *In re Application of Digitechnic*, 2007 U.S. Dist. LEXIS 33708 (W.D. Wash. 2007).

[38] *In re Application of Microsoft Corp.*, 428 F. Supp. 2d 188, 193 (S.D. N.Y. 2006) respectively *In re Application of Microsoft Corp.*, 2006 U.S. Dist. LEXIS 32577 (Mass. 2006) respectively *In re: Rubber Chemicals Antitrust Litigation*, 486 F. Supp. 2d 1078, 1081 (N.D. Cal. 2007).

[39] *In re Application of Digitechnic*, 2007 U.S. Dist. LEXIS 33708 (W.D. Wash. 2007).

[40] The mere fact that US-American discovery methods are more liberal than the foreign provisions does not speak against granting of discovery*; In re the Application of SERVICIO PAN AMERICANO DE PROTECCION, C.A.*, 354 F. Supp. 2d 269, 274 (S.D. N.Y. 2004).

[41] *In re: Application of Elisabeth Kang* v. *Nova Vision, Inc. et al.*, 2007 U.S. Dist. LEXIS 46135 (S.D. Fla. 2007).

III. Utilization of Evidence Obtained in Discovery Procedure in Switzerland

The first part of this article focused on the possibilities and limitations of legal assistance pursuant to 28 U.S.C. § 1782. This chapter shall discuss if or if not the evidence obtained in discovery procedures may be brought into Swiss civil respectively arbitral proceedings and if so, how. Beforehand it must be clarified that the issue of using evidence from discovery only becomes relevant when legal assistance is sought by a party individually. If the (arbitral) court itself has initiated the proceeding or it did so at the request of one or both parties, or if it agrees to the approach by the applicant, the evidence can undoubtedly be used in Switzerland.

A. Procedure before a State Court

1. In General

The main question is how to introduce the evidence (testimony respectively documents) obtained in discovery into the proceeding. The Cantonal Civil Procedure Laws as well as § 165 Para. 1 E ZPO-CH 2006 list the admissible evidence in an exhaustive way.[42] Therefore the evidence gathered based on discovery must be subsumable under one of the statutorily acknowledged categories. Evidence which the applicable procedural law excludes in an explicit or implied manner may not be utilized.[43]

Documents obtained in the discovery procedure do not pose any problems in this respect and may be admitted as documentary evidence. As for the deposition of a person it must be examined whether it can be introduced into the proceeding as testimony or as a document (record of witness' testimony).

2. Deposition of a Person as Testimonial Evidence

In principle, those witnesses summoned by the court must appear in person and are interrogated by the court.[44] The interrogation of witnesses abroad generally is conducted by means of legal assistance (Hague Evidence

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42 S. VOGEL/SPÜHLER, 275; Message of the Federal Council of Switzerland on the Draft of the Swiss Code of Civil Procedure of 28 June 2006, BBl 2006, 7221, 7320.

43 VOGEL/SPÜHLER, 275.

44 Cf. e.g. § 152, 155, 162, 164-167 ZPO-ZH.

Convention, cf. infra III.C.1.).[45] If the US-American deposition initiated by a party was not ordered by the (Swiss) court, the court declines to recognize its content. Therefore the deposition cannot be introduced as testimonial evidence.

Certain procedural laws (e.g. § 168 ZPO-ZH) allow written statements of private persons instead of formal examinations of witnesses under exceptional circumstances.[46] It is controversial whether the testimony obtained by the parties is admissible.[47] In any event questions of great importance may not be decided upon based on statements pursuant to § 168 ZPO-ZH.[48] Hence, the deposition can generally not be utilized as written statement of a private person in terms of § 168 ZPO-ZH (and similar provisions).

3. Deposition as Documentary Evidence

It is questionable whether the deposition (respectively the verbatim record) may be regarded as documentary evidence. All documents such as writs, drawings, photos, films, sound recordings, electronic datasets and the like apt of proving facts relevant in law are considered as documents (e.g. § 174 E ZPO-CH 2006).[49] The quality as evidence is to be evaluated abstractly. This results in a broad notion of documents because in principle every document records or describes something. It is not a requirement that the document must serve as evidence.[50]

A verbatim deposition is classified as documentary evidence.[51] This special form of testimonial document contains statements from a proceeding induced by a (foreign) court and recorded by a court reporter word-for-word. This can be compared to the situation where documents from a prior criminal proceeding are used in the civil proceedings. These files prove that the

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45 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 (SR 0.274.132); 45 member states to this Convention as of October 2008 (cf. http://www.hcch.net, visited on 27 October 2008); thereto VOLKEN, 93 ff.; WALTER, 341 ff.

46 Likewise § 187 Para. 2 E ZPO-CH 2006, thereto message of the Federal Council of Switzerland on the Draft document of the Swiss Code of Civil Procedure of 28 June 2006, BBl 2006, 7221, 7325 f.

47 Cf. FRANK/STRÄULI/MESSMER, § 168, N. 2.

48 Court of Cassation of Zurich, ZR 2003 65.

49 According to VOGEL/SPÜHLER, 277, the definition of a document is not based on whether the document serves as evidence or not.

50 Likewise message of the Federal Council of Switzerland on the Draft document of the Swiss Code of Civil Procedure of 28 June 2006, BBl 2006, 7221, 7322.

51 Different view VOGEL/SPÜHLER, 277 (witness statements are generally not admissible); restrictive GULDENER, 195 (affirmative VOLKEN, 73).

respective statements were indeed made.[52] Thereby the deposition of a witness can be qualified as documentary evidence (to the assessment of evidence cf. infra III.A.4.).[53]

4. Assessment of Proof

Ultimately, the court has to decide on the admissibility of the evidence presented by the parties. It assesses the evidence with free discretion (cf. e.g. § 148 ZPO-ZH; § 154 E ZPO-CH 2006). This concept of free assessment also implies that simplified forms of evidence are admissible.[54] The free consideration of evidence requires the evidence to have been gathered in a lawful evidence procedure.[55] In the international context this means that the statutory provisions of either the state requesting or granting legal assistance have to be met.[56]

The pre-trial discovery procedure carried out pursuant to the F.R.C.P. is lawful even if the deposition of the witness by well-trained US-American lawyers reaches an intensity (as regards content and time) which is unknown to Swiss courts. The F.R.C.P. guarantee the impartiality of the interrogation and the protection of the deponent. Moreover the parties in Swiss evidence proceedings can comment on the result and raise all objections, including those that they would be barred from by Rule 32(d) F.R.C.P.

With respect to the consideration of evidence, the court will take into account that it cannot assess the witness' credibility based on the testimonial record to the same extent as it could during the direct examination of witnesses. This may result in a reduced value of evidence of the deposition.[57] However, the principle of directness of the deposition of a witness does not apply without restrictions. For instance the court can delegate the taking of evidence to one or more of its members pursuant to § 155 Para. 1 E ZPO-CH 2006. Further the international context has to be considered as well: When a foreign court hears the witness' testimony under the Hague Evidence Convention the Swiss court must rely on the perceptions of the foreign court.[58]

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[52] Cf. e.g. § 154 Para. 1 Judicature Law of Zurich (GVG-ZH), thereto HAUSER/SCHWERI, § 154, N. 1 ff.; FRANK/STRÄULI/MESSMER, § 140, N. 13: The consultation of documents serves the purpose of establishing the truth as well as the efficiency of proceedings.

[53] Likewise for German law ESCHENFELDER, RIW 2006 443, 448.

[54] VOGEL/SPÜHLER, 266.

[55] FRANK/STRÄULI/MESSMER, § 148, N. 2.

[56] E.g. § 9 Hague Evidence Convention, thereto WALTER, 342 f.

[57] ESCHENFELDER, RIW 2006 443, 448.

[58] It can be alternatively argued that the court can use the evidence in analogy to § 25 CPIL: Even though there is no decision in terms of § 25 CPIL, evidence was taken, i.e. there is "not nothing".

B. Procedure before an International Arbitral Tribunal

1. Applicable Procedural Provisions

Only few provisions of § 176 ff. CPIL concern the evidence procedure. The parties may directly or by reference to rules of arbitration regulate the arbitral procedure; they may also subject the procedure to the procedural law of their choice (§ 182 Para. 1 CPIL). If the parties have not regulated the procedure, it shall be fixed by the arbitral tribunal (§ 182 Para. 2 CPIL). In any case the arbitral tribunal must ensure that the right to be heard be respected in an adversarial procedure (§ 182 Para. 3 CPIL); this also includes the right to evidence.[59]

Several rules of arbitration common in practice contain only brief, incomplete rules of evidence, which do not address the question at hand.[60] This may be due to the fact that the *IBA Rules on the Taking of Evidence in International Commercial Arbitration* (1999) (IBA-Rules) have become the standard for the taking of evidence in international arbitration. On one hand these rules apply when chosen by the parties, on the other hand they are used as subsidiary rules of the evidence procedure in terms of § 182 Para. 2 CPIL. Moreover it is noteworthy that most of the procedural orders allow for the possibility of a pre-hearing discovery.[61]

2. Taking of Evidence by the Arbitral Tribunal

According to § 184 Para. 1 CPIL, the arbitral tribunal shall take the evidence itself, i.e. it may not delegate the gathering of proof to the parties or to third parties.[62] It is questionable whether this provision conflicts with the taking of evidence pursuant to 28 U.S.C. § 1782, for in this case the witness is (generally) interviewed by the lawyer of a party and not by the arbitral tribunal.

In contrast to the state court, the arbitral tribunal does not possess public authority, which is why uncooperative witnesses cannot be forced to appear before the tribunal.[63] Therefore, a request for assistance must be made

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59 Thereto MÜLLER, 99.

60 § 20 f. ICC-Rules; § 24 f., 27 UNCITRAL Model Law-Rules; § 24 f., 27 Swiss-Rules; § 19-21 LCIA-Rules; § 27 f. DIS-SchiedsO; § 21-23 SIAC-Rules; cf. overview in O'MALLEY/CONWAY, 18 Transnat'l Law. 371, 373 ff. (2005); for law of evidence in international arbitral proceedings in general REDFERN/HUNTER, § 6-68 ff.

61 BERNINI, in: The Leading Arbitrators' Guide to International Arbitration, 2004, 269, 300 ff.

62 BERGER/KELLERHALS, N. 1197.

63 Cf. O'MALLEY/CONWAY, 18 Transnat'l Law. 371, 375 ff. (2005); REDFERN/HUNTER, § 6-73; the term "third party" may possibly include subsidiaries of a party, cf. *Lonrho v. Shell Petroleum*, [1980] 1 W.L.R. 627 (HL).

to the state judge at the seat of the tribunal (§ 184 Para. 2 CPIL).[64] If the witness or the sought-after document is not located in the respective Cantonal court's jurisdiction, it (i.e. the state court) must initiate a procedure of legal assistance.[65] The arbitral tribunal cannot resort directly to legal aid pursuant to the Hague Evidence Convention.

Thus the (mandatory) obligation of the arbitral tribunal to take evidence itself, does not in principal conflict with the gathering of evidence by way of legal assistance.[66] Therefore it must be admissible for an arbitral tribunal to make use of the „direct" legal assistance pursuant to 28 U.S.C. § 1782, rather than taking the „indirect" path via Cantonal court. This also results from § 3 (8) IBA-Rules (documents in possession of a third party) respectively from § 4 (10) IBA-Rules (witness who will not testify voluntarily), which empowers the arbitral tribunal to take all available legal measures upon request of a party in order to initiate the production of documents by the third party respectively to obtain the testimony of the uncooperative witness.[67]

3. Discovery Initiated by a Party Pursuant to 28 U.S.C. § 1782

In my opinion § 3 (8) respectively § 4 (10) IBA-Rules do not exclude the possibility for one party to apply for deposition respectively for production of documents pursuant to 28 U.S.C. § 1782 and to then introduce

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64 WIRTH/HOFFMANN-NOWOTNY, SchiedsVZ, 66, 71; as a result e.g. also the US-American Federal Arbitration Act (9 U.S.C. § 7); different view LALIVE/POUDRET/REYMOND, § 184 N. 6 (Arbitral tribunal can directly apply to the Federal Office of Justice to forward the request for judicial assistance).

65 BERGER/KELLERHALS, N. 1213, 1251; VOLKEN, in: ZK CPIL, § 184 N. 22 f.; SCHNEIDER, in: BSK CPIL, § 184 N. 63; WIRTH/HOFFMANN-NOWOTNY, SchiedsVZ, 66, 70, rightly point out that this constellation concerns the assistance of the respective state court (requested to assist an arbitral procedure) by way of legal assistance in examination of the witness.

66 In contrast critically FELLAS, Arb. Int'l 23 (2007), 379, 401 ff., who wishes to grant the arbitral tribunal authority over the procedure of evidence (including the possibility of discovery) – subject to a different arrangement by the parties.

67 **§ 3 (8) IBA-Rules**: "If a Party wishes to obtain the production of documents from a person or organization who is not a Party to the arbitration and from whom the Party cannot obtain the documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested documents. The Party shall identify the documents in sufficient detail and state why such documents are relevant and material to the outcome of the case. The Arbitral Tribunal shall decide on this request and shall take the necessary steps if in its discretion it determines that the documents would be relevant and material"; likewise **§ 4 (10) IBA-Rules**: "If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person. The Party shall identify the intended witness, shall describe the subjects on which the witness' testimony is sought and shall state why such subjects are relevant and material to the outcome of the case. The Arbitral Tribunal shall decide on this request and shall take the necessary steps if in its discretion it determines that the testimony of that witness would be relevant and material".

the evidence into arbitral proceedings as a form of a witness statement.[68] Contrary to § 184 Para. 2 CPIL the request can be made without the involvement of the arbitral tribunal.[69]

Caution is recommended in regard to evidence obtained without the necessary specifications in the request for evidence (fishing-expedition). According to § 3 (8) IBA-Rules a party shall identify the requested documents «in sufficient detail» and state why such documents are relevant and material to the outcome of the case. If the request made pursuant to 28 U.S.C. § 1782 does not meet this standard the corresponding evidence is to be excluded by the arbitral tribunal according to § 9 (1) respectively (2)(g) IBA-Rules.[70] Subject to this the relevant evidence presented in due time and form[71] pursuant to 28 U.S.C. § 1782 shall be admitted.

C. Possible Obstacles to Usefulness of Proof

In the following it is to be examined whether the Hague Evidence Convention contains a possible prohibition of pre-trial establishment of contact with witnesses and whether it is against the Swiss *ordre public* to use evidence obtained in the discovery procedure.

1. Exclusive Application of the Hague Evidence Convention

Evidence located outside of the jurisdiction of the Swiss court can only be obtained through legal assistance.[72] Both Switzerland and the US are member states to the Hague Evidence Convention which offers two versions for the taking of evidence. Either the responsible US-American court takes evidence upon request by the Swiss court (§ 2 ff., § 10 Hague Evidence Convention) or the taking of evidence occurs by diplomatic or consular representation, respectively by persons specially assigned to interrogate witnesses.[73]

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68 To the practical approach s. FELLAS, Arb. Int'l 23 (2007), 379, 387 ff.

69 FELLAS, Arb. Int'l 23 (2007), 379, 385; to § 184 cf. LALIVE/POUDRET/REYMOND, § 184 N. 9.

70 **§ 9 (1) IBA-Rules**: "The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence"; **§ 9 (2)(g) IBA-Rules**: "The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any document (…) , statement, oral testimony or inspection for (…) considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling"; to sufficient certainty of a discovery request s. BROWER/SHARPE, in: The Leading Arbitrators' Guide to International Arbitration, 2004, 307, 316 ff.

71 FCD 106 II 170, 171.

72 The procedure to be observed by arbitral courts cf. supra III.B.2.

73 VOGEL/SPÜHLER, 272 f.

The question is whether the Hague Evidence Convention is exclusively applicable between Switzerland and the US. This would suggest that parties to a Swiss court proceeding are excluded from legal assistance pursuant to 28 U.S.C. § 1782. Most US-American Federal and State courts grant legal assistance according to the provisions of their own law (especially discovery according to the applicable rules, respectively the F.R.C.P.)[74] parallel to the Hague Evidence Convention. Switzerland has issued a statement to § 1 Hague Evidence Convention in which it makes clear that it regards the Convention to be applicable exclusively, respectively at least paramount amongst the member states. Thus the approach of the member states is non-uniform and there is no court decision on this question.[75]

One of the aims of the Hague Evidence Convention is to facilitate the obtaining of evidence abroad. This can be seen, inter alia, in the fact that a member state may admit procedures pursuant to its own law other than those provided for by the Hague Evidence Convention (§ 27 (c) Hague Evidence Convention).[76] Yet if the Hague Evidence Convention itself allows for alternatives to the procedures designated in the convention it does not seem clear why parties should not be permitted to make use of the discovery procedure pursuant to 28 U.S.C. § 1782. The Hague Evidence Convention is exclusively directed at judicial authorities, which is why the use of 28 U.S.C. § 1782 by parties does not constitute a circumvention of the convention.

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74 Elementary: *Société Nationale industrielle Aerospatiale et al.* v. *United States District Court for the Southern District of Iowa*, 482 U.S. 522, 533 ff., 107 S. Ct. 2542, 96 L. Ed. 2d 461, 1987 U.S. LEXIS 2615 (1987), cf. thereto VOLKEN, 99 ff.; TRITTMANN/LEITZEN, IPRax 2003 7, 8 f.; *Promotional Containers, Inc.* v. *Aztec Concrete Accessories Inc.*, 2006 U.S. Dist. LEXIS 16322 (E. D. KY 2006): There is no uniform practice among the state courts: cf. *Husa* v. *Laboratoires Servier SA*, 326 N.J. Super. 150, 156, 740 A.2d 1092 (Sup. Ct. NJ, App. Div. 1999): "We are persuaded that the Convention should be utilized unless it is demonstrated that its use will substantially impair the search for truth, which is at the heart of all litigation, or will cause unduly prejudicial delay"; no precedence of the Hague Evidence Convention by contrast in: *American Home Insurance Co. v. Société Commercial Toutelectric*, 104 Cal. App. 4th 406; 128 Cal. Rptr. 2d 430 (C.A. 2002); *Bank of Tokyo-Mitsubishi, Ltd., New York Branch* v. *Kvaerner a.s. et al.*, 175 Misc. 2d 408; 671 N.Y.S.2d 902 (Sup. Ct. 1998).

75 Exclusive application of the Hague Evidence Convention: Germany, Spain; voluntary application: probably France (cf. CA de Versailles 9 April 1993, publ. on http://www.hcch.net; Hong Kong; cf. for responses of the member states to a questionnaire issued by the Permanent Bureau of the Hague Conference: http://www.hcch.net).

76 VOLKEN, 137 f.

2. Prohibition of Pre-Trial Contacting of Witnesses

a) In General

Swiss law does not address the question whether or not a lawyer may contact a witness before the trial.[77] Neither § 12 BGFA (Swiss Lawyer's Law)[78] nor § 7 of the Swiss Bar Association Guidelines on Code of Professional Conduct of 10 June 2005 forbid a pre-trial contact in principle; simply the manipulation of or tampering with witnesses is barred.[79] There exists no precedent by the Supreme Court; yet there is relatively comprehensive Cantonal case law.

Contacting a potential witness is not generally prohibited.[80] However, such contact may only take place exceptionally, due to its inherent risk of tampering or manipulation.[81] Therefore, it is to be born in mind that when contacting a witness even the appearance of tampering or manipulation must be avoided.[82] The concrete circumstances of the individual case are decisive.[83] An establishment of contact may be necessary in order to evaluate whether a witness can testify on certain facts[84] or in order to decide whether certain procedural steps must be taken.[85] A written witness statement, as long as the witness wrote it itself, is admissible.[86]

b) Interrogation of Witnesses in Pre-Trial Discovery Procedure

In the light of these principles it shall be examined whether the deposition in the pre-trial discovery procedure violates the prohibition of tampering with witnesses. There seems to be no risk of manipulating witnesses and of hiding the truth in the discovery procedure: the procedure is

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77 On the whole NATER, SJZ 2006 256, 256 ff.

78 Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (BGFA) of 23 June 2000 (Status of 14. November 2006), SR 935.61.

79 § 7 Swiss Bar Association Guidelines ("Contact with witnesses") provides: "Lawyers must refrain from influencing witnesses and experts in any way, subject to specific rules concerning arbitral proceedings as well as proceedings before supra-national courts."; NATER, SJZ 2006 256, 257.

80 Supervisory Commission for Attorneys-at-law ZH, ZR 1982 102, 103 and ZR 1996 131.

81 Bar Association SG, SGGVP 1994 150, 151.

82 Bar Association, SG, SGGVP 1994 150, 151; Supervisory Commission for Attorneys-at-law ZH, ZR 1982 102, 103; Higher Court TG, RBOG 1995 205, 206 f.

83 Bar Association SG, SGGVP 1994 150, 151; Supervisory Commission for Attorneys-at-law ZH, ZR 1982 102, 103; Supervisory Commission for Attorneys-at-law BS, BJM 1991 163.

84 Bar Association SG, SGGVP 1994 150, 151; NATER, SJZ 2006 256, 258.

85 Supervisory Commission for Attorneys-at-law ZH, ZR 1982 102, 103; ZR 1955 364, ZR 1963 12 (commencement of proceedings); ZR 1963 12 (allegation); ZR 1949 272 (status of motion to admit evidence; undertaking of a significant procedural act); Court of Cassation of Zurich, ZR 1983 172 (filing or withdrawal of legal remedies).

86 Supervisory Commission for Attorneys-at-law ZH, ZR 1982 102, 103.

statutorily regulated, a court must grant discovery and the counter-party may either be present itself or be represented (cf. infra III.C.3.).[87] Thus there is no prohibited pre-trial contact with a witness if the witness gives a statement within the deposition. Moreover there is no reason to diminish the value of deposition merely based on the pre-trial contact of a witness.[88]

3. Violation of the *Ordre Public*

A foreign decision will inter alia not be recognized in Switzerland if such recognition would be manifestly incompatible with the Swiss *ordre public* (§ 27 Para. 1 CPIL). The foreign decision will likewise not be recognized if it was rendered in violation of fundamental principles of Swiss procedural law (§ 27 Para. 2 lit. b CPIL). Indeed the issue of utilization of evidence obtained abroad does not concern the recognition of a decision. Yet comparable interests are affected in the matter which is why an application along the lines of § 27 CPIL is justified. It follows that the minimum requirements of § 29 Para. 2 of the Swiss Federal Constitution (right to be heard) respectively of § 6 Para. 3 lit. d of the European Convention on Human Rights (right to examine or have examined witnesses against him, cf. also § 150 I E ZPO-CH 2006) must be met.[89]

This means that the applicant must inform the other party about the deposition in time so it has the opportunity: a) to attend the deposition, b) to interview the witness and c) to object to questions by the applicant that it regards as inadmissible. The deposition must either be literally recorded by an independent qualified person or it must be ensured in another way (e.g. video recordings) that the statements are authentic. The witness must be able to correct or amend the record and the latter must be signed by him as well as by the recorder. These requirements are fulfilled by the F.R.C.P. regulating the deposition.[90]

Each particular case must be examined in the light of whether the evidence obtained is in violation of the prohibition of obtaining evidence by exploratory questioning in the pre-trial discovery procedure.[91] Requests for

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87 According to DAMASKA, 45 Am. J. Comp. L. 839, 847, "a lawyer-orchestrated system of proof-taking cannot be effective without allowing counsel to contact and interview potential witnesses".

88 Supervisory Commission for Attorneys-at-law BS, BJM 1991 163; similar Higher Court TG, RBOG 1995 205, 206; Supervisory Commission for Attorneys-at-law ZH, ZR 1996 131, 132.

89 Cf. NIGG, 178 ff.; to the right to evidence in general s. KOFMEL, 15 ff.

90 Cf. in detail Rule 30 F.R.C.P.

91 It is noteworthy that Switzerland does not categorically object to pre-trial discovery as such in regard to letters of request. The reservation to § 23 Hague Evidence Convention (Letters of request for the purpose of obtaining "pre-trial Discovery of documents") is limited.

discovery may not constitute fishing-expeditions.[92] The request for the deposition must therefore be sufficiently substantiated. § 23 Hague Evidence Convention can be helpful in this context. It provides that for a pre-trial discovery request a direct and necessary relation to the underlying proceeding must be given and a person may not be requested to disclose which documents concerning the legal dispute are in its custody. Furthermore, it must not be demanded that the person present documents other than those specified in the request, which presumably are in its custody. Finally, the parties' interests worthy of protection are to be respected.

Subject to the prohibition of obtaining evidence by exploratory questioning the pre-trial discovery neither infringes the substantive nor the procedural Swiss *ordre public*. In this context it is worth noting that the US-American discovery rules have been tightened in the last five to ten years and the role of the court has been strengthened. The risk of inadmissible fishing-expeditions has not completely been eliminated, yet it has at least been constrained.[93]

IV. Summary

Under 28 U.S.C. § 1782, a US District Court can order a person to give testimony or to produce a document or other thing for use in a foreign procedure. This person must reside or be found in the district of said court. The request must either be made by the tribunal or by an interested person. If the statutory requirements are satisfied the court has the discretion to grant the request. It must take into account whether the person carrying the burden of proof is beyond the foreign court's jurisdiction, whether the result of discovery is utilizable, whether foreign provisions on evidence are being circumvented and whether discovery is unreasonably burdensome.

The evidence obtained in the discovery procedure is utilizable in the procedure of evidence of a state court as certificate of evidence. International arbitral tribunals seated in Switzerland respectively the persons involved in the arbitral proceeding may also make use of the discovery procedure pursuant to 28 U.S.C. § 1782. The relevant evidence presented in due time and form shall be admissible in arbitral proceedings.

The Hague Evidence Convention is not contrary to the application of 28 U.S.C. § 1782. Clearly, witness interrogation is not an inadmissible pre-

92 FCD 132 III 291, 295 ff.; all about the same VOLKEN, 136 f.

93 Cf. TRITTMANN/LEITZEN, IPRax 2003 7, 10 f.

trial establishment of contact. Furthermore, utilizing the evidence obtained according to 28 U.S.C. § 1782 does not infringe the material or procedural Swiss *ordre public,* subject to the disapproved fishing-expeditions.[94] In consideration of an efficient legal system the recognition of evidence obtained in the discovery procedure should be approved.[95]

Markus MÜLLER-CHEN, *The Use of Evidence Obtained in US-American Discovery in International Civil Procedure Law and Arbitration in Switzerland*

Summary

The gathering of evidence is a key element in legal proceedings. Contrary to the regulations in Switzerland, the US legal order allows for pre-trial discovery, i.e. the parties are entrusted with the collecting of evidence at an early stage. This diverging approach becomes relevant in civil proceedings or arbitral proceedings in Switzerland with a linkage to the USA. The question arises if and how parties may profit from the US-American discovery procedure. This paper wants to answer the question by examining the use of evidence gathered in US-American discovery in international proceedings before Swiss courts as well as arbitral tribunals located in Switzerland. Part one concentrates on the possibilities and limitations of legal assistance pursuant to 28 U.S.C. § 1782. In part two the utilization of evidence collected in discovery procedure in Switzerland, in the event of a party seeking legal assistance individually, is evaluated. Thereby, special consideration is given to the Hague Evidence Convention and the Swiss *ordre public*. The paper concludes with a short summary of the author's findings and rationalizations why evidence collected in discovery proceedings should be admitted.

[94] Likewise for German law ESCHENFELDER, 155 ff.

[95] ESCHENFELDER, RIW 2006 443, 446.

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