

CROSS-BORDER TAKING OF EVIDENCE
IN CIVIL AND COMMERCIAL MATTERS IN SWITZERLAND, SOUTH
AFRICA, BOTSWANA, NAMIBIA, NIGERIA, AND UGANDA

by

Prisca Christina Léonie Schleiffer Marais

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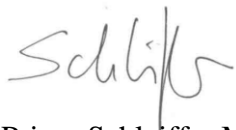
February 2013

DECLARATION

I declare that

“Cross-border Taking of Evidence in Civil and Commercial Matters in Switzerland,
South Africa, Botswana, Namibia, Nigeria, and Uganda”

is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.



Prisca Schleiffer Marais

Student no.: 4663 8059



Date

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I dedicate this thesis to my beloved parents and husband.

Prisca Schleiffer Marais

Pretoria/Zurich, February 2013

In this thesis, the masculine pronoun shall be taken to include the feminine.

SUMMARY

The thesis investigates the extent to which cross-border taking of evidence in civil and commercial matters in relation to Switzerland, South Africa, Botswana, Namibia, Nigeria, and Uganda is allowed. Such evidence-taking is not only governed by the domestic law of the state seeking evidence abroad and that of the state where the relevant means of proof are located, but also by public international law, and more specifically by the concept of sovereignty. The admissibility of the cross-border taking of evidence under public international law depends on whether or not evidence-gathering in civil litigation is regarded as a judicial act, which violates sovereignty when performed on foreign territory, or as a purely private act. In the first case, the evidentiary material has to be obtained through channels of international judicial assistance. Such assistance can either be rendered based on the basis of an international treaty, or through *courtoisie internationale*. No international judicial assistance is necessary in cases of a so-called “transfer of foreign evidence”, provided no compulsion is applied which infringes the sovereignty of the foreign state.

The thesis analyses the taking of evidence abroad based on the Hague Evidence Convention, and the Hague Procedure Convention. It further expounds how evidence located in Switzerland, Botswana, Namibia, Nigeria, and Uganda can be obtained for the benefit of civil proceedings pending abroad in the absence of any relevant international treaty. The thesis also examines under what conditions a litigant in civil proceedings in the aforementioned countries may request evidence to be taken on foreign soil. The position of cross-border taking of evidence in civil and commercial matters in the said countries is assessed, and suggestions are made on how such *status quo* may be improved. The thesis makes an attempt to establish the basic principles for a convention on evidence-taking in civil and commercial matters between South Africa, Botswana, Namibia, Nigeria, and Uganda. The development of such principles, however, is only possible once the similarities and differences in the procedure for the taking of evidence and the means of proof in the relevant laws of the aforesaid countries have been identified.

KEY WORDS

cross-border taking of evidence

public international law

sovereignty

act of state

international judicial assistance

courtoisie internationale

letter of request

commissioner

civil proceedings

means of proof

TABLE OF ABBREVIATIONS

AC	Appeal Cases (England)
AD	Appellate Division (South Africa)
All ER	All England Reports
All NLR	All Nigeria Law Reports
All SA	All South African Law Reports
BBI	Bundesblatt (Switzerland)
BCLR	Butterworths Constitutional Law Reports (South Africa)
BGE	Bundesgerichtsentscheid (Switzerland)
BLR	Botswana Law Reports
BP	Burrell's Patent Law Reports (South Africa)
Car & K	Carrington & Kirwan's Nisi Prius Reports (England)
CC	Constitutional Court (South Africa)
Cf.	Confer ("compare")
Ch	Chancery Division (England)
Ch App	Law Reports Chancery Appeals (England)
Ch D	Chancery Division (England)
Cox CC	Cox's Criminal Cases (England)
CPD	Cape Provincial Division (South Africa)
Cr App R	Criminal Appeal Reports (England)
Crim LR	Criminal Law Review (England)
CTR	Cape Times Law Reports, Cape Supreme Court (South Africa)
EA	Eastern African Law Reports
ECSLR	East-Central State of Nigeria Law Reports
EDC	Eastern Districts Court of the Cape Colony (South Africa)
EDL	Eastern Districts Local Division (South Africa)
ENLR	Eastern Nigeria Law Reports
et seq./seqq.	et sequens/sequentia ("and following")
FHCLR	Federal High Court Law Reports (Nigeria)
fn./fns.	footnote/footnotes
FSC	Selected Judgments of the Federal Supreme Court of Nigeria

H & N	Hurlstone & Norman's Exchequer Reports (England)
K & J	Kay & Johnson's Vice Chancellor's Reports (England)
KALR	Kampala Law Reports (Uganda)
KB	King's Bench Division (England)
Kotze	Kotze's Reports of the High Court of the Transvaal (South Africa)
LJQB	Law Journal, Queen's Bench (England)
LLR	Law Reports of the High Court of Lagos State (Nigeria)
LS	Loseblattsammlung (Switzerland)
LT	Law Times Reports (England)
Man & G	Manning & Granger's Common Pleas Reports (England and Wales)
n.	note
NLR	Natal Law Reports (South Africa)
NMLR	Nigeria Monthly Law Reports
NNLR	Northern Nigeria Law Reports
no.	number
NPD	Natal Provincial Division (South Africa)
NR	Namibian Law Reports
NSCC	Nigerian Supreme Court Cases
NWLR	Nigeria Weekly Law Reports
OPD	Orange Free State Provincial Division (South Africa)
P	Law Reports Probate (England)
para./paras.	paragraph/paragraphs
PCIJ	Permanent Court of International Justice
PH	Prentice-Hall Weekly Service (South Africa)
Pt.	Part
QB	Queen's Bench Reports (England)
QBD	Queen's Bench Division, Law Reports (England)
RIAA	Reports of International Arbitral Awards
Roscoe	Roscoe's Reports of the Supreme Court of the Cape Colony (South Africa)
SA	South African Law Reports

SACR	South African Criminal Law Reports
SAR	Reports of the High Court of the South African Republic
SC	Supreme Court of the Cape Colony (South Africa)/Judgments of the Supreme Court of Nigeria/Supreme Court of Namibia
SCNJ	Supreme Court of Nigeria Judgments
ser.	series
SR	Systematische Sammlung des Bundesrechts (Switzerland)/Reports of the High Court of Southern Rhodesia
SWA	Reports of the High Court of South West Africa
TH	Reports of the Witwatersrand High Court (South Africa)
TPD	Transvaal Provincial Division (South Africa)
TS	Reports of the Supreme Court of the Transvaal (South Africa)
UGCA	Uganda Court of Appeal
UGCommC	Uganda Commercial Court
UGHC	Uganda High Court
UGSC	Uganda Supreme Court
VPB	Verwaltungspraxis der Bundesbehörden (Switzerland)
WACA	Selected Judgments of the West African Court of Appeal
WNLR	Western Nigeria Law Reports
WLD	Witwatersrand Local Division (South Africa)
WLR	Weekly Law Reports (England)
WRNLR	Western Region of Nigeria Law Reports
ZR	Blätter für Zürcherische Rechtsprechung (Switzerland)

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CHAPTER 1

INTRODUCTION

I. Context of Thesis

In the course of worldwide globalisation and the facilitation of the transfer of goods, services, and persons across national borders, civil and commercial interaction between individuals or entities domiciled in different countries has gained in significance over the last few decades. The growth of cross-border relations has inevitably resulted in an increase in both international civil disputes and litigation. In the majority of such legal proceedings, courts and parties are faced with evidence located outside the state in which the lawsuit is pending.

In practice, experience in civil proceedings often demonstrates that to be right and to be proven to be right are sometimes two different things. The result of any court case depends largely on the extent to which the litigant bearing the *onus* of proof, normally the plaintiff, is able to prove the facts in dispute. Thus, the lawsuit of a plaintiff can succeed only where the evidence necessary to establish the claim is accessible to the plaintiff, even if that requires the support of the trial court. Where the relevant means of proof are located in the state of the trial court, obtaining evidence will be a purely domestic matter and generally will not cause major problems for the plaintiff. The situation is different, however, with regard to evidence situated in a foreign state. Here, the taking of evidence not only affects the jurisdiction of the trial court, but it also involves another state. In other words, the obtaining of evidence is no longer just a national affair, but it has an international impact. The following example illustrates the problems which typically arise from the cross-border taking of evidence:

A motor vehicle accident occurred in Switzerland between A, a Swiss national domiciled in Switzerland, and B, a South African residing in South Africa. A sues B in Switzerland claiming damages. B rejects A's claim alleging that the accident was A's fault. To support his allegation, B calls C, a South African national domiciled in Namibia, who was a passenger in B's car at the time of the accident, as witness. Against this background, the following questions arise: can the Swiss court examine B and C who live in South Africa and Namibia, respectively? Is the Swiss judge entitled to travel to South Africa and Namibia to question B and C? Are B and C under an obligation to cooperate with the Swiss court, in particular to attend court in Switzerland? Does the Swiss court require the involvement of any South African and Namibian

authority in order to obtain the testimony of B and C? What law governs the examination of B and C?

Given the aforesaid international impact, the cross-border taking of evidence in civil and commercial matters is not only subject to the domestic rules of the state of the trial court and the foreign state where the relevant evidence is located, but also to public international law which governs the relation between states. One of the cornerstones of public international law is the sovereignty of states which includes the right of a state to exercise functions of a state within its borders to the exclusion of other states. As will be shown in Chapter 2, the concept of sovereignty is closely intertwined with the cross-border taking of evidence and determines to what extent the latter is admissible under public international law.

In the light of the above, the trial court seeking evidence abroad does not only have to take into account its own interests, but also those of the foreign state where the relevant means of proof are located. As a result, the cross-border taking of evidence is often faced with a dilemma: on the one hand, the need of the trial court to obtain the evidence necessary to establish all the relevant facts to make a correct court ruling; on the other, the wish of the foreign state to safeguard its sovereignty, and to protect the interests of its residents against interference from the state where the trial court is situated.

II. Scope of Thesis

The thesis focuses on the cross-border taking of evidence in civil and commercial matters. It does not deal with the taking of evidence in criminal, fiscal, or administrative matters. In addition, questions related to the recognition and enforcement of judgments are excluded. The service of judicial documents abroad is, in the sense of an excursus, marginally discussed in the context of the so-called “transfer of foreign evidence”. The thesis is moreover limited to the taking of evidence in pending civil proceedings. It therefore does not address the preservation of evidence that may take place before proceedings are initiated. The thesis deals with the procedure for the taking of evidence, as well as the means of proof; however, it excludes questions regarding the admissibility and weight of evidence, as well as the burden of proof.

The thesis is confined to the cross-border-taking of evidence in civil and commercial matters in Switzerland, South Africa, Botswana, Namibia, Nigeria, and Uganda. Based on the fact that the thesis is submitted at the University of South Africa and the author is a Swiss qualified attorney at law, the choice of South Africa and Switzerland stands to reason. Moreover, Switzerland

is a good example of a civil-law country while, at least with regard to its rules on civil procedure, South Africa¹ follows the common-law tradition. The choice of Botswana, Namibia, Nigeria, and Uganda was necessitated by the lack of research material for other African countries. From a practical point of view, it would have made more sense to focus on countries of the so-called “Southern African Development Community” (“SADC”)² would have made more sense. However, the scarcity of sources dealing with the legal systems of some of the SADC countries compelled the author to let her gaze wander beyond the boundaries of the SADC and to include Nigeria and Uganda within the scope of the thesis.

Where reference is made to civil proceedings pending in Switzerland, the focus lies on the so-called “ordinary proceedings” (*ordentliches Verfahren*) before the District Court or the Commercial Court. As the name suggests, this type of proceedings usually applies in civil and commercial matters with a value in dispute higher than 30,000 Swiss Francs.³ With regard to South Africa, Botswana, Namibia, Nigeria, and Uganda, reference is made to action proceedings pending before the High Court of the particular country. This type of proceedings is most comparable to the aforesaid ordinary proceedings under Swiss law.

III. Research Methodology

Chapter 2 analyses the relation between the cross-border taking of evidence in civil and commercial matters and the public international law concept of sovereignty. The term “cross-border taking of evidence” forms the point of departure in this Chapter. It also explains the notion and the different elements of sovereignty. The Chapter proceeds to examine whether the taking of evidence constitutes a judicial act which may infringe the sovereignty of the foreign state where the evidence to be obtained is located. Since this question depends on whether it is the trial court that is, or the parties that are, in control of evidence-taking in civil proceedings, civil litigation in the common-law and civil-law traditions is outlined, and the major differences between the two systems are identified. Chapter 2 also addresses international judicial assistance in evidence-taking in civil and commercial matters. The legal basis and applicable

¹ As well as Botswana, Namibia, Nigeria, and Uganda.

² Apart from South Africa, the SADC includes not only South Africa’s immediate neighbours, namely Botswana, Lesotho, Mozambique, Namibia, Swaziland, and Zimbabwe, but also Angola, the Democratic Republic of Congo, Malawi, Madagascar, Mauritius, Seychelles, Tanzania, and Zambia. For more information on the SADC, cf. <http://www.sadc.int/about-sadc/overview/> (date of use: 26 June 2013).

³ Cf. Article 219 read in conjunction with Article 243(1) of the Swiss Civil Procedure Code of 19 December 2008, SR 272. For the (unofficial) English translation of the Swiss Civil Procedure Code, see <http://www.admin.ch/ch/e/rs/2/210.en.pdf> (date of use: 31 January 2013).

law relating to international judicial assistance, as well as the different forms of such assistance are expounded.

Chapter 3 focuses on the transfer of foreign evidence from abroad to the jurisdiction of the trial court as an alternative for such court to obtain foreign evidence compared to international judicial assistance. The main differences between these two forms of evidence-taking are analysed. The Chapter also examines whether and, if so, to what extent, a transfer of foreign evidence is limited by the sovereignty of the foreign state. It investigates whether litigants and third parties are under an obligation to cooperate with the trial court in obtaining foreign evidence, and whether the former may apply coercive measures against recalcitrant witnesses. Chapter 3 proceeds to analyse the different forms of a transfer of foreign evidence, as well as the service abroad of a respective request of the trial court.

In Chapter 4, the rules that govern cross-border taking of evidence in relation to Switzerland, South Africa, Botswana, Namibia, Nigeria, and Uganda are addressed. The discussion not only includes the domestic rules of the said countries, but also the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970, and the Convention on Civil Procedure of 1 March 1954. The *status quo* of cross-border taking of evidence in the aforementioned countries is assessed, and suggestions are made as to how the situation can be improved in these countries.

Chapter 5 deals with the means of proof and the procedure for the taking of evidence in civil proceedings pending in Switzerland, South Africa, Botswana, Namibia, Nigeria, and Uganda.

In Chapter 6, an attempt is made to generate the basic principles for a proposed convention on the cross-border taking of evidence in civil and commercial matters between South Africa, Botswana, Namibia, Nigeria, and Uganda. The most preferable method for judicial assistance in evidence-taking between the foregoing countries is identified. Suggestions are also made with regard to the main points to be considered in such a convention.

Chapter 7 summarises the major conclusions reached in the thesis.

The method of research followed with regard to chapters 1-6 is based on the study of statutes, reported case law, governmental and inter-governmental legal opinions and records, text books, law journals, monographs, and internet resources. With regard to Nigeria, it has to be mentioned that case law is reported in more than 40 different law reports, published by both official and unofficial publishers. The publication of many series of law reports, however, be they from

official or unofficial publishers, were discontinued, and in the case of some of the series after the publication of only a few volumes. As a result, access to law reports from outside Nigeria has proved difficult. Although a considerable number of series of law reports were accessible in libraries in South Africa, Botswana, and Germany, not all the different series could be reviewed. The same holds true with regard to the law reports from Uganda. Although, compared to Nigeria, the number of series of law reports published in Uganda is more limited, access from outside Uganda is restricted. In spite of these limitations and constraints, it has been possible to undertake in-depth research of the legal systems of the African countries dealt with in this thesis.

CHAPTER 2

CROSS-BORDER TAKING OF EVIDENCE IN CIVIL AND COMMERCIAL MATTERS AND SOVEREIGNTY

I. Introduction and Terminology

The extent to which the cross-border taking of evidence in civil and commercial matters is admissible under public international law is intimately connected with the sovereignty of states. Thus, this chapter focuses on the relationship between the concept of sovereignty in public international law and the cross-border taking of evidence in civil and commercial matters. The notion of “cross-border taking of evidence” forms the point of departure for this chapter. Subsequently, the concept of sovereignty is explained, and the restrictions, which result from this concept when obtaining evidence abroad, are analysed. In this context, whether the taking of evidence constitutes an act of state that interferes with the sovereignty of the foreign state where the evidentiary material is situated is examined. Finally, the chapter deals with international judicial assistance as a means to overcome the said restrictions in respect to the cross-border taking of evidence.

In the course of this thesis, the notion “trial court” is used for the court where the lawsuit, for which evidence located abroad is sought, is pending. The country, where the said evidence is situated, is referred to as “foreign state”. The term “foreign court” or “foreign authority” relates to the judicial or any other governmental body in the foreign state involved in the cross-border taking of evidence. “Foreign litigant”, “foreign third party” or “foreign witness” refers to a litigant, a third party or a witness¹ who is domiciled in the foreign state. Finally, “foreign evidence” describes evidentiary material that is located in a foreign state, or is in possession or under the control of a foreign litigant or foreign third party.

II. Cross-border Taking of Evidence

Cross-border taking of evidence is necessary where a litigant in civil proceedings pending before the trial court wishes to obtain evidence that is located in a foreign state. It goes without saying that cross-border taking of evidence occurs where the testimony of a foreign litigant or third party, or evidence that involves an immovable property or location situated in a different

¹ For the differentiation between “third parties” and “witnesses”, see fn. 51 below.

state than that of the trial court, is sought. However, what if the relevant evidence includes documents or movable property? Here, depending on where the litigant or third party controlling the documents or property is domiciled, two configurations can be distinguished: on the one hand, the case where the litigant or third party is situated in the state of the trial court, but the evidence administered by him is located abroad. On the other hand, the litigant or third party may be domiciled in a foreign state while the relevant evidence is situated either within or outside the state of the trial court.²

It is submitted that cross-border taking of evidence only occurs in the second case, that is, where the litigant or the third party controlling the evidence and the trial court are located in different states. This holds particularly true for documents, but it also applies to movable property. In many cases, the location of documents is purely accidental and can, moreover, easily be changed.³ In contrast, a change of legal residence of the litigant or third party administering the documents from one country to another is entirely more troublesome. More importantly, however, is the fact that a court order for production of documents has to be issued towards the person who is in possession or, at least, in control of the relevant documents. In other words, such an order is not aimed at the documents, but at the individual administering the documents. The emphasis thus clearly lies on the domicile of the respective person and not the location of the documents.⁴ Having said this, the situation mentioned above in which the litigant or third party, domiciled in the state of the trial court, and controlling documents which are located abroad, is therefore regarded not as a cross-border matter, but as a purely domestic issue.

III. Sovereignty

A. Concept of Sovereignty

The sovereignty of states⁵ is a core concept under public international law and is closely connected with the fundamental doctrine of the equality of states. According to the latter, each

² Cf. also Küttler A *Das Erlangen von Beweisen in den USA zur Verwertung im deutschen Zivilprozeß* 2007 128.

³ A plaintiff, for instance, keeps the relevant documents in his holiday home abroad and not at his permanent legal residence.

⁴ Cf. also Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 134; Meier AL *Die Anwendung des Haager Beweisübereinkommens in der Schweiz unter besonderer Berücksichtigung der Beweisaufnahme für U.S.-amerikanische Zivilprozesse* 1999 60 *et seq.*

⁵ See in this regard Steinberger H 'Sovereignty' in Bernhardt R (ed) *Encyclopedia of Public International Law Volume IV* 2000 500, who emphasises that "sovereignty is the most glittering and controversial notion in the history, doctrine and practice of public international law" and that the meaning of sovereignty "has oscillated throughout the history of law and of the State since medieval times".

state is independent and not subject to the power of any other state.⁶ As a result, a state has, to the exclusion of any other state, the monopoly on the exercise within its borders of the functions of a state over its affairs and subjects.⁷ Sovereignty, however, not only includes a positive right, the competence to exercise power, but also a negative or defence right against any interference from other states.⁸ Hence, it also contains the obligation of states to respect the independence of other states. As a result, sovereignty is not an absolute concept, but it is of a relative nature, as it is restricted by the sovereignty of other states. It can thus only be exercised to an extent which does not interfere with the sovereignty of another state. Consequently, the sovereignty merely exists within the confines of public international law or, put differently, the degree of sovereignty is restricted by the principles laid down in public international law.⁹ In the so-called *Island of Palmas*-case, the Permanent Court of International Justice held that the:

“(...) sovereignty (...) involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States (...).”¹⁰

B. Elements of Sovereignty

Sovereignty as a general concept includes three elements, namely, territorial sovereignty, personal sovereignty, and so-called “*facultas jurisdictionis*”.

⁶ Dahm G, Delbrück J, and Wolfrum R *Völkerrecht Band I/1: Die Grundlagen. Die Völkerrechtssubjekte* 1989 233, 236; Dahm G, Delbrück J, and Wolfrum R *Völkerrecht Band I/3* 2002 783 *et seq.*; Ipsen K *Völkerrecht* 2004 367 n. 7; Geiger R *Grundgesetz und Völkerrecht: mit Europarecht: die Bezüge des Staatsrechts zum Völkerrecht und Europarecht* 2010 281; Anand RP ‘Sovereign Equality of States in International Law’ in Académie de Droit International (ed) *Recueil des Cours: Collected Courses of the Hague Academy of International Law 1986 II* 1987 22; Steinberger H ‘Sovereignty’ in Bernhardt R (ed) *Encyclopedia of Public International Law Volume IV* 2000 515; Castro-Rial JM ‘States, Sovereign Equality’ in Bernhardt R (ed) *Encyclopedia of Public International Law Volume IV* 2000 682 *et seq.*; Kingsbury B ‘Sovereignty and Inequality’ 1998 *European Journal of International Law* 600, 603 *et seq.*; Shearer IA *Starke’s Introduction to International Law* 1994 99 *et seq.* See also Article 2(1) of the Charter of the United Nations of 26 June 1945 stating that the United Nations is based on the “sovereign equality” of states. For the text of the said Charter, cf. <http://www.un.org/en/documents/charter/index.shtml> (date of use: 31 January 2013).

⁷ Dugard J *International Law: A South African Perspective* 2011 146; Lookofsky JM and Hertz K *Transnational Litigation and Commercial Arbitration: An Analysis of American, European, and International Law* 2004 467.

⁸ Bertele J *Souveränität und Verfahrensrecht: Eine Untersuchung der aus dem Völkerrecht ableitbaren Grenzen staatlicher extraterritorialer Jurisdiktion im Verfahrensrecht* 1998 64; Dahm G, Delbrück J, and Wolfrum R *Völkerrecht Band I/3* 2002 784; Geimer R *Internationales Zivilprozessrecht* 2009 46 n. 119; Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozessrechts* 1989 34.

⁹ Dahm G, Delbrück J, and Wolfrum R *Völkerrecht Band I/1: Die Grundlagen. Die Völkerrechtssubjekte* 1989 213 *et seq.*, 215; Dahm G, Delbrück J, and Wolfrum R *Völkerrecht Band I/3* 2002 783; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 22; Oeter S ‘Souveränität – ein überholtes Konzept?’ in Cremer H-J *et al* (eds) *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger* 2002 276.

¹⁰ *Island of Palmas*-case 1928 2 RIIA 829 at 839. See also *Kaunda and Others v President of the Republic of South Africa and Others* [2004] 2 All SA 37 (T) at 48; *Abdi and Another v Minister of Home Affairs and Others* [2011] 3 All SA 117 (SCA) at 128.

1. Territorial Sovereignty

Territorial sovereignty¹¹ means the sole power of a state over its own territory. As a consequence, a state may, for instance, without interference of any other state cede a part of its territory to a third state.¹² Territorial authority is regarded as part of territorial sovereignty and stands for the state's competence to perform acts of state within its borders to the exclusion of other states. Such competence extends to all property and subjects located on the state's territory, regardless of the subjects' nationality or the reasons for their stay in that particular state (domicile or temporary residence).¹³ Conversely, the exclusivity of territorial authority precludes a state from performing acts of state on the territory of a foreign state, unless the latter gives its permission.¹⁴ In the so-called *Lotus*-case, the Permanent Court of International

¹¹ This terminology follows the German doctrine which has greatly influenced the discussion on sovereignty in continental Europe and beyond Europe's borders. This doctrine divides the so-called "*territoriale Hoheitsgewalt*" (territorial supremacy) into "*territoriale Souveränität*" (territorial sovereignty) and "*Gebietshoheit*" (territorial authority). The legal literature, however, does often not clearly distinguish between "*territoriale Souveränität*" and "*Gebietshoheit*", but also uses the former when referring to "*Gebietshoheit*". See Verdross 1949 *Ius gentium* 248, 252, who was the first legal scholar to introduce such distinction in Germany. See also Dahm G, Delbrück J, and Wolfrum R *Völkerrecht Band I/1: Die Grundlagen. Die Völkerrechtssubjekte* 1989 318; Schablenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 25; Siegrist D *Hoheitsakte auf fremdem Staatsgebiet* 1987 9; Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozessrechts* 1989 39 fn. 70; Verdross A, Simma B and Geiger R 'Territoriale Souveränität und Gebietshoheit' in 1980 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 223; Geiger R *Grundgesetz und Völkerrecht: mit Europarecht: die Bezüge des Staatsrechts zum Völkerrecht und Europarecht* 2010 233.

¹² Siegrist D *Hoheitsakte auf fremdem Staatsgebiet* 1987 9; Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozessrechts* 1989 39 fn. 70; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozess: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 20; Shaw MN *International Law* 2008 487 *et seq.* See also Dugard J *International Law: A South African Perspective* 2011 125 fn. 3 with reference to the *Island of Palmas*-case 1928 2 RIIA 829-871.

¹³ Verdross A, Simma B and Geiger R 'Territoriale Souveränität und Gebietshoheit' in 1980 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 225, 240, 243; Geimer R *Internationales Zivilprozessrecht* 2009 46 n. 119; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozess: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 20; Dahm G, Delbrück J, and Wolfrum R *Völkerrecht Band I/3* 2002 319, 793; Dixon M *Textbook on International Law* 2007 143, 146; Anand RP 'Sovereign Equality of States in International Law' in Académie de Droit International (ed) *Recueil des Cours: Collected Courses of the Hague Academy of International Law 1986 II* 1987 27 *et seq.*; Meng W 'Extraterritorial Effects of Administrative Judicial and Legislative Acts' in Bernhardt R (ed) *Encyclopedia of Public International Law Volume II* 1995 340; Torres Bernárdez S 'Territorial Sovereignty' in Bernhardt R (ed) *Encyclopedia of Public International Law Volume IV* 2000 826; Shearer IA *Starke's Introduction to International Law* 1994 144. See also *Commissioner of Taxes, Federation of Rhodesia v McFarland* [1965] 1 All SA 389 (W) at 393 *et seq.*

¹⁴ Dahm G, Delbrück J, and Wolfrum R *Völkerrecht Band I/3* 2002 792; Anand RP 'Sovereign Equality of States in International Law' in Académie de Droit International (ed) *Recueil des Cours: Collected Courses of the Hague Academy of International Law 1986 II* 1987 28; Steinberger H 'Sovereignty' in Bernhardt R (ed) *Encyclopedia of Public International Law Volume IV* 2000 516; Shaw MN *International Law* 2008 490; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozess: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 20; Schablenberger A *Der Zeuge im*

Justice described territorial sovereignty as follows:¹⁵

*“Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.”*¹⁶

In the context of cross-border taking of evidence, the question arises whether the taking of evidence for the benefit of proceedings pending before the trial court is an act of state which cannot be performed in a foreign state, unless the latter gives its permission.¹⁷

2. Personal Sovereignty

As explained earlier,¹⁸ territorial sovereignty encompasses all subjects located in a particular state, irrespective of their nationality. In contrast, personal sovereignty focuses on individuals of a specific nationality who stay, permanently or temporarily, in a foreign state. Based on personal sovereignty, a state has governmental power over those of its nationals who reside abroad.¹⁹ In the case of individuals with dual nationality, that is, the nationality of the country where they were born and the nationality of the foreign state in which they reside, it is submitted that the nationality of that state with which the person is more closely associated will prevail. This is normally the country of residence where the individual has his family and social ties.²⁰

Ausland im deutschen Zivilprozess 1996 26; Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeßrechts* 1989 39; Trittmann RA ‘Extraterritoriale Beweisaufnahmen und Souveränitätsverletzungen im deutsch-amerikanischen Rechtsverkehr’ 1989 *Archiv des Völkerrechts* 195; Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 22; VPB 65 (2001) no. 71 2; VPB 59 (1995) no. 156 consideration I; BGE 133 I 239 consideration 2.5.1.

¹⁵ *S.S. Lotus* 1927 PCIJ (ser. A) no. 10 19 *et seq.*

¹⁶ See also the *Island of Palmas*-case in 1928 2 RIIA 838, where the Permanent Court of International Justice held the following: “Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusivity of an other States, the functions of a State.”

¹⁷ Cf. para. IV.A below.

¹⁸ See para. III.B.1 above.

¹⁹ Dahm G, Delbrück J, and Wolfrum R *Völkerrecht Band I/1: Die Grundlagen. Die Völkerrechtssubjekte* 1989 216; Anand RP ‘Sovereign Equality of States in International Law’ in Académie de Droit International (ed) *Recueil des Cours: Collected Courses of the Hague Academy of International Law 1986 II* 1987 29; Meng W ‘Extraterritorial Effects of Administrative Judicial and Legislative Acts’ in Bernhardt R (ed) *Encyclopedia of Public International Law Volume II* 1995 340; Stadler A *Der Schutz des Unternehmensgeheimnisses im deutschen und US-amerikanischen Zivilprozess und im Rechtshilfeverfahren* 1989 271 *et seq.*; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 33; Torres Bernárdez S ‘Territorial Sovereignty’ in Bernhardt R (ed) *Encyclopedia of Public International Law Volume IV* 2000 829.

²⁰ Cf. also Stein T and von Buttlar C *Völkerrecht* 2012 204 n. 570 who use the term of “*effektive Staatsangehörigkeit*”, which translates literally as “effective nationality”.

In cases where an individual is domiciled outside his state of origin, the latter's personal sovereignty may come into conflict with the territorial authority of his state of residence, as the person is subject to both the personal sovereignty of his state of origin and the territorial authority of his state of residence. In the context of the cross-border taking of evidence, such conflict may, for instance, occur if an individual residing in a different country than his state of origin is requested to testify in proceedings pending in the latter state. Here, the question arises as to whether the state of origin can order its nationals domiciled abroad to give evidence in the said proceedings.²¹ The answer to this question depends on the relation between personal and territorial sovereignty. In other words, whether personal sovereignty prevails over territorial authority and *vice versa*.

3. **Facultas Jurisdictionis**

It follows from the concept of sovereignty that each state has so-called "*facultas jurisdictionis*" which includes the jurisdiction to prescribe, the jurisdiction to enforce, and the jurisdiction to adjudicate.²² The jurisdiction to prescribe refers to the power of a state to enact laws and issue rules, in other words, the state's competence to make its law applicable to a particular event. In this regard, the question arises as to whether a state can extend its laws to persons, property and acts outside its territory, or whether such extension interferes with the sovereignty of other states. The jurisdiction to enforce relates to the territorial extent to which a state is allowed to enforce its laws and to sanction their disregard,²³ while the jurisdiction to adjudicate describes the power of a state to render a decision that takes effect abroad.²⁴ Both the jurisdiction to prescribe and the jurisdiction to enforce are relevant in the context of cross-border tak-

²¹ Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 33. See further on this subject Chapter 3.

²² Dugard J *International Law: A South African Perspective* 2011 146; Kaczorowska A *Public International Law* 2010 309; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 36 *et seq.*; Stadler A *Der Schutz des Unternehmensgeheimnisses im deutschen und US-amerikanischen Zivilprozess und im Rechtshilfeverfahren* 1989 271; Geimer R *Internationales Zivilprozessrecht* 2009 182 n. 371 *et seq.*; Dahm G, Delbrück J, and Wolfrum R *Völkerrecht Band I/1: Die Grundlagen. Die Völkerrechtssubjekte* 1989 319; Schlosser P 'Extraterritoriale Rechtsdurchsetzung im Zivilprozess' in Pfister B and Will MR (eds) *Festschrift für Werner Lorenz zum siebzigsten Geburtstag* 1991 505; Shaw MN *International Law* 2008 649. Unlike Schabenberger and Stadler, Schlosser, Dahm, Delbrück and Wolfrum do not consider the *facultas jurisdictionis* as an independent element of sovereignty, but as a part of territorial authority. The question of whether or not the *facultas jurisdictionis* is regarded as a third element of sovereignty, is from a practical point of view of small importance as the *facultas jurisdictionis* is covered by sovereignty in any case.

²³ Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 37; Geimer E *Internationale Beweisaufnahme* 1998 21 *et seq.*; Dahm G, Delbrück J, and Wolfrum R *Völkerrecht Band I/1: Die Grundlagen. Die Völkerrechtssubjekte* 1989 319 with reference to the *Lotus*-case; Shaw MN *International Law* 2008 649, 650 *et seq.*

²⁴ Geimer E *Internationale Beweisaufnahme* 1998 22; Kokott J, Doehring K and Buergeth T *Grundzüge des Völkerrechts* 2003 148; Thallinger G *Grundrechte und extraterritoriale Hoheitsrechte* 2008 11 *et seq.*; Shaw MN *International Law* 2008 651.

ing of evidence, as they determine whether a state may include rules on the taking of foreign evidence in its domestic law and whether such rules can be enforced and sanctioned abroad. The same holds true for the jurisdiction to adjudicate which refers to the question of whether, and if so to what extent, a trial court can issue an order regarding evidence located abroad.²⁵

IV. Sovereignty-based Restrictions on the Cross-border Taking of Evidence

As has been noted above,²⁶ the sovereignty of a state is not absolute, but limited by the sovereignty of other states. As a result, a state is not allowed to perform any acts of state on the territory of a foreign state, since such acts interfere with the latter's sovereignty. The following two subchapters deal first with acts of state in general and then investigate whether the taking of evidence constitutes such an act.

A. Act of State

An act of state is an act performed by a governmental organ in exercise of its official authority. This includes, *inter alia*, acts performed by a police authority or a judicial body. A typical example of an act of state is the arrest of a suspect by a police officer or the holding of a court hearing by a judge.

The performance of acts of state is usually reserved to authorities. In practice, however, such acts cannot only be carried out by public officials, but also by private individuals, be it based upon the authority of a statute or of a public official, or without such permission. In this context, the question arises as to whether such acts of private individuals are to be qualified as acts of state. The answer depends on whether the said acts can be imputed to the state. There is no doubt that such acts are to be regarded as acts of state where the laws of the state allow private individuals to perform such acts,²⁷ or where an authority requests them to execute such acts.²⁸ The same must be true for cases where the state did not explicitly instruct private individuals,

²⁵ See below Chapter 3.

²⁶ Cf. para. III.A.

²⁷ See in this regard, for instance, Section 42 of the South African Criminal Procedure Act 51 of 1977 which, in certain circumstances, allows a private individual to execute an arrest (a so-called "citizen's arrest").

²⁸ Siegrist *D Hoheitsakte auf fremdem Staatsgebiet* 1987 79; Bertele *J Souveränität und Verfahrensrecht: Eine Untersuchung der aus dem Völkerrecht ableitbaren Grenzen staatlicher extraterritorialer Jurisdiktion im Verfahrensrecht* 1998 89. See the example in Bertele *J Souveränität und Verfahrensrecht: Eine Untersuchung der aus dem Völkerrecht ableitbaren Grenzen staatlicher extraterritorialer Jurisdiktion im Verfahrensrecht* 1998 89 where a German customs officer at the German-Austrian border prompted six tourists to follow a car to Austria in order to stop the car and bring its driver back to Germany. The tourists detained the driver in Austria and handed the latter over to the German authorities. The Austrian government successfully claimed a violation of Austrian sovereignty.

but was aware of the acts to be performed and did not restrain them from doing so. Consequently, the acts were tolerated by the state and can thus be imputed to the latter. In cases, however, where the state was not aware of the relevant acts, they should not be regarded as acts of state. Here, the private individuals acted on their own authority and their actions should not be attributed to the state.²⁹

As has been mentioned earlier,³⁰ the sovereignty of a state is closely connected with its territory, and acts of state performed on foreign soil thus violate the sovereignty of the foreign state. The arrest of a suspect by a police officer of state A on the territory of state B therefore infringes the sovereignty of state B. However, what about situations where an act of state is carried out in state A, but has an impact on the territory of state B? This may, for instance, be the case where the said police officer fires a gun in state A at a suspect located in state B. Here, not only the performance of the act of state as such (the shot by the police officer), but also its result have to be taken into account. The fact that the outcome of an act of state occurred in a foreign state should suffice to qualify the act as an act of state that was performed on foreign territory.³¹ What, however, if the aforesaid police officer located in state A interrogates a suspect who resides in state B by telephone? Unlike the example of the shot across a national border, the result of the act of state (the questioning by the police officer) does not materialise in state B, but only in state A; the responses given by the suspect are used in the investigation taking place in state A. Moreover, the answering of the questions by the suspect in state B does not constitute an act of state imputable to state A. In other words, the addressee of an act of state does not act in a sovereign manner when complying with such an act.³² As a result, the telephonic questioning by the police officer does not interfere with the sovereignty of the state where the suspect is located.

An act of state does not require the use or threat of coercive measures. For determining whether an act qualifies as an act of state, it is thus irrelevant whether a state uses coercive measures or not.³³ As a result, the consent of the addressee of a particular act is immaterial for the quali-

²⁹ Bertele J *Souveränität und Verfahrensrecht: Eine Untersuchung der aus dem Völkerrecht ableitbaren Grenzen staatlicher extraterritorialer Jurisdiktion im Verfahrensrecht* 1998 90; Siegrist D *Hoheitsakte auf fremdem Staatsgebiet* 1987 79.

³⁰ See Chapter 1 para. I.

³¹ Bertele J *Souveränität und Verfahrensrecht: Eine Untersuchung der aus dem Völkerrecht ableitbaren Grenzen staatlicher extraterritorialer Jurisdiktion im Verfahrensrecht* 1998 80, 87.

³² Bertele J *Souveränität und Verfahrensrecht: Eine Untersuchung der aus dem Völkerrecht ableitbaren Grenzen staatlicher extraterritorialer Jurisdiktion im Verfahrensrecht* 1998 87 *et seq.*, 92 *et seq.*

³³ Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeßrechts* 1989 40; Bertele J *Souveränität und Verfahrensrecht: Eine Untersuchung der aus dem Völkerrecht ableitbaren Grenzen*

fication of an act of state, as only states, but not private individuals, can waive their sovereignty.³⁴

B. Taking of Evidence as an Act of State?

This subchapter first investigates whether there is a general rule on whether evidence-taking in civil litigation is to be qualified as an act of state or not. Once the absence of such a rule has been established, the nature of taking evidence in civil-law countries, on the one hand, and in countries sharing the common-law tradition, on the other, is analysed. In order to fully understand the different approach taken by the civil- and common-law countries in this regard, it is necessary to outline the civil procedure in the civil- and common-law systems, and to highlight the fundamental differences between these two legal models in terms of gathering evidence in civil litigation. Finally, the subchapter deals with Article 271 of the Swiss Criminal Code which protects the sovereignty of Switzerland by prohibiting activities for the benefit of a foreign state on Swiss soil.

1. Absence of a General Rule

There is no *consensus*, let alone an international rule on whether or not the taking of evidence in civil litigation can be classified as an act of state or a judicial act, respectively. Rather, it is each state that decides whether and, if so, to what extent the collection of evidence within its territory is tantamount to a judicial act. In the context of cross-border taking of evidence, it is the foreign state, where the evidence to be obtained is located, that determines whether or not the procurement of evidence is an exercise of sovereignty. In other words, it is irrelevant whether the state, where the trial court seeking foreign evidence is situated, considers the collection of evidence as a private act.³⁵

staatlicher extraterritorialer Jurisdiktion im Verfahrensrecht 1998 84; VPB 59 (1995) no. 156 consideration I; VPB 65 (2001) no. 71 consideration 3. See also VPB 51 (1987) no. 5 consideration 2.e.

³⁴ Siegrist D *Hoheitsakte auf fremdem Staatsgebiet* 1987 12; Meng W 'Extraterritorial Effects of Administrative Judicial and Legislative Acts' in Bernhardt R (ed) *Encyclopedia of Public International Law Volume II* 1995 339; Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 23; Stadler A *Der Schutz des Unternehmensgeheimnisses im deutschen und US-amerikanischen Zivilprozess und im Rechtshilfeverfahren* 1989 278; Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozessrechts* 1989 41, 45; Bertele J *Souveränität und Verfahrensrecht: Eine Untersuchung der aus dem Völkerrecht ableitbaren Grenzen staatlicher extraterritorialer Jurisdiktion im Verfahrensrecht* 1998 86 *et seq.*; Geimer E *Internationale Beweisaufnahme* 1998 15 *et seq.*; VPB 59 (1995) no. 156 consideration I; VPB 65 (2001) no. 71 consideration 8.

³⁵ Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 22; Siegrist D *Hoheitsakte auf fremdem Staatsgebiet* 1987 147.

In terms of the qualification of evidence-taking, the legal world can be divided into two groups, namely the civil-law countries on the one hand, qualifying the taking of evidence as an exercise of sovereignty and, on the other, the common-law jurisdiction that regards the collection of evidence as a non-judicial act.³⁶

2. Civil Litigation in the Civil- and Common-law Systems

a) General Remarks

Over the years, both the civil-law and the common-law systems have developed with regard to civil litigation, and neither of the two legal traditions exists in its pure form, but each is a hybrid of the two legal models.³⁷ This development not only affected the relation between the civil-law and common-law systems and resulted in a convergence between these two traditions, but also the correlation within the civil- and common-law systems. Within both traditions, there are many gradations, which make it difficult to portray an archetype of a civil- or common-law civil procedure that meets all nuances within the civil- and common-law systems, respectively.

The subsequent description of the general principles underlying civil litigation in the civil-law tradition is based on the legal system of Switzerland. Switzerland is a civil-law country whose civil litigation procedure is generally similar to that of other countries sharing the civil-law tradition. With regard to civil procedure in the common-law system, the focus lies on South Africa. South Africa does not, unlike Nigeria, and Uganda, fall into the category of common-law jurisdictions, but follows a hybrid system consisting of Roman-Dutch and English law.³⁸ The

³⁶ Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 22; Lookofsky JM and Hertz K *Transnational Litigation and Commercial Arbitration: An Analysis of American, European, and International Law* 2004 468 *et seq.*; McClean D *International Judicial Assistance* 1992 57; Oxman BH 'The Choice between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Convention' 1982-1983 *University of Miami Law Review* 761 *et seq.*; Bishop RD 'International Litigation in Texas; Obtaining Evidence in Foreign Countries' 1982 *Houston Law Review* 364 *et seq.*

³⁷ Australian Law Reform Commission *Issue Paper 20: Review of the Federal Civil Justice System: Rethinking the Federal Civil Litigation System* (Closing Date: 8 August 1997) <http://www.austlii.edu.au/au/other/alrc/publications/issues/20/02advers.html> para. 2.5 (date of use: 31 January 2013); Australian Law Reform Commission *Report 89: Managing Justice – A Review of the Federal Civil Justice System* (2000) <http://www.austlii.edu.au/au/other/alrc/publications/reports/89/ch1.html#Heading15> para. 1.126 (date of use: 31 January 2013).

³⁸ De Vos WL 'Developments in South African Civil Procedural Law Over the Last Fifty Years' 2000 *Stellenbosch Law Review* 344; Du Bois F 'Introduction: History, System and Sources' in Van der Merwe CG and Du Plessis JE (eds) *Introduction to the Law of South Africa* 2004 9 *et seq.* Cf. also Edwards AB 'Sources of South African Law' in Hosten WJ *et al* (eds) *Introduction to South African Law and Legal Theory* 1995 382 *et seq.*; De Bruin J and Barratt A 'History and development of South African law' in Meintjes-Van der Walt *et al* *Introduction to South African Law: Fresh Perspectives* 2011 18; De Vos WL 'South African civil procedural law in historical and social context' 2002 *Stellenbosch Law Review* 238 *et seq.*; Du Plessis J 'The promises

rules on civil procedure in South Africa, however, are derived from the English law³⁹ and can thus serve as an example of common-law civil procedure.⁴⁰ The same holds true for civil litigation procedure in Botswana and Namibia.⁴¹

b) Civil Litigation in the Civil-law System

In Switzerland, civil litigation procedure is divided into three stages, namely, the pleading stage, the trial stage, and the judgment stage. In the course of the pleading stage, the litigants exchange their statement of claim and statement of defence which, amongst others, include the presentation of the key facts underlying the claims, as well as the prayers for relief.⁴² The

and pitfalls of mixed legal systems: the South African and Scottish experiences' 1998 *Stellenbosch Law Review* 340 *et seq.*; Barrat A, Snyman P, and Kapindu E *Researching South African Law* (2010 update) http://www.nyulawglobal.org/globalex/South_Africa1.htm (date of use: 31 January 2013).

³⁹ Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 6; Malan FR *et al* 'Transnational Litigation in South African Law' 1995 *Tydskrif vir die Suid Afrikaanse Reg* 108; De Vos WL 'Developments in South African Civil Procedural Law Over the Last Fifty Years' 2000 *Stellenbosch Law Review* 344. *Cf.* also Du Bois F 'Introduction: History, System and Sources' in Van der Merwe CG and Du Plessis JE (eds) *Introduction to the Law of South Africa* 2004 11; De Vos WL 'South African civil procedural law in historical and social context' 2002 *Stellenbosch Law Review* 241 *et seq.*; Erasmus HJ 'Law of Civil Procedure' in van der Merwe CG and Du Plessis JE (eds) *Introduction to the Law of South Africa* 2004 432 *et seq.* Civil litigation in the United States differs substantially from the Anglo-Saxon civil procedure. This is true, in particular, with regard to the extent of discovery and the fact that in the United States, juries are still involved in civil cases. Regarding the differences between discovery in England and the United States, see, for instance, Junker A *Discovery im deutsch-amerikanischen Rechtsverkehr* 1987 60 *et seq.*; McClean D *International Judicial Assistance* 1992 60 *et seq.*; Bishop RD 'International Litigation in Texas: Obtaining Evidence in Foreign Countries' 1982 *Houston Law Review* 365. For a brief outline of civil-law and common-law civil litigation, see Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 115 n. 161 *et seq.*; Swiss Federal Council *Botschaft betreffend Genehmigung von vier Übereinkommen im Bereich der internationalen Rechtshilfe in Zivil- und Handelssachen vom 8. September 1993* BBl 1993 1274; Stürner R 'Parteiherrschaft versus Richtermacht: Materielle Prozessleitung und Sachverhaltsaufklärung zwischen Verhandlungsmaxime und Effizienz' 2010 *Zeitschrift für Zivilprozess* 149 *et seq.*; Ingenhoven T *Grenzüberschreitender Rechtsschutz durch englische Gerichte: Prozessuale Gestaltungsmöglichkeiten für ausländische Unternehmen im Forum London* 2001 30 *et seq.*; Stiefel E and Petzinger WF 'Deutsche Parallelprozesse zur Abwehr amerikanischer Beweiserhebungsverfahren?' 1983 *Recht der Internationalen Wirtschaft* 244. See also Murray PL 'Ein rechtsvergleichendes Experiment' 1999 *Zeitschrift für Zivilprozeß International* 291 *et seq.*

⁴⁰ Throughout the thesis, South Africa will thus be treated as a common-law country in relation to the conduct of civil proceedings, including the taking of evidence.

⁴¹ Prior to their independence in 1966 and 1990, respectively, Botswana and Namibia were administered by South Africa. As a consequence, the then South African common law, being a mixture of Roman-Dutch law and English law, was extended to the said countries. For more in this regard, *cf.* Fombad CM and Boo L *Botswana's Legal System and Legal Research* (May/June 2011 update) <http://www.nyulawglobal.org/globalex/Botswana1.htm> (date of use: 31 January 2013); Geraldo M, Skeffers Nowases I, and Nandago H *Researching Namibian Law and the Namibian Legal System* (January 2013 update) <http://www.nyulawglobal.org/globalex/Namibia1.htm> (date of use: 31 January 2013); Pain JH 'The reception of English and Roman-Dutch law in Africa with reference to Botswana, Lesotho and Swaziland' 1978 *Comparative and International Law Journal of Southern Africa* 163 *et seq.* See also Kakuli GM 'The historical sources and development of civil procedure and practice in the High Court of Botswana' 1995 *Stellenbosch Law Review* 185 who points out that "the procedural law of Botswana is basically that of South Africa". Having said this, also Botswana and Namibia will be treated as common-law countries in relation to the conduct of civil proceedings.

⁴² Article 221(1)(b) and (d) of the Swiss Civil Procedure Code.

pleadings must also indicate the evidence offered for the allegations of fact.⁴³ If available at the time, the documentary evidence has to be enclosed with the pleadings.⁴⁴

Once the parties have concluded their pleadings, the judge reviews the latter together with the documentary evidence submitted, and makes himself familiar with the case. Thereafter, he schedules a hearing for the litigants and their counsel.⁴⁵ Prior to such hearing, the court issues the so-called "*Beweisverfügung*", where the judge decides what the relevant issues in dispute are and what evidence proffered by the parties in their pleadings is admitted.⁴⁶ The judge furthermore decides whether or not it is necessary to obtain an expert opinion. In the former case, he not only determines whom to appoint as an expert, but he also instructs the latter as to which aspect requires an expert opinion.⁴⁷

The trial phase consists of one or several oral hearings.⁴⁸ In the course of such hearings, the court may discuss the case with the parties and their counsel, sometimes revealing its provisional views on the probable outcome of the lawsuit. The court may also make an attempt to persuade the parties to settle the case amicably.⁴⁹ The core element of the trial stage, however, is the hearing of evidence.⁵⁰ The examination of the litigants, non-party witnesses,⁵¹ and experts is conducted by the judge.⁵² Once the court has concluded its interrogation of witnesses and experts, the litigants or their counsel may pose *via* the judge additional questions.⁵³ At the conclusion of the hearing of evidence, the parties have the opportunity to comment on the out-

⁴³ Article 221(1)(e) of the Swiss Civil Procedure Code.

⁴⁴ Article 221(2)(c) of the Swiss Civil Procedure Code.

⁴⁵ Articles 226 and 228 of the Swiss Civil Procedure Code.

⁴⁶ Article 154 of the Swiss Civil Procedure Code.

⁴⁷ Articles 183(1) and 185(1) of the Swiss Civil Procedure Code. Under Swiss law, experts are not regarded as ordinary third party witnesses. For more in this regard, see Chapter 5 para. B.1.

⁴⁸ Articles 226, 228, 231, and 232 of the Swiss Civil Procedure Code. *Cf.* also Langbein JH 'The German Advantage in Civil Procedure' 1985 *University of Chicago Law Review* 826 *et seq.*

⁴⁹ Article 226(1)-(2) of the Swiss Civil Procedure Code. See also Langbein JH 'The German Advantage in Civil Procedure' 1985 *University of Chicago Law Review* 828, 832.

⁵⁰ In Switzerland, the so-called "*Beweisabnahme*". *Cf.* Article 231 of the Swiss Civil Procedure Code.

⁵¹ Unlike common-law countries, civil-law jurisdictions distinguish between the testimony by "parties" and by "witnesses". As a result, a party cannot be a witness and *vice versa*. See Article 169 of the Swiss Civil Procedure Code. *Cf.* also Gerber DJ 'Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States' 1986 *American Journal of Comparative Law* 758. For more on this distinction, see Chapter 5 para. B.1. To avoid any misunderstandings in this regard, the following terminology will be used throughout the thesis: "party witnesses" for litigants, "non-party witnesses" for individuals other than litigants and experts, and "witnesses" for party witnesses, non-party witnesses, and experts.

⁵² Articles 172, 187, and 191(1) of the Swiss Civil Procedure Code.

⁵³ Article 173 of the Swiss Civil Procedure Code.

come of the hearing.⁵⁴ Once the matter is due for a court ruling, that is, after developing the key facts and hearing the litigants' arguments, the judge decides the case.⁵⁵

c) Civil Litigation in the Common-law System

In South Africa, civil litigation can be broken down into four sections, namely pleadings, pre-trial procedures, trial, and judgment.⁵⁶ The first stage of civil procedure under South African law parallels the pleading stage in civil litigation in Switzerland. In the pleadings, the litigants give, *inter alia*, details of their respective claims and state the material facts of the case upon which the judge is called to adjudicate.⁵⁷ Unlike under Swiss law, pleadings do not indicate any means of proof, and as a result, no documentary evidence has to be appended to the pleadings.⁵⁸ The fact that evidence has not to be pleaded was described by Judge Kotze as follows:⁵⁹

“It is a trite rule of pleading that a defendant is entitled to know what the case is which he has to meet. He is not entitled to know the evidence, but he may demand to know what are the grounds upon which the claim is based.”

The pleading stage is followed by the pre-trial phase in which the litigants prepare for trial. The object of pre-trial procedures is to ensure a smooth and speedy trial, and to persuade the parties to settle the lawsuit amicably prior to, or at least at the beginning of, the trial.⁶⁰ The key element of the pre-trial stage is the so-called “discovery” which can be described as the:

“process by which the parties to a civil cause (...) are enabled to obtain, within certain defined limits, full information of the existence and the contents of all relevant documents (...) relating to any matter in question between them

⁵⁴ Article 232(1) of the Swiss Civil Procedure Code.

⁵⁵ Article 236(1) of the Swiss Civil Procedure Code. For more on the procedure for the taking of evidence under Swiss law, see Chapter 5 paras. II.B.4 and II.C.3.

⁵⁶ Petè S *et al* *Civil Procedure: A Practical Guide* 2008 154.

⁵⁷ Rule 18(4) of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa. These Rules are also known as “Uniform Rules of Court” or “High Court Rules”. It is the latter term that will be used throughout this thesis. For more on the object of pleadings, see, *inter alia*, *Palmer v Guadagni* [1906] 2 Ch 494 at 497; *Benson and Simpson v Robinson* 1917 WLD 126 at 130; *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 218 at 238, 239; *Thorp v Holdsworth* [1876] 3 Ch D 637 at 639; *HT Group (Pty) Ltd v Hazelhurst* [2003] 2 All SA 262 (C) at 265 with further references. See also Daniels H Beck's *Theory and Principles of Pleading in Civil Actions* 2002 43 *et seq.*

⁵⁸ Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 565; Petè S *et al* *Civil Procedure: A Practical Guide* 2008 165; Daniels H Beck's *Theory and Principles of Pleading in Civil Actions* 2002 45, 47.

⁵⁹ *Durr v South African Railways and Harbours* 1917 CPD 284 at 287. See also *Benson and Simpson v Robinson* 1917 WLD 126 at 129.

⁶⁰ Petè S *et al* *Civil Procedure: A Practical Guide* 2008 246; Harms LTC *Civil Procedure in the Superior Courts, Students' Edition* 2003 226. See also De Vos WL ‘Developments in South African Civil Procedural Law Over the Last Fifty Years’ 2000 *Stellenbosch Law Review* 345.

and which, are, or have been, in their possession, custody or power or in the possession of (...) persons on their behalf.’⁶¹

The function of discovery is to inform the litigants prior to the trial stage of all relevant documents of the opponent in order to assist them in identifying the adversary’s position and assess the weakness and strength of their respective cases.⁶² In this sense, discovery serves the so-called “*prozessuale Waffengleichheit*”, literally “procedural equality of weapons” or, in this instance, the equal fighting chances of the parties.⁶³ Each litigant shall be aware of all relevant documents so that at the trial, no party can be taken by surprise in relation to documentary evidence. Moreover, discovery serves the purpose of finding out the truth and to guarantee a transparent civil litigation.⁶⁴

In this context, Sir John Donaldson stated the following:⁶⁵

“In plain language litigation is conducted ‘cards face up on the table’. Some people from other lands regard this as incomprehensible. ‘Why’ they ask ‘should I be expected to provide my opponent with the means of defeating me?’ The answer, of course, is that litigation is not a war or even a game. It is

⁶¹ Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 777. Cf. Rule 35 of the South African High Court Rules. See also Petè S *et al Civil Procedure: A Practical Guide* 2008 248 *et seq.*; Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 132; Eschenfelder ED *Beweiserhebung im Ausland und ihre Verwertung im inländischen Zivilprozess: Zur Bedeutung des US-amerikanischen discovery-Verfahrens für das deutsche Erkenntnisverfahren* 2002 43. For more on discovery in South Africa, Botswana, Namibia, Nigeria, and Uganda, see Chapter 5 paras. III.B, IV.B, V.B. VI.B, and VII.B.

⁶² See, amongst others, Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 777; Petè S *et al Civil Procedure: A Practical Guide* 2008 248 *et seq.*; Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 132; Hazard GC Jr ‘Discovery and the Role of the Judge in Civil Law Jurisdiction’ 1997-1998 *Notre Dame Law Review* 1021; Eschenfelder ED *Beweiserhebung im Ausland und ihre Verwertung im inländischen Zivilprozess: Zur Bedeutung des US-amerikanischen discovery-Verfahrens für das deutsche Erkenntnisverfahren* 2002 4. See also *Pelidis v Ndhlamuti* 1969 (3) SA 563 (R) at 563F which states that the “rules relating to discovery are designed for the benefit of the parties to an action”.

⁶³ For the notion of “*Waffengleichheit*”, see amongst others, Baumgärtel G ‘Ausprägung der prozessualen Grundprinzipien der Waffengleichheit und der fairen Prozeßführung im zivilprozessualen Beweisrecht’ in Ballon OJ and Hagen JJ (eds) *Verfahrensgarantien im nationalen und internationalen Prozeßrecht: Festschrift Franz Matscher zum 65. Geburtstag* 1993 31.

⁶⁴ See, amongst others, Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 777; Petè S *et al Civil Procedure: A Practical Guide* 2008 248 *et seq.*; Lowenfeld AF ‘Discovery-Verfahren und internationale Rechtshilfe’ 1984 *Praxis des Internationalen Privat- und Verfahrensrechts* 52; Junker A *Discovery im deutsch-amerikanischen Rechtsverkehr* 1987 82, 108 *et seq.*; Niehr P *Die zivilprozessuale Dokumentenvorlage im deutsch-englischen Rechtshilfeverkehr nach der deutschen und der englischen Prozessrechtsreform* 2004 59, 100; Meier AL *Die Anwendung des Haager Beweisübereinkommens in der Schweiz unter besonderer Berücksichtigung der Beweisaufnahme für U.S.-amerikanische Zivilprozesse* 1999 34; Honegger PC *Amerikanische Offenlegungspflichten in Konflikt mit schweizerischen Geheimhaltungspflichten unter besonderer Berücksichtigung der Rechtshilfe bei Steuerhinterziehungen und Insidergeschäften* 1986 108; Timmerbeil S *Witness Coaching and Adversary System: Der Einfluss der Parteien und ihrer Prozessbevollmächtigten auf Zeugen und Sachverständige im deutschen und U.S.-amerikanischen Zivilprozess* 2004 7 *et seq.* See also *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1093.

⁶⁵ *Davies v Eli Lilly & Co and Others* [1987] 1 WLR 428 at 431.

designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object.”

Or in the words of the United States Supreme Court where discovery is meant to make a trial

*“less a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”*⁶⁶

The discovery process is entirely under the control of the parties. The court is not involved, unless a party refuses to comply with the opponent’s request for discovery.⁶⁷

Pre-trial procedures, however, not only include discovery, that is, the revealing of documents and other recorded material,⁶⁸ but also arrangements for further evidence, such as medical examinations, inspections of objects or expert evidence, as well as the steps to obtain statements of witnesses and to ensure their appearance at the trial.⁶⁹ As in the case of discovery, the revelation of such further evidence is usually conducted by the parties without the involvement of the court. This is in particular true with regard to experts who are appointed and instructed by the parties.⁷⁰

The pre-trial stage is concluded with the so-called “pre-trial conference” where the parties, usually without the involvement of the court, try to curtail the proceedings by narrowing down

⁶⁶ *United States v Procter & Gamble Co*, 356 U.S. 677 (1958) 682 *et seq.* See also Frei L ‘Discovery, Secrecy and International Mutual Assistance in Civil Matters’ in Zäch R (ed) *Litigation of Business Matters in the United States and International Mutual Assistance* 1984 173; Andrews N ‘The Pursuit of Truth in Modern English Civil Proceedings’ 2003 *Zeitschrift für Zivilprozeß International* 82.

⁶⁷ Rule 35(7) of the South African High Court Rules. See also De Vos WL and Van Loggerenberg DE ‘The activism of the judge in South Africa’ 1991 *Tydskrif vir die Suid Afrikaanse Reg* 601; Erasmus HJ ‘Law of Civil Procedure’ in Van der Merwe CG and du Plessis JE (eds) *Introduction to the Law of South Africa* 2004 441. Cf. furthermore Lowenfeld AF *International Litigation and the Quest for Reasonableness: Essays in Private International Law* 1996 140; Niehr P *Die zivilprozessuale Dokumentenvorlage im deutsch-englischen Rechtshilfeverkehr nach der deutschen und der englischen Prozessrechtsreform* 2004 101; Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 27; Schlosser P ‘Jurisdiction and International Judicial and Administrative Co-operation’ in Académie de Droit International (ed) *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 2000 2001 115; Trittmann RA ‘Extraterritoriale Beweisaufnahmen und Souveränitätsverletzungen im deutsch-amerikanischen Rechtsverkehr’ 1989 *Archiv des Völkerrechts* 200 *et seq.*; Timmerbeil S *Witness Coaching and Adversary System: Der Einfluss der Parteien und ihrer Prozessbevollmächtigten auf Zeugen und Sachverständige im deutschen und U.S.-amerikanischen Zivilprozess* 2004 8; Stürner R ‘U.S.-amerikanisches und europäisches Verfahrensverständnis’ in Lutter M *et al* (eds) *Festschrift für Ernst C. Stiefel zum 80. Geburtstag* 1987 767 *et seq.*; Maxeiner J ‘Die Gefahr der Übertragung deutschen Rechtsdenkens auf den US-amerikanischen Zivilprozeß’ 1990 *Recht der Internationalen Wirtschaft* 443. For a comparison of discovery with the taking of evidence in civil litigation under Swiss law, see BGE 132 III 295 consideration 2.1.

⁶⁸ For instance, tape recordings, cf. Rule 35(1) of the South African High Court Rules.

⁶⁹ Rules 36(1), (6) and (9), as well as 38(1) of the South African High Court Rules; Section 30(1) of the South African Supreme Court Act.

⁷⁰ For more on expert evidence in South Africa, Botswana, Namibia, Nigeria, and Uganda, see Chapter 5 paras. III.A.3.e), IV.A.3.e), V.A.3.e), VI.A.3.e), and VII.A.3.e).

the matters in dispute, settle as many issues as possible and agree how to proceed at the trial.⁷¹ The pre-trial phase is followed by the trial, a single continuous event which, as a general principle, cannot be interrupted.⁷²

In the course of the trial, the litigants present their evidence gathered during the pre-trial proceedings. The key element of the trial is the questioning of witnesses which remains the primary responsibility of the parties. The counsel of the party sustaining the burden of proof, usually the plaintiff, first questions each of his witnesses (the so-called “examination in chief”). Following such examination, the witnesses are interrogated by the opponent’s counsel (in the “cross-examination”). The purpose of cross-examination is to elicit facts favourable to the cross-examiner’s case and to challenge the truth or accuracy of the witness’ version of the disputed events in the examination-in-chief.⁷³ Adah describes cross-examination as:

*“the most lethal weapon in the armoury of the advocate. In the hands of an ingenious advocate, cross-examination is the probing search light which roams the dark and unexplored abyss of falsehood, deception and deliberate exaggeration”*⁷⁴

and labels cross-examination as:

“a duel between the advocate and the witness. The cross-examiner either destroys the witness or the witness destroys him”.⁷⁵

The counsel, who originally called the witnesses, may then pose additional questions (“re-examination”). The purpose of re-examination is to:

“repair any damage that may have been done by the cross-examination and to give the witness the opportunity of reconciling any inconsistency or ambiguities”.⁷⁶

Once all witnesses of the plaintiff have been examined, the same procedure applies with regard to the witnesses called by the defendant; they are examined in chief by the defendant’s counsel,

⁷¹ Rule 37 of the South African High Court Rules. Cf. also Rule 37(8)(a) of the South African High Court Rules which provides for judicial participation in the pre-trial conference. Such involvement, however, is at the judge’s discretion. See De Vos WL ‘International Aspects of Civil Procedural Law’ 1996 *Stellenbosch Law Review* 350. Cf. also *Bosman v AA Mutual Insurance Association Ltd* [1977] 2 All SA 400 (C) at 402; *Rauff v Standard Bank Properties (A division of Standard Bank of SA Ltd) and Another* 2002 (6) SA 693 (W) at 704A-D.

⁷² Erasmus HJ ‘Law of Civil Procedure’ in Van der Merwe CG and du Plessis JE (eds) *Introduction to the Law of South Africa* 2004 441.

⁷³ *Carroll v Carroll* [1947] 4 All SA 10 (D) at 13.

⁷⁴ Adah CE *The Nigerian Law of Evidence* 2000 261 with further references.

⁷⁵ Adah CE *The Nigerian Law of Evidence* 2000 266.

⁷⁶ Akaniro EG *Study Manual on Law of Evidence and Procedure II* 1997 159. See, amongst others, Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 373 *et seq.*

cross-examined by the plaintiff's lawyer and re-examined by the counsel for the defendant.⁷⁷ The judge is usually not actively involved in the questioning of witnesses, but merely supervises the presentation of evidence by the parties to ensure a fair trial and the observance of the respective rules by the litigants.⁷⁸ Once the parties have presented all their evidence, their legal counsel have the opportunity to comment on the results of such presentation.⁷⁹ Following the parties' closing addresses, the trial stage concludes, and the court decides the case based on the evidence presented to it and the law.⁸⁰

d) Fundamental Differences between Civil-law and Common-law Civil Litigation

In the light of the above, the considerable divergences between civil litigation in countries sharing the civil-law tradition and those following the common-law model are evident. This is in particular true with regard to the gathering of evidence in civil proceedings. Schlosser describes this difference as follows:⁸¹

“There is no field where civil law and common law procedural systems are more divergent than in the context of obtaining information needed for the resolution of a lawsuit”.

⁷⁷ Rule 39(8) of the South African High Court Rules. See also Petè S *et al Civil Procedure: A Practical Guide* 2008 281; De Vos WL and Van Loggerenberg DE ‘The activism of the judge in South Africa’ 1991 *Tydskrif vir die Suid Afrikaanse Reg* 602; Eschenfelder ED *Beweiserhebung im Ausland und ihre Verwertung im inländischen Zivilprozess: Zur Bedeutung des US-amerikanischen discovery-Verfahrens für das deutsche Erkenntnisverfahren* 2002 76. For more on the *viva voce* examination of witnesses in South Africa, Botswana, Namibia, Nigeria, and Uganda, see Chapter 5 paras. III.A.3.a), IV.A.3.a), V.A.3.a), VI.A.3.a), and VII.A.3.a).

⁷⁸ Petè S *et al Civil Procedure: A Practical Guide* 2008 281; De Vos WL and Van Loggerenberg DE ‘The activism of the judge in South Africa’ 1991 *Tydskrif vir die Suid Afrikaanse Reg* 599, 601; Damaška M ‘The Common Law/Civil Law Divide: Residual Truth of Misleading Distinction’ in Walker J and Chase OG (eds) *Common Law, Civil Law and the Future of Categories* 2010 17; Junker A ‘Die Informationsbeschaffung für den Zivilprozeß: Informationsbeschaffung durch Beweispersonen’ in Schlosser P (ed) *Die Informationsbeschaffung für den Zivilprozeß: die verfahrensmäßige Behandlung von Nachlässen, ausländisches Recht und Internationales Zivilprozessrecht* 1996 99. Stürner R ‘U.S.-amerikanisches und europäisches Verfahrensverständnis’ in Lutter M *et al* (eds) *Festschrift für Ernst C. Stiefel zum 80. Geburtstag* 1987 769; Maxeiner J ‘Die Gefahr der Übertragung deutschen Rechtsdenkens auf den US-amerikanischen Zivilprozeß’ 1990 *Recht der Internationalen Wirtschaft* 443.

⁷⁹ Rule 39(10) of the South African High Court Rules.

⁸⁰ Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 924; De Vos WL and Van Loggerenberg DE ‘The activism of the judge in South Africa’ 1991 *Tydskrif vir die Suid Afrikaanse Reg* 603.

⁸¹ ‘Jurisdiction and International Judicial and Administrative Co-operation’ in Académie de Droit International (ed) *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 2000 2001 114.

The key differences in the collection of evidence in civil litigation are, on the one hand, the distinct role of parties and judges, and, on the other, the clear division in pre-trial and trial in common-law civil procedure.⁸²

In the context of the contrasting role of parties and judges in civil-law and common-law civil litigation, one often refers to the so-called “adversarial system” as opposed to the “non-adversarial system” or “inquisitorial system”.⁸³ The adversarial system is the system of civil procedure prevailing in countries following the common-law tradition. According to Hurter, the adversarial system is based on three assumptions: (i) disputes are private, and (ii) the parties know how best to prepare and present their case (iii) without the involvement of the judge.⁸⁴ Or in the words of Sir Jacob:⁸⁵

“Under the adversary system, the basic assumptions are that civil disputes are a matter of private concern for the parties involved, and may even be regarded as their private property, although their determination by the courts may have wider, more far-reaching, even public repercussions, and that the parties are themselves the best judges of how to pursue and serve their own interests in the conduct and control of their respective cases, free from the directions of or intervention by the court.”

Under the adversarial system, the parties, and not the judge, thus take the main responsibility for “defining the issues in dispute and for investigating and advancing the dispute.”⁸⁶ Or in the words of Hurter:⁸⁷

⁸² Langbein JH ‘The German Advantage in Civil Procedure’ 1985 *University of Chicago Law Review* 826. Cf. also De Vos WL ‘Developments in South African Civil Procedural Law Over the Last Fifty Years’ 2000 *Stellenbosch Law Review* 344 *et seq.*

⁸³ See, amongst others, Lookofsky JM and Hertz K *Transnational Litigation and Commercial Arbitration: An Analysis of American, European, and International Law* 2004 467 *et seq.*; Sanders AJGM ‘The characteristic features of the Civil Law’ 1981 *Comparative and International Law Journal of Southern Africa* 206; Junker A *Discovery im deutsch-amerikanischen Rechtsverkehr* 1987 78 *et seq.*; Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 6; Junker A ‘Die Informationsbeschaffung für den Zivilprozeß; Informationsbeschaffung durch Beweispersonen’ in Schlosser P (ed) *Die Informationsbeschaffung für den Zivilprozeß: die verfahrensmäßige Behandlung von Nachlässen, ausländisches Recht und Internationales Zivilprozessrecht* 1996 120.

⁸⁴ Hurter E ‘Seeking truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation’ 2007 *Tydskrif vir die Suid Afrikaanse Reg* 242. See also Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 9.

⁸⁵ Jacob JIH *The Fabric of English Civil Justice* 1987 8.

⁸⁶ Australian Law Reform Commission Report 89: *Managing Justice – A Review of the Federal Civil Justice System* (2000) <http://www.austlii.edu.au/au/other/arc/publications/reports/89/ch1.html#Heading15> para. 1.117 (date of use: 31 January 2013); De Vos WL and Van Loggerenberg DE ‘The activism of the judge in South Africa’ 1991 *Tydskrif vir die Suid Afrikaanse Reg* 598 *et seq.*; Theophilopoulos C *Fundamental Principles of Civil Procedure* 2006 295; De Vos WL ‘South African civil procedural law in historical and social context’ 2002 *Stellenbosch Law Review* 246; Hazard GC Jr ‘Discovery and the Role of the Judge in Civil Law Jurisdiction’ 1997-1998 *Notre Dame Law Review* 1019.

⁸⁷ Hurter E ‘Seeking truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation’ 2007 *Tydskrif vir die Suid Afrikaanse Reg* 243. See also Timmerbeil S *Witness Coaching and Adversary System: Der Einfluss der Parteien und ihrer Prozessbevollmächtigten auf Zeugen und Sachverständige*

“under the adversarial system, it is the parties who dictate at all stages the form, content and pace of proceedings.”

Given the above, it is not surprising that in common-law civil litigation, there is no court order equivalent to the aforementioned “*Beweisverfügung*” under Swiss law.⁸⁸

In common law, it is the prevailing view that in civil litigation, truth is best found by counsel who enquire and present the facts to the court from a partisan perspective.⁸⁹ To put it differently, the “*clash of adversaries is a powerful means for hammering out the truth*”.⁹⁰ The cross-examination of witnesses by the parties’ counsel⁹¹ thereby plays an important role and is, among other things, portrayed as “*the greatest legal engine ever invented for the discovery of truth*”.⁹²

In contrast to the common-law counsel, dominant and active in the collection and examination of evidence, the common-law judge is not involved in this regard so as not to create any impression of partiality. Rather, the judge is confined to a passive and receptive role of a mere umpire or referee who “*is first a spectator and subsequently an arbiter of a duel between two lawyers*”⁹³ and “*holds the balance between the contending parties without himself taking part*

im deutschen und U.S.-amerikanischen Zivilprozess 2004 3 *et seq.*; Zuckermann AAS ‘English Civil Procedure – The Shift away from Party Control and Orality’ 1996 *Zeitschrift für Zivilprozeß International* 65.

⁸⁸ Cohn EJ ‘Beweisaufnahme im Wege der zivilprozessualen Rechtshilfe durch das englische Gericht’ 1967 *Zeitschrift für Zivilprozess* 231, 240; Nagel H *Nationale und internationale Rechtshilfe im Zivilprozeß: das europäische Modell* 1971 144 *et seq.*

⁸⁹ Kötz H ‘The role of the judge in the court-room [*sic*]: The common law and civil law compared’ 1987 *Tydskrif vir die Suid Afrikaanse Reg* 37; Timmerbeil S *Witness Coaching and Adversary System: Der Einfluss der Parteien und ihrer Prozessbevollmächtigten auf Zeugen und Sachverständige im deutschen und U.S.-amerikanischen Zivilprozess* 2004 170. See also Hurter E ‘Seeking truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation’ 2007 *Tydskrif vir die Suid Afrikaanse Reg* 246; Junker A *Discovery im deutsch-amerikanischen Rechtsverkehr* 1987 80; Gerber DJ ‘Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States’ 1986 *American Journal of Comparative Law* 767.

⁹⁰ Frankel M ‘The Search for Truth: An Umpireal View’ 1975 *University of Pennsylvania Law Review* 1036. Cf. also *Ridehalgh v Horsefield* [1994] 3 WLR 462 (CA) at 470 *et seq.*, where the adversarial system was described as follows: “*By the clash of competing evidence and argument, the judge is best enabled to decide what happened, to formulate the relevant principles of law and to apply those principles to the facts of the case before him as he has found them.*”

⁹¹ The notion of “cross-examination” is used here as a generic term that includes the examination-in-chief, cross-examination (in the narrower sense), and re-examination.

⁹² Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 9 with reference to Wigmore HJ *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* 1961 para. 1367. See also Maxeiner J ‘Die Gefahr der Übertragung deutschen Rechtsdenkens auf den US-amerikanischen Zivilprozeß’ 1990 *Recht der Internationalen Wirtschaft* 445, Meintjes-Van der Walt L ‘The Proof of the Pudding: the Presentation and Proof of Expert Evidence in South Africa’ 2003 *Journal of African Law* 100; Müller K and Tait M ‘The child witness and the accused’s right to cross-examination’ 1997 *Tydskrif vir die Suid Afrikaanse Reg* 520 *et seq.*

⁹³ Frei L ‘Discovery, Secrecy and International Mutual Assistance in Civil Matters’ in Zäch R (ed) *Litigation of Business Matters in the United States and International Mutual Assistance* 1984 171.

in their disputations”⁹⁴. Lord Denning described the position of the common-law judge as follows:⁹⁵

“In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination, as happens, we believe in some foreign countries (...). Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal.”

In the same context, Lord Greene stated:⁹⁶

*“a judge who himself conducts the examination (...) descends into the arena and is liable to have his vision clouded by the dust of the conflict.”*⁹⁷

In clear contrast with all this, is the inquisitorial system which refers to the civil-law model of conducting civil proceedings.⁹⁸ Here, the conduct of every aspect of civil proceedings is under the control of the court which is, amongst others, responsible for the development of evidence.⁹⁹ The judge decides which witnesses, as indicated by the parties in their pleadings, to summon to testify in court. It is also the judge who questions the witnesses, and there is thus no

⁹⁴ Kötz H ‘The role of the judge in the court-room [sic]: The common law and civil law compared’ 1987 *Tydskrif vir die Suid Afrikaanse Reg* 37. See also Hurter E ‘Seeking truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation’ 2007 *Tydskrif vir die Suid Afrikaanse Reg* 243, 257; Niehr P *Die zivilprozessuale Dokumentenvorlage im deutsch-englischen Rechtshilfeverkehr nach der deutschen und der englischen Prozessrechtsreform* 2004 95; Twining W *Rethinking Evidence: Explanatory Essays* 2006 183; Theophilopoulos C *Fundamental Principles of Civil Procedure* 2006 296; Cohn EJ ‘Beweisaufnahme im Wege der zivilprozessualen Rechtshilfe durch das englische Gericht’ 1967 *Zeitschrift für Zivilprozess* 231 *et seq.*; Maxeiner J ‘Die Gefahr der Übertragung deutschen Rechtsdenkens auf den US-amerikanischen Zivilprozeß’ 1990 *Recht der Internationalen Wirtschaft* 440.

⁹⁵ *Jones v National Coal Board* [1957] 2 QB 55 at 61.

⁹⁶ *Yuill v Yuill* [1945] 1 All ER 183 at 189. Cf. also Frankel M ‘The Search for Truth: An Umpireal View’ 1975 *University of Pennsylvania Law Review* 1042.

⁹⁷ See also *Jones v National Coal Board* [1957] 2 QB 55 at 64, where the following was held: “*The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemingly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the work of an advocate; (...).*”

⁹⁸ Australian Law Reform Commission *Discussion Paper 62: Review of the Federal Civil Justice System* (19 July 1999) <http://www.austlii.edu.au/au/other/alrc/publications/dp/62/ch2.html#Heading6> para. 2.25 (date of use: 31 January 2013).

⁹⁹ Martens D-R ‘Germany’ in Platto C and Lee M (eds) *Obtaining Evidence in Another Jurisdiction in Business Disputes* 1993 93; Bruno P ‘The Common Law from a Civil Lawyer’s Perspective’ in Danner RA and Bernal M-LH (eds) *Introduction to Foreign Legal Systems* 1994 5 *et seq.*; Damaška M ‘The Common Law/Civil Law Divide: Residual Truth of Misleading Distinction’ in Walker J and Chase OG (eds) *Common Law, Civil Law and the Future of Categories* 2010 16; Stürmer R ‘The ALI/UNIDROIT Principles of Transnational Civil Procedure and Their Influence on Future Private Enforcement of European Competition Law’ in Walker J and Chase OG (eds) *Common Law, Civil Law and the Future of Categories* 2010 424; Gerber DJ ‘Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States’ 1986 *American Journal of Comparative Law* 753; Niehr P *Die zivilprozessuale Dokumentenvorlage im deutsch-englischen Rechtshilfeverkehr nach der deutschen und der englischen Prozessrechtsreform* 2004 101; Stürmer R ‘U.S.-amerikanisches und europäisches Verfahrensverständnis’ in Lutter M *et al* (eds) *Festschrift für Ernst C. Stiefel zum 80. Geburtstag* 1987 767.

room for cross-examination through the parties' counsel. Having said this, civil-law judges are the "powerful centrepiece" of civil proceedings, while the role of the parties is limited to furnishing the court with the facts underlying the respective lawsuit and the means of proof.¹⁰⁰ The active role of the civil-law judge requires that he is, unlike his common-law counterpart, familiar with the case once the trial stage begins in order to efficiently administer the examination of witnesses.¹⁰¹ Kaplan, Van Mehren and Schaefer summarise, from a common-law perspective, the role of the civil-law judge as follows:¹⁰²

“(…) one can see in the (…) judge a common image of the paterfamilias (…) having a large measure of power and considerable willingness to exercise it, the (…) judge sits high and exalted over the parties, dominating the courtroom scene; at the same time he is constantly descending to the level of the litigants, as an examiner, patient and hectoring, as counsellor, adviser and insistent promoter of settlements.”

Notwithstanding the above divergences, one also has to bear in mind the similarities of the civil- and common-law civil procedure. In both legal traditions, the so-called “principle of party presentation”¹⁰³ usually prevails in civil litigation. According to this principle, it is the parties who initiate the proceedings, determine the matters to be adjudicated by the court and select witnesses as well as other means of proof. Moreover, the judge does not investigate facts that were not presented to him by the parties.¹⁰⁴ Apart from the process of how the means of proof

¹⁰⁰ Niehr P *Die zivilprozessuale Dokumentenvorlage im deutsch-englischen Rechtshilfeverkehr nach der deutschen und der englischen Prozessrechtsreform* 2004 101; Bruno P ‘The Common Law from a Civil Lawyer’s Perspective’ in Danner RA and Bernal M-LH (eds) *Introduction to Foreign Legal Systems* 1994 396; Gerber DJ ‘Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States’ 1986 *American Journal of Comparative Law* 755; Kaplan B ‘Civil Procedure – Reflections on the Comparison of Systems’ 1959-1960 *Buffalo Law Review* 411; Timmerbeil S *Witness Coaching and Adversary System: Der Einfluss der Parteien und ihrer Prozessbevollmächtigten auf Zeugen und Sachverständige im deutschen und U.S.-amerikanischen Zivilprozess* 2004 164 *et seq.*

¹⁰¹ Kötz H ‘The role of the judge in the court-room [*sic*]: The common law and civil law compared’ 1987 *Tydskrif vir die Suid Afrikaanse Reg* 40.

¹⁰² Kaplan B, Van Mehren AT, and Schaefer R ‘Phases of German Civil Procedure II’ 1957 *Harvard Law Review* 1472. See also Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 10.

¹⁰³ In Switzerland called “*Verhandlungsmaxime*” or “*Verhandlungsgrundsatz*”.

¹⁰⁴ Australian Law Reform Commission *Discussion Paper 62: Review of the Federal Civil Justice System* (19 July 1999) <http://www.austlii.edu.au/au/other/alrc/publications/dp/62/ch2.html#Heading6> para. 2.27 (date of use: 31 January 2013); Australian Law Reform Commission *Report 89: Managing Justice – A Review of the Federal Civil Justice System* (2000) <http://www.austlii.edu.au/au/other/alrc/publications/reports/89/ch1.html#Heading15> para. 1.126 (date of use: 31 January 2013). See also Gerber DJ ‘Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States’ 1986 *American Journal of Comparative Law* 754; Stürner R ‘U.S.-amerikanisches und europäisches Verfahrensverständnis’ in Lutter M *et al* (eds) *Festschrift für Ernst C. Stiefel zum 80. Geburtstag* 1987 766; Stürner R ‘Parteiherrschaft versus Richtermacht: Materielle Prozessleitung und Sachverhaltsaufklärung zwischen Verhandlungsmaxime und Effizienz’ 2010 *Zeitschrift für Zivilprozess* 156; Eschenfelder ED *Beweiserhebung im Ausland und ihre Verwertung im inländischen Zivilprozess: Zur Bedeutung des US-amerikanischen discovery-Verfahrens für das deutsche Erkenntnisverfahren* 2002 88, 172; Sutter-Somm T and von Arx G ‘Art. 55’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur*

are introduced into civil proceedings and the examination of evidence at the trial, civil procedure in civil-law countries is thus as adversarial as civil litigation in common-law countries.¹⁰⁵ In this regard, the use of the term “inquisitorial system” as opposed to that of “adversarial system” can be misleading, as the former could imply a connection to the so-called “principle of inquisitorial procedure”.¹⁰⁶ Under this principle, the judge of his own accord seeks out facts and means of proof, and is not limited to the evidence proffered by the parties.¹⁰⁷ Such connection, however, does not exist, as in countries following the inquisitorial system, the judge does usually not investigate the facts.¹⁰⁸

In recent years, the extent of procedural intervention by judges in civil litigation in some of the common-law countries such as England, Australia, South Africa, or Nigeria, has been increased in order to expedite the trial proceedings.¹⁰⁹ In addition to the aforementioned blend of

Schweizerischen Zivilprozessordnung 2010 378 n. 9 *et seq.*; Geimer R *Internationales Zivilprozessrecht* 2009 706 n. 2271.

¹⁰⁵ Langbein JH ‘The German Advantage in Civil Procedure’ 1985 *University of Chicago Law Review* 841 *et seq.*; Hurter E ‘Seeking truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation’ 2007 *Tydskrif vir die Suid Afrikaanse Reg* 252; Junker A ‘Die Informationsbeschaffung für den Zivilprozeß: Informationsbeschaffung durch Beweispersonen’ in Schlosser P (ed) *Die Informationsbeschaffung für den Zivilprozeß: die verfahrensmäßige Behandlung von Nachlässen, ausländisches Recht und Internationales Zivilprozessrecht* 1996 121 *et seq.*

¹⁰⁶ In Switzerland called “*Untersuchungsmaxime*” or “*Untersuchungsgrundsatz*”.

¹⁰⁷ See, amongst others, Gerber DJ ‘Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States’ 1986 *American Journal of Comparative Law* 754 fn. 42; Steck D ‘Art. 296’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 1412 n. 7; Sutter-Somm T and von Arx G ‘Art. 55’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 388 n. 60 *et seq.*

¹⁰⁸ With regard to Switzerland, see Article 55(1) of the Swiss Civil Procedure Code, which stipulates that the parties are responsible for pleading the facts on which they base their claims and for offering evidence, *cf.* the (unofficial) English translation of Article 55 by Berti SV (ed) *ZPO, CPC, CCP* 2009 542. For exceptions to Article 55(1), see Articles 247(2), 255, 272, 277(2), 296(1), and 306 of the Swiss Civil Procedure Code. See also Kötzt H ‘The role of the judge in the court-room [*sic*]: The common law and civil law compared’ 1987 *Tydskrif vir die Suid Afrikaanse Reg* 36 *et seq.*, who notes that the label “inquisitorial system” is “*unfortunate and misleading*” insofar as the former term is used to refer to the “*bureaucratic omnipotence*” of the judge. In this context, see also Stürner R ‘Parteiherrschaft versus Richtermacht: Materielle Prozessleitung und Sachverhaltsaufklärung zwischen Verhandlungsmaxime und Effizienz’ 2010 *Zeitschrift für Zivilprozess* 154 *et seq.*

¹⁰⁹ Australian Law Reform Commission *Issue Paper 20: Review of the Federal Civil Justice System: Rethinking the Federal Civil Litigation System* (Closing Date: 8 August 1997) <http://www.austlii.edu.au/au/other/alrc/publications/issues/20/02advers.html> paras. 2.29 *et seq.* and 5.1 *et seq.* (date of use: 31 January 2013); Australian Law Reform Commission *Discussion Paper 62: Review of the Federal Civil Justice System* (19 July 1999) <http://www.austlii.edu.au/au/other/alrc/publications/dp/62/ch2.html#Heading6> para. 2.27 (date of use: 31 January 2013); Australian Law Reform Commission *Report 89: Managing Justice – A Review of the Federal Civil Justice System* (2000) <http://www.austlii.edu.au/au/other/alrc/publications/reports/89/ch1.html#Heading15> para. 1.127 *et seq.* (date of use: 31 January 2013); De Vos WL ‘International Aspects of Civil Procedural Law’ 1996 *Stellenbosch Law Review* 349; Kötzt H ‘The role of the judge in the court-room [*sic*]: The common law and civil law compared’ 1987 *Tydskrif vir die Suid Afrikaanse Reg* 42; Hurter E ‘Seeking truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation’ 2007 *Tydskrif vir die Suid Afrikaanse Reg* 256 *et seq.*; De Vos WL ‘Developments in South African Civil Procedural Law Over the Last Fifty Years’ 2000 *Stellenbosch Law Review* 349 *et seq.*; Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 27; Bamford D ‘The Continuing Revolution: Experts and Evidence in Com-

adversarial and inquisitorial elements in civil- and common-law civil litigation, this so-called “managerial judging” results in a further convergence in civil procedural matters in both legal models. It is to be expected that such rapprochement will further increase in the future in order to combine the advantages of civil procedure in both legal systems.¹¹⁰ The dichotomy between the adversarial and the inquisitorial model, however, will remain due to the long-standing existence of both traditions.

The second key difference in the collection of evidence in civil and common law, namely the breakdown of common-law civil procedure in the pre-trial and trial stage, has its roots in the jury system. The common-law jury trial has been described as “*single continuous drama*”, as a jury cannot be “*assembled, dismissed and reconvened from time to time over an extended period.*”¹¹¹ To put it differently, the temporary availability of the jury requires the trial to be a continuous event. Once commenced, a trial cannot be interrupted for the collection of additional evidence. In order to present all evidentiary material to the jury at the trial, it is therefore essential that it is gathered prior to the trial stage. This also gives litigants the time that is required to preview the opponent’s evidence and to develop a strategy on how to counter such evidence before the jury.¹¹² Hence, the time for gathering evidence is necessarily before the trial. Evi-

mon Litigation’ in Walker J and Chase OG (eds) *Common Law, Civil Law and the Future of Categories* 2010 161 *et seq.*, 177; Ingenhoven T *Grenzüberschreitender Rechtsschutz durch englische Gerichte: Prozessuale Gestaltungsmöglichkeiten für ausländische Unternehmen im Forum London* 2001 33 *et seq.*; Andrews N A *New Civil Procedural Code for England: Party-Control “Going, Going, Gone”* 1999 *Zeitschrift für Zivilprozeß International* 9 *et seq.*; Andrews N ‘The Pursuit of Truth in Modern English Civil Proceedings’ 2003 *Zeitschrift für Zivilprozeß International* 72 *et seq.*; Zuckermann AAS ‘English Civil Procedure – The Shift away from Party Control and Orality’ 1996 *Zeitschrift für Zivilprozeß International* 65 *et seq.*, 84, 86; Alimi LO *The 2004 Lagos State (Civil Procedure) Rules and The Nigerian Law of Evidence: Some Matters Arising* (undated)

[http://www.alimiandco.com/publications/2004%20LAGOS%20STATE%20\(CIVIL%20PROCEDURE\)%20RULES%20AND%20THE%20LAW%20OF%20EVIDENCE.pdf](http://www.alimiandco.com/publications/2004%20LAGOS%20STATE%20(CIVIL%20PROCEDURE)%20RULES%20AND%20THE%20LAW%20OF%20EVIDENCE.pdf) 3, 17 (date of use: 31 January 2013); Alimi LO *An Overview of the 2004 Abuja and Lagos Civil Procedure Rules* (12 October 2005) <http://www.alimiandco.com/publications/AN%20OVERVIEW%20OF%20THE%20NEW%20CIVIL%20PROCEDURE%20RULE.pdf> 1 *et seq.* (date of use: 31 January 2013).

¹¹⁰ See, for instance, Erasmus HJ ‘Civil Procedural Reform – Modern Trends’ 1999 *Stellenbosch Law Review* 13 *et seq.* For a presentation of shortcomings of civil procedure in the adversarial system, see, amongst others, Erasmus HJ “‘Much ado about not so much’ – or, the excess of adversarial process’ 1996 *Stellenbosch Law Review* 114 *et seq.*, Langbein JH ‘The German Advantage in Civil Procedure’ 1985 *University of Chicago Law Review* 823 *et seq.*

¹¹¹ Kötz H ‘The role of the judge in the court-room [*sic*]: The common law and civil law compared’ 1987 *Tydskrif vir die Suid Afrikaanse Reg* 40. See also De Vos WL and Van Loggerenberg DE ‘The activism of the judge in South Africa’ 1991 *Tydskrif vir die Suid Afrikaanse Reg* 601; Gerber DJ ‘Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States’ 1986 *American Journal of Comparative Law* 749.

¹¹² Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 26; Varga I *Beweiserhebung in transatlantischen Schiedsverfahren: Eine Suche nach Kompromissen zwischen deutscher und US-amerikanischer Beweisrechtstradition* 2006 83 *et seq.*; Maxeiner J ‘Die Gefahr der Übertragung deutschen Rechtsdenkens auf den US-amerikanischen Zivilprozeß’ 1990 *Recht der Internationalen Wirtschaft* 443; Ha-

dentiary material that is not collected prior to the beginning of the trial cannot be presented to the jury and, thus, cannot be taken into consideration when deciding the case.¹¹³ Having said this, there is usually no second opportunity for the litigants to collect evidence following the pre-trial procedure.¹¹⁴

Although in many common-law countries, such as England, South Africa, Botswana, Namibia, Nigeria or Uganda, there are no longer juries in civil litigation,¹¹⁵ the separation of civil procedure into the pre-trial and trial stage remained, and the aforementioned principles designed for jury trials still apply.¹¹⁶

By contrast, in civil-law civil procedure, there is no need for a distinction between pre-trial and trial, as it is not based on a jury system. The judge is, unlike a jury, permanently available to hear evidence. As a result, civil litigation in civil-law jurisdictions does not require a pre-trial stage, let alone discovery.¹¹⁷ The collection of evidence has thus not to be concluded prior to the trial stage, but can, if necessary, also take place during the latter. Moreover, the trial may

zard GC Jr 'Discovery and the Role of the Judge in Civil Law Jurisdiction' 1997-1998 *Notre Dame Law Review* 1020.

¹¹³ Schlosser P 'Jurisdiction and International Judicial and Administrative Co-operation' in Académie de Droit International (ed) *Recueil des Cours: Collected Courses of the Hague Academy of International Law 2000* 2001 115; Weis J 'The Hague Evidence Convention and United States civil procedure' 1991 *Zeitschrift für vergleichende Rechtswissenschaft* 413; Lowenfeld AF *International Litigation and the Quest for Reasonableness: Essays in Private International Law* 1996 140; Junker A 'Die Informationsbeschaffung für den Zivilprozeß; Informationsbeschaffung durch Beweispersonen' in Schlosser P (ed) *Die Informationsbeschaffung für den Zivilprozeß: die verfahrensmäßige Behandlung von Nachlässen, ausländisches Recht und Internationales Zivilprozessrecht* 1996 120; Eschenfelder ED *Beweiserhebung im Ausland und ihre Verwertung im inländischen Zivilprozess: Zur Bedeutung des US-amerikanischen discovery-Verfahrens für das deutsche Erkenntnisverfahren* 2002 4, 42, 81.

¹¹⁴ Adams M 'The conflicts of jurisdictions – an economic analysis of pre-trial discovery, fact gathering and cost shifting rules in the United States and Germany' in De Geest G and Van den Bergh R (eds) *Comparative Law and Economics Volume III* 2004 60. See also Sunderland ER 'The Function of Pre-Trial Procedure' 1939 *University of Pittsburgh Law Review* 1 cited in Nordenberg MA 'The Supreme Court and Discovery Reform: The Continuing Need for An Umpire' 1980 *Syracuse Law Review* 554, who describes the relationship between the pre-trial and trial stages as follows: "In the first stage the points of dispute are ascertained and defined; in the second they are tried and determined."

¹¹⁵ Unlike, for instance, in the United States. With regard to South Africa, see Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 5; Meintjes-Van der Walt L 'Ruling on expert evidence in South Africa: A comparative analysis' 2001 *International Journal of Evidence & Proof* 226.

¹¹⁶ See, amongst others, De Vos WL and Van Loggerenberg DE 'The activism of the judge in South Africa' 1991 *Tydskrif vir die Suid Afrikaanse Reg* 601; De Vos WL 'South African civil procedural law in historical and social context' 2002 *Stellenbosch Law Review* 247; Adams M 'The conflicts of jurisdictions – an economic analysis of pre-trial discovery, fact gathering and cost shifting rules in the United States and Germany' in De Geest G and Van den Bergh R (eds) *Comparative Law and Economics Volume III* 2004 60; Hazard GC Jr 'Discovery and the Role of the Judge in Civil Law Jurisdiction' 1997-1998 *Notre Dame Law Review* 1020.

¹¹⁷ Sanders AJGM 'The characteristic features of the Civil Law' 1981 *Comparative and International Law Journal of Southern Africa* 206; Hazard GC Jr 'Discovery and the Role of the Judge in Civil Law Jurisdiction' 1997-1998 *Notre Dame Law Review* 1020 *et seq.*; Eschenfelder ED *Beweiserhebung im Ausland und ihre Verwertung im inländischen Zivilprozess: Zur Bedeutung des US-amerikanischen discovery-Verfahrens für das deutsche Erkenntnisverfahren* 2002 93.

consist of a sequence of hearings and may be interrupted.¹¹⁸ In this context, it should also be recalled that in civil proceedings in civil-law countries, the judge is actively involved in the collection of evidence, and, since he is in charge of the trial, can gather evidence at any stage of the proceedings.

3. Evidence-taking in Civil-law and Common-law Civil Litigation

Based on the fact that in civil litigation in civil-law jurisdictions, the judge is responsible for gathering the evidence, the taking of evidence is regarded as a judicial act that is entrusted exclusively to the judicial authorities of the state in whose jurisdiction the evidentiary material is located. The evidence-taking by a trial court without the involvement of the competent authorities of the foreign state is therefore seen as trespassing on the domain of the foreign courts.¹¹⁹ From the perspective of a civil-law country, members of a court located abroad are thus precluded from travelling to the said country in order to, for instance, question witnesses or inspect a location.¹²⁰ In this context, one has to recall that it is irrelevant whether the court domiciled abroad applies any compulsory measures in the said state or not. Also, the collection of evidence in a civil-law country by a private individual¹²¹ for the benefit of foreign civil proceedings is regarded as a judicial act.¹²² From a civil-law viewpoint, the individual acts as an

¹¹⁸ Kötzt H 'The role of the judge in the court-room [*sic*]: The common law and civil law compared' 1987 *Tydskrif vir die Suid Afrikaanse Reg* 40; Langbein JH 'The German Advantage in Civil Procedure' 1985 *University of Chicago Law Review* 826; McClean D *International Judicial Assistance* 1992 57; Adams M 'The conflicts of jurisdictions – an economic analysis of pre-trial discovery, fact gathering and cost shifting rules in the United States and Germany' in De Geest G and Van den Bergh R (eds) *Comparative Law and Economics Volume III* 2004 392; Gerber DJ 'Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States' 1986 *American Journal of Comparative Law* 750.

¹¹⁹ See, amongst others, De Vos WL 'International Aspects of Civil Procedural Law' 1996 *Stellenbosch Law Review* 174; Geimer R *Internationales Zivilprozessrecht* 2009 736; Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 22; Siegrist D *Hoheitsakte auf fremdem Staatsgebiet* 1987 147; Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 116 n. 164 *et seq.*; Spühler K, Dolge A, and Gehri M *Schweizerisches Zivilprozessrecht und Grundzüge des internationalen Zivilprozessrechts* 2010 281 n. 317; Lookofsky JM and Hertz K *Transnational Litigation and Commercial Arbitration: An Analysis of American, European, and International Law* 2004 468 *et seq.*; McClean D *International Judicial Assistance* 1992 57 *et seq.*; Rogers JM 'On the Exclusivity of the Hague Evidence Convention' 1985-1986 *Texas International Law Journal* 444 *et seq.*; Oxman BH 'The Choice between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Convention' 1982-1983 *University of Miami Law Review* 762 with reference to the Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law; Bishop RD 'International Litigation in Texas: Obtaining Evidence in Foreign Countries' 1982 *Houston Law Review* 364; Burns MT 'The Hague Convention on Taking Evidence Abroad: Conflict over Pretrial Discovery' 1985 *Michigan Yearbook of International Legal Studies* 292.

¹²⁰ Geimer R *Internationales Zivilprozessrecht* 2009 216 n. 442, 46 n. 120; Linke H and Hau W *Internationales Zivilverfahrensrecht* 2011 47 n. 97.

¹²¹ For instance, the inspection of documents by a party's counsel in the course of discovery proceedings or the examination of immovable property.

¹²² Eschenfelder ED *Beweiserhebung im Ausland und ihre Verwertung im inländischen Zivilprozess: Zur Bedeutung des US-amerikanischen discovery-Verfahrens für das deutsche Erkenntnisverfahren* 2002 71; Pfeiffer T 'Internationale Zusammenarbeit bei der Vornahme innerstaatlicher Rechtshandlungen – International cooperation

extended arm of the court located abroad, as the evidentiary material obtained by the individual is ultimately used in a foreign civil litigation.

By contrast, common-law countries consider the taking of evidence in civil proceedings as a non-judicial act, provided no measures of compulsion are applied.¹²³ This is a corollary of the adversarial system which places upon the parties the duty of securing and presenting evidence at the trial. The gathering of evidence is thus regarded as a purely private matter in which the judicial authorities, in whose jurisdiction the evidence is located, usually have no interest and no wish to participate.¹²⁴ The questioning, for instance, of a willing third party in a common-law country by a counsel for the benefit of foreign civil proceedings is, therefore, not considered as a judicial act and does not violate the sovereignty of the said country.¹²⁵

4. Evidence-taking in Civil and Commercial Matters in Switzerland and Article 271 of the Swiss Criminal Code

a) Evidence-taking as a Criminal Offence

Like other civil-law countries, Switzerland regards the taking of evidence as a judicial act reserved to judicial authorities.¹²⁶ Compared to other civil-law countries, however, Switzerland went a step further by inserting in the 1930s' Article 271 in its Criminal Code.¹²⁷ This provision prohibits acts on Swiss territory for the benefit of a foreign government in order to

tion in the making of interior jurisdictional measures' in Gilles P (ed) *Transnationales Prozeßrecht – Transnational Aspects of Procedural Law* 1995 94.

¹²³ Geimer E *Internationale Beweisaufnahme* 1998 12, 15; Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 22; Oxman BH 'The Choice between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Convention' 1982-1983 *University of Miami Law Review* 762.

¹²⁴ Oxman BH 'The Choice between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Convention' 1982-1983 *University of Miami Law Review* 762.

¹²⁵ See in this regard also Obi-Okoye A *Essays on Civil Proceedings Volume One* 1986 314, who emphasises that a court located outside Nigeria is not bound to go through the local high court to obtain evidence in the latter's jurisdiction. Rather, the court is, according to Obi-Okoye, at liberty to appoint any person it desires as an examiner, and so long as the witness is willing to attend and give evidence, the examination may be conducted without the intervention of the said high court.

¹²⁶ Frei L 'The Service of Process and the Taking of Evidence on Behalf of U.S. Proceedings – the Problem of Granting Assistance' 1983 *Wirtschaft und Recht* 196; Government of Switzerland 'Brief of Government of Switzerland as Amicus Curiae in Support of Petitioners' 1986 *International Legal Materials* 1551, 1553; Volken P 'Vor Art. 11' in Girsberger A *et al* (eds) *Zürcher Kommentar zum IPRG* 2004 143 n. 17.

¹²⁷ Of 21 December 1937, SR 311.0.

protect the sovereignty of Switzerland.¹²⁸ Article 271(1) of the Swiss Criminal Code reads as follows:¹²⁹

“Any person who carries out activities on behalf of a foreign state on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official, (...), any person who encourages such activities shall be liable to a custodial sentence not exceeding three years or to a monetary penalty, or in serious cases to a custodial sentence of not less than one year.”

The notion of “*activities on behalf of a foreign state*” is quite broad. It is not only activities carried out by an authority or a public official that fall within this notion, but also the activities of a private individual. Under Swiss law, the acts of authorities, public officials and private individuals constitute activities in the sense of Article 271(1) of the Swiss Criminal Code if they can first be characterised as activities of state in view of their nature or function, and, second, if the activities benefit a foreign governmental, judiciary or legislative body.¹³⁰ A typical activity under Article 271(1) is the taking of evidence, such as questioning witnesses or inspecting documents located in Switzerland, as such an act is, from a Swiss perspective, entrusted to public officials. Cross-border taking of evidence furthermore assists the trial court outside Switzerland for whose benefit the evidence is taken on Swiss soil. In this context, the Swiss Federal Court held that any activities performed in the interest of a foreign state or its authorities are considered, under Article 271(1) of the Swiss Criminal Code, as activities that benefit foreign states. This, according to the said court, is particularly true with regard to the enforcement of law by court judgments which, in every state, is regarded as one of the major duties of

¹²⁸ Federal Office of Justice *Bericht des Bundesamtes für Justiz zu Rechtsfragen im Zusammenhang mit der Zusammenarbeit mit ausländischen Behörden (Amtshilfe, Rechtshilfe, Souveränitätsschutz)* (14 March 2011) <http://www.bj.admin.ch/content/dam/data/sicherheit/rechtshilfe/ber-auslandszusammenarbeit-d.pdf> 20 (date of use: 31 January 2013); decision of the Swiss Federal Court 6B_402/2008 of 6.11.2008 consideration 2.3.2.

¹²⁹ For the (unofficial) English translation of the Swiss Criminal Code, see <http://www.admin.ch/ch/e/rs/3/311.0.en.pdf> (date of use: 31 January 2013).

¹³⁰ BGE 114 IV 130 consideration 2.a; BGE 65 I 43 consideration 2; decision of the Swiss Federal Court 6B_402/2008 of 6.11.2008 consideration 2.3.2; VPB 66 (2002) no. 128 consideration 6; VPB 61 (1997) no. 82 consideration III.1; Schramm D ‘Entwicklungen bei der Strafbarkeit von privaten Zeugenbefragungen in der Schweiz durch Anwälte für ausländische Verfahren’ 2006 *Aktuelle Juristische Praxis* 491 *et seq.*; Hopf T ‘Art. 271’ in Niggli MA and Wiprächtiger H (eds) *Basler Kommentar Strafrecht II Art. 111-392 StGB* 2007 1916 n. 7. For criticism regarding BGE 114 IV 130, see Schramm D ‘Entwicklungen bei der Strafbarkeit von privaten Zeugenbefragungen in der Schweiz durch Anwälte für ausländische Verfahren’ 2006 *Aktuelle Juristische Praxis* 494 *et seq.*; Schultz H ‘Die strafrechtliche Rechtsprechung des Bger 1988’ 1990 *Zeitschrift des Bernischen Juristenvereins* 25 *et seq.*; Delnon V and Rüdi B ‘Strafbare Beweisführung’ 1998 *Schweizerische Zeitschrift für Strafrecht* 330; ZR 104 (2005) no. 62.

state. The gathering of evidence ultimately serves such enforcement, as it forms an essential part of the adjudicative process.¹³¹

Under Article 271(1) of the Swiss Criminal Code, it is not only irrelevant whether the evidence-taking is conducted by an authority or by a private individual, but also whether the latter was requested to obtain evidence on Swiss territory by a court abroad or a litigant in civil proceedings before such court.¹³² A counsel who, for instance, questions a non-party witness in Switzerland on behalf of his client for the benefit of foreign civil proceedings, violates Article 271(1) of the Swiss Criminal Code. In other words, it is immaterial whether in the state where the said proceedings are pending, the evidence-gathering is considered as a purely private matter.¹³³ Article 271(1) also applies, irrespective of whether the testimony of the witness examined on Swiss soil will directly (by submitting the transcript of the witness examination to the court outside Switzerland) or indirectly (by a testimony of the person who questioned the witness in Switzerland) be introduced into the foreign proceedings.¹³⁴ Moreover, it is also irrelevant under Article 271(1) whether the authority or the private individual taking the evidence uses measures of compulsion or not.¹³⁵

Activities of a litigant or his counsel, that merely serve to assess the chances of success of a lawsuit or to prepare the latter, do not constitute “*activities on behalf of a foreign state*” and thus do not fall under Article 271(1), provided the respective information will later on not be used as evidence in the foreign civil proceedings. Having said this, private research or informal investigations, such as conversations with potential non-party witnesses, do not, as a general

¹³¹ BGE 114 IV 132 consideration 3.b; decision of the Swiss Federal Court 9X.1/1999 of 7.7.2000; VPB 61 (1997) no. 82 consideration III.1; Schramm D ‘Entwicklungen bei der Strafbarkeit von privaten Zeugenbefragungen in der Schweiz durch Anwälte für ausländische Verfahren’ 2006 *Aktuelle Juristische Praxis* 492; Markees C ‘Die Vornahme von Prozeßhandlungen auf schweizerischem Gebiet zuhanden eines ausländischen Verfahrens im Lichte des Art. 271 StGB’ 1969 *Schweizerische Juristenzeitung* 35.

¹³² Honegger PC *Amerikanische Offenlegungspflichten in Konflikt mit schweizerischen Geheimhaltungspflichten unter besonderer Berücksichtigung der Rechtshilfe bei Steuerhinterziehungen und Insidergeschäften* 1986 137; Trechsel S and Vest H ‘Art. 271’ in Trechsel S and Pieth M (eds) *Schweizerisches Strafgesetzbuch Praxiskommentar* 2013 1280 n. 2.

¹³³ Hopf T ‘Art. 271’ in Niggli MA and Wiprächtiger H (eds) *Basler Kommentar Strafrecht II Art. 111-392 StGB* 2007 1921 n. 15; Markees C ‘Die Vornahme von Prozeßhandlungen auf schweizerischem Gebiet zuhanden eines ausländischen Verfahrens im Lichte des Art. 271 StGB’ 1969 *Schweizerische Juristenzeitung* 35; Cassani U ‘“Pretrial Discovery” sur sol suisse et protection pénale de la souveraineté territoriale’ 1992 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 13; Trechsel S and Vest H ‘Art. 271’ in Trechsel S and Pieth M (eds) *Schweizerisches Strafgesetzbuch Praxiskommentar* 2013 1280 n. 2.

¹³⁴ Schramm D ‘Entwicklungen bei der Strafbarkeit von privaten Zeugenbefragungen in der Schweiz durch Anwälte für ausländische Verfahren’ 2006 *Aktuelle Juristische Praxis* 492.

¹³⁵ BGE 114 IV 131 *et seq.*; decision of the Swiss Federal Court 9X.1/1999 of 7.7.2000 consideration 6.b; Markees C ‘Die Vornahme von Prozeßhandlungen auf schweizerischem Gebiet zuhanden eines ausländischen Verfahrens im Lichte des Art. 271 StGB’ 1969 *Schweizerische Juristenzeitung* 35; Trechsel S and Vest H ‘Art. 271’ in Trechsel S and Pieth M (eds) *Schweizerisches Strafgesetzbuch Praxiskommentar* 2013 1280 n. 2.

principle, infringe Article 271(1) of the Swiss Criminal Code.¹³⁶ In practice, to distinguish whether an activity falls under the said provision or merely constitutes a preparatory measure exempt from punishment can be challenging and has to be decided on a case-by-case basis.¹³⁷ In order to avoid any risk of criminal prosecution under Article 271(1), counsel and parties in proceedings pending outside Switzerland are advised to refrain from taking any evidence on Swiss soil or, at least, to consult a Swiss lawyer before taking action in Switzerland to ensure that the intended activity does not infringe the said provision.

The voluntary presentation of documents to a court located abroad by a litigant domiciled in Switzerland does not constitute a violation of Article 271(1) of the Swiss Criminal Code. Such transmission is not regarded as an act reserved to an authority, but as a matter for the parties.¹³⁸

Article 271(1) of the Swiss Criminal Code requires that the activity on behalf of a foreign state is performed on Swiss soil. It is, however, not necessary that the entire act be conducted in

¹³⁶ BGE 132 IV 132 consideration 2.d; Federal Office of Justice *Bericht des Bundesamtes für Justiz zu Rechtsfragen im Zusammenhang mit der Zusammenarbeit mit ausländischen Behörden (Amtshilfe, Rechtshilfe, Souveränitätsschutz)* (14 March 2011) <http://www.bj.admin.ch/content/dam/data/sicherheit/rechtshilfe/ber-auslandszusammenarbeit-d.pdf> 29 (date of use: 31 January 2013); Schramm D ‘Entwicklungen bei der Strafbarkeit von privaten Zeugenbefragungen in der Schweiz durch Anwälte für ausländische Verfahren’ 2006 *Aktuelle Juristische Praxis* 492; Honegger PC *Amerikanische Offenlegungspflichten in Konflikt mit schweizerischen Geheimhaltungspflichten unter besonderer Berücksichtigung der Rechtshilfe bei Steuerhinterziehungen und Insidergeschäften* 1986 137; Frei L ‘Discovery, Secrecy and International Mutual Assistance in Civil Matters’ in Zäch R (ed) *Litigation of Business Matters in the United States and International Mutual Assistance* 1984 192 *et seq.*; Zulauf U ‘Korruption mit dem Ausland: Verrat an der Schweiz? Gedanken zu den Schweizer Verbotsgesetzen (“Blocking Statutes”) von Art. 271 und 273 StGB und Art. 47 BankG’ in Waldburger R *et al* (eds) *Wirtschaftsrecht zu Beginn des 21. Jahrhunderts, Festschrift für Peter Nobel zum 60. Geburtstag* 2005 1085; Markees C ‘Die Vornahme von Prozeßhandlungen auf schweizerischem Gebiet zuhanden eines ausländischen Verfahrens im Lichte des Art. 271 StGB’ 1969 *Schweizerische Juristenzeitung* 36.

¹³⁷ For Swiss prosecution authorities, it may be difficult to assess whether information resulting from private or informal researches were directly used in proceedings before a trial court. For examples in this regard, see Hopf T ‘Art. 271’ in Niggli MA and Wiprächtiger H (eds) *Basler Kommentar Strafrecht II Art. 111-392 StGB* 2007 1921 n. 15; Federal Office of Justice *Bericht des Bundesamtes für Justiz zu Rechtsfragen im Zusammenhang mit der Zusammenarbeit mit ausländischen Behörden (Amtshilfe, Rechtshilfe, Souveränitätsschutz)* (14 March 2011) <http://www.bj.admin.ch/content/dam/data/sicherheit/rechtshilfe/ber-auslandszusammenarbeit-d.pdf> 29 (date of use: 31 January 2013). See also Cassani U ‘“Pretrial Discovery” sur sol suisse et protection pénale de la souveraineté territoriale’ 1992 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 14 who opines that all preparatory measures shall fall under Article 271(1) of the Swiss Criminal Code, irrespective of whether the information gained from such measures is used in proceedings before the trial court or not.

¹³⁸ In BGE 114 IV 131 consideration 2.c *in fine*, the Swiss Federal Court held that in contrast to hearing witnesses, the submission of documents is a party measure not requiring official action in the sense of Article 271(1) of the Swiss Criminal Code. In VBP 61.82 consideration III.1, however, the Swiss Federal Council opined in a case, where two defendants domiciled in Switzerland were ordered by a U.S. court to hand over certain documents, that such transmission is about aiding the taking of evidence by a judge of a foreign country and that it hence violates the aforesaid provision. In this context, it has to be noted that the opinion of the Swiss Federal Council is merely the view of the executive and is thus not binding on any judicial authority. See also Hopf T ‘Art. 271’ in Niggli MA and Wiprächtiger H (eds) *Basler Kommentar Strafrecht II Art. 111-392 StGB* 2007 1922 n. 15 and Frei L ‘Discovery, Secrecy and International Mutual Assistance in Civil Matters’ in Zäch R (ed) *Litigation of Business Matters in the United States and International Mutual Assistance* 1984 193 who share the opinion of the Swiss Federal Court.

Switzerland, but it suffices that it partly take place on Swiss territory.¹³⁹ It goes without saying that in cases where the questioning of a witness or the inspection of documents occurs entirely outside Switzerland, Article 271(1) does not apply. Counsel or parties in proceedings before a court located abroad may thus, for instance, agree with a non-party witness domiciled in Switzerland to question the latter outside of Switzerland, that is, in the nearest country that allows the examination of witnesses by a counsel or litigant¹⁴⁰ and so avoid criminal prosecution under Article 271(1) of the Swiss Criminal Code. The same holds true for an inspection of documents, provided the latter are reviewed outside Switzerland.¹⁴¹

b) Authorisation under Article 271(1) of the Swiss Criminal Code

Courts or private individuals wishing to perform acts falling under Article 271(1) of the Swiss Criminal Code require a waiver from the competent Swiss authority.¹⁴² Permission from the individual affected by the act does not suffice, as only states can relinquish their sovereignty.¹⁴³ Where a waiver is not granted, the said courts or private individuals are not allowed to perform the relevant acts on Swiss territory, but have to seek international judicial assistance.¹⁴⁴

Permissions under Article 271(1) are only given in exceptional cases. A waiver may be granted where international judicial assistance is theoretically feasible, that is, where there are no grounds for refusal, and where it appears practically impossible, or even absurd, to request the relevant Swiss authority for judicial assistance.¹⁴⁵ When determining whether permission under

¹³⁹ It is, for instance, sufficient, if the examination of the witness took place in Switzerland, while the signing of the transcript by the witness, however, occurred abroad, Hopf T ‘Art. 271’ in Niggli MA and Wiprächtiger H (eds) *Basler Kommentar Strafrecht II Art. 111-392 StGB* 2007 1924 n. 17; Honegger PC *Amerikanische Offenlegungspflichten in Konflikt mit schweizerischen Geheimhaltungspflichten unter besonderer Berücksichtigung der Rechtshilfe bei Steuerhinterziehungen und Insidergeschäften* 1986 138.

¹⁴⁰ For instance Germany.

¹⁴¹ Honegger PC *Amerikanische Offenlegungspflichten in Konflikt mit schweizerischen Geheimhaltungspflichten unter besonderer Berücksichtigung der Rechtshilfe bei Steuerhinterziehungen und Insidergeschäften* 1986 138.

¹⁴² See Article 31(1) of the Government and Administrative Ordinance of 25 November 1998 (“*Regierungs- und Verwaltungsverordnung*”, SR 172.010.1), <http://www.admin.ch/ch/d/as/1999/1258.pdf> (date of use: 31 January 2013). Authorisations are granted by one of the seven Federal Departments and the Federal Chancellery.

¹⁴³ BGE 65 I 46 consideration 4.

¹⁴⁴ For international judicial assistance, see para. V. below.

¹⁴⁵ The latter is, for instance, the case where a court located abroad requests an on-site inspection in Switzerland. See Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 35 (date of use: 31 January 2013). These guidelines are the official guide on international judicial assistance in civil matters drafted by the Federal Office of Justice, that is, the federal authority responsible for international judicial assistance in Switzerland. Currently, the Federal Office of Justice is busy revising the guidelines. Unfortunately, at the time this thesis was printed (14 February 2013), the newly updated version was not yet available. See furthermore also VPB 61 (1997) no. 82 consideration III.2, III.3; Frei L ‘Discovery, Secrecy and International Mutual Assistance in Civil Matters’ in Zäch R (ed) *Litigation of Business Matters in the United States and International Mutual Assistance* 1984 192; Zulauf U ‘Korruption mit dem Ausland: Verrat an der Schweiz? Gedanken zu den Schweizer Verbotsgesetzen (“Blocking Statutes”) von Art. 271 und 273 StGB und

Article 271(1) of the Swiss Criminal Code shall be granted or not, the competent authorities have to balance the various interests involved, namely the protection of Swiss sovereignty, the cooperation with the relevant authorities outside Switzerland, and the interests of individuals affected by the permission.¹⁴⁶

c) **Protection of Foreign Sovereignty under Article 299(1) of the Swiss Criminal Code**

Under Swiss law, not only the encroachment on Swiss sovereignty constitutes a criminal offence, but also that of a foreign state. Article 299(1) of the Swiss Criminal Code states the following:

“Any person who violates the territorial sovereignty of a foreign state, in particular by conducting official activities without authorisation on foreign territory (...), shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.”¹⁴⁷

This provision penalises Swiss public officials who perform official acts for the benefit of Switzerland on foreign territory. The scholarly doctrine in Switzerland is ambiguous on whether Article 299(1) merely punishes acts performed by authorities or public officials, or also those carried out by private individuals. To date, the Swiss Federal Court has not yet dealt, at least not in a published decision, with this issue. In any event, there is no doubt that, for instance, the questioning of witnesses or the inspection of documents by a Swiss judge abroad infringe Article 299(1) of the Swiss Criminal Code, provided the foreign state regards such activities as judicial acts.¹⁴⁸

V. **International Judicial Assistance in Taking of Evidence in Civil and Commercial Matters**

This subchapter deals with international judicial assistance as a means to vanquish the aforementioned restrictions resulting from the concept of sovereignty. First, the practical significance of international judicial assistance in the context of cross-border taking of evidence in

Art. 47 BankG' in Waldburger R *et al* (eds) *Wirtschaftsrecht zu Beginn des 21. Jahrhunderts: Festschrift für Peter Nobel zum 60. Geburtstag* 2005 1085.

¹⁴⁶ Federal Office of Justice *Bericht des Bundesamtes für Justiz zu Rechtsfragen im Zusammenhang mit der Zusammenarbeit mit ausländischen Behörden (Amtshilfe, Rechtshilfe, Souveränitätsschutz)* (14 March 2011) <http://www.bj.admin.ch/content/dam/data/sicherheit/rechtshilfe/ber-auslandszusammenarbeit-d.pdf> 51 (date of use: 31 January 2013).

¹⁴⁷ For the (unofficial) English translation of the Swiss Criminal Code, see <http://www.admin.ch/ch/e/rs/3/311.0.en.pdf> (date of use: 31 January 2013).

¹⁴⁸ Omlin E 'Art. 299' in Niggli MA and Wiprächtiger H (eds) *Basler Kommentar Strafrecht II Art. 111-392 StGB* 2007 2137 n. 5, 2138 n. 12. In practice, Article 299(1) of the Swiss Criminal Code is of little importance. See in this regard Omlin E 'Art. 299' in Niggli MA and Wiprächtiger H (eds) *Basler Kommentar Strafrecht II Art. 111-392 StGB* 2007 2137 n. 1.

civil and commercial matters is highlighted. Subsequently, the notion of “international judicial assistance”, the legal basis of judicial assistance as well as the applicable law are explained. The subchapter also outlines the different forms of international judicial assistance in evidence-taking in civil and commercial matters, and discusses their advantages and disadvantages. Finally, the subchapter addresses the question of how a trial court seeking evidence abroad may proceed in cases where the foreign state does not render judicial assistance.

A. Terminology and Practical Significance of International Judicial Assistance

As explained earlier,¹⁴⁹ a state is not allowed, due to the concept of sovereignty, to perform judicial acts on the territory of a foreign state, as such acts would infringe the latter’s sovereignty. This is particularly true for the taking of evidence in a foreign state, provided the latter regards the gathering of evidence as a judicial act.

International judicial assistance constitutes an instrument to overcome the hurdles imposed by the sovereignty of states by, amongst other things, facilitating the production of evidence situated abroad. It means the support of an activity of a state by another state and consists in the execution of an official activity in one state in response to a request from an authority in another state with the objective of assisting a pending matter in the latter state.¹⁵⁰

International judicial cooperation is critical for a lawsuit not to fail on the grounds that evidence is located in a foreign state. In other words, evidence should not merely be excluded in the proceedings pending before a trial court, because it is located abroad. It is thus of utmost importance that states grant each other judicial assistance in the taking of evidence to the greatest possible extent and abstain from refusing cooperation without any good cause. This is all the more important as the world grows “smaller” which entails, *inter alia*, a growth of cross-border relations that result in an increase in both international civil disputes and litigation. Moreover, it has to be borne in mind, that a state, which rejects a request for judicial assistance without good cause, penalises the litigant proffering the relevant evidence, and not the state

¹⁴⁹ Cf. paras. III.A and IV.A above.

¹⁵⁰ This definition refers to the so-called “active judicial assistance”. For more on the different forms of international judicial assistance, see the paragraph below. Cf. also Jones HL ‘International Judicial Assistance: Procedural Chaos and a Program for Reform’ 1953 *Yale Law Journal* 515; Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 2 n. 5; Geiger R ‘Legal Assistance between States in Civil Matters’ in Bernhardt R (ed) *Encyclopedia of Public International Law Volume III* 1997 194; Nobel P ‘Die Rechtshilfe in Zivilsachen im Lichte der Ratifikation der Haager Konvention von 1970 über die Beweisaufnahme im Ausland in Zivil- und Handelssachen’ in 1995 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 75; Hauser R and Schweri E *GVG, Kommentar zum zürcherischen Gerichtsverfassungsgesetz vom 13. Juni 1976 mit den seithe-rigen Änderungen* 2002 409 n. 1; ZR 97 (1998) no. 116 consideration 2; ZR 88 (1989) no. 95 consideration 3.

requesting judicial assistance. It is the said litigant who ultimately bears the respective negative consequences, and he is in no position to exert influence on the mutual assistance procedure. In addition, the refusal of a request for judicial assistance may result in an incorrect court judgment, as the trial court may have to decide the case without having all relevant facts before it.¹⁵¹

Due to the worldwide globalisation, the need for an intensification of international judicial cooperation in civil and commercial matters has been increased in recent years. As a consequence, more and more states have strengthened their judicial cooperation, in particular with regard to the cross-border taking of evidence, by entering into treaties or joining conventions that facilitate and regularise the procedure for obtaining evidence abroad. It is to be hoped that this trend will continue, as international judicial assistance is the most viable vehicle for overcoming the difficulties arising from the cross-border taking of evidence and creating legal certainty in cases where a litigant wishes to obtain foreign evidence.

In the context of international judicial assistance, one has to distinguish between the “requesting state”, the state that requests another state to grant judicial assistance, and the “requested state”, the state that is asked to render judicial assistance by the requesting state. Where international judicial assistance is requested to obtain foreign evidence in civil and commercial matters, the proceedings in which the evidence is sought are pending in the requesting state, while the relevant means of proof is located in the requested state. The latter thus provides assistance in support of civil proceedings pending in the requesting state. International judicial assistance must thus be considered from two angles, namely that of the requesting and the requested state.

International judicial assistance can be divided into two categories. On the one hand, there is the so-called “active judicial assistance” where the requested state conducts the official activity on its own territory and passes the outcome of such performance on to the requesting state. On the other, there is the so-called “passive judicial assistance” where the requested state permits the requesting state to perform the official act on its territory.¹⁵²

¹⁵¹ Guldener M *Das internationale und interkantonale Zivilprozeßrecht der Schweiz* 1951 21; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 60; Geimer R *Internationales Zivilprozessrecht* 2009 49 n. 124b.

¹⁵² De Vos WL ‘International Aspects of Civil Procedural Law’ 1996 *Stellenbosch Law Review* 173; Layton A and Mercer H (eds) *European Civil Practice Volume 1* 2004 177 n. 7.022; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 22; Geimer R *Internationales Zivilprozessrecht* 2009 852 n. 2426; Geimer E *Internationale Beweisaufnahme* 1998 5; Meier AL *Die Anwendung des Haager Beweisübereinkommens in der Schweiz unter besonderer Berücksichtigung der Beweisaufnahme für U.S.-amerikanische Zivilprozesse*

B. Legal Basis of International Judicial Assistance

Due to its sovereignty,¹⁵³ each state determines whether, and if so to what extent, it renders international judicial assistance to other states. This particularly includes the state's decision as to whether it enters into any bilateral treaties or becomes a member of any multilateral convention on transborder judicial cooperation.¹⁵⁴

1. International Judicial Assistance Based on *Courtoisie Internationale*

In absence of any relevant treaty or convention, states are not obliged under public international law to render judicial assistance.¹⁵⁵ As a result, each state can at its own discretion and on a case-by-case basis determine whether or not it grants judicial assistance.¹⁵⁶ Most states, however, render judicial assistance to states with which they have diplomatic relations in expectation that the latter will reciprocate and grant assistance.¹⁵⁷ They do this based on the so-called “*courtoisie internationale*”, that is, the mutual courtesy and respect states usually show for one another.¹⁵⁸ Having said this, a state requesting assistance from another state, that is neither party to a relevant international treaty, is at the mercy of the requested state, as it can never be sure whether in a particular case, the requested state will render judicial assistance or not.

1999 3 *et seq.*; Hess B *Europäisches Zivilprozessrecht* 2010 463 n. 33 *et seq.*; ZR 88 (1989) no. 95. See, however, Schablenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 50 *et seq.*, who opines that mere tolerance should not be qualified as (passive) judicial assistance, as this goes beyond the scope of judicial assistance.

¹⁵³ Stadler A ‘§ 363’ in Musielak H-J (ed) *Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz* 2012 1254 n. 10.

¹⁵⁴ See in this regard the so-called *S.S. Wimbledon*-case 1923 PCIJ (ser. A) no. 1 15 where the following was stated: “[T]he right of entering into international engagements is an attribute of State sovereignty.” Cf. also Anand RP ‘Sovereign Equality of States in International Law’ in Académie de Droit International (ed) *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 1986 II 1987 29; Stein T and von Buttlar C *Völkerrecht* 2012 182 n. 516 *et seq.*

¹⁵⁵ Cf., *inter alia*, Stadler A ‘§ 363’ in Musielak H-J (ed) *Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz* 2012 1252 n. 3; Schack H *Internationales Zivilverfahrensrecht* 2010 73 n. 198. See also 1998 *Die Praxis des Bundesgerichts* no. 12 consideration 4.c)bb).

¹⁵⁶ Based on their domestic law, however, states may be under an obligation to render international judicial assistance.

¹⁵⁷ Kreindler RH *Transnational Litigation: A Basic Primer* 1998 125; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 26 *et seq.*

¹⁵⁸ Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 27; Schack H *Internationales Zivilverfahrensrecht* 2010 73 n. 198; Geimer R *Internationales Zivilprozessrecht* 2009 61 n. 157, 76 n. 192b; Geiger R ‘Legal Assistance between States in Civil Matters’ in Bernhardt R (ed) *Encyclopedia of Public International Law Volume III* 1997 194; Geimer E *Internationale Beweisaufnahme* 1998 52; Nagel H and Gottwald P *Internationales Zivilprozessrecht* 2007 338 n. 15, 343 n. 34; Dahm G, Delbrück J, and Wolfrum R *Völkerrecht Band I/1: Die Grundlagen. Die Völkerrechtssubjekte* 1989 74, 484; Schablenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 57; Geimer R ‘Betrachtungen zur internationalen (aktiven und passiven) Rechtshilfe und zum grenzüberschreitenden Rechtsverkehr’ in Bernreuther J *et al* (eds) *Festschrift für Ulrich Spellenberg* 2010 407; ZR 97 (1998) no. 116 consideration 3.

States, that do not render judicial assistance based on *courtoisie internationale*, do not violate public international law. Other states, however, may interpret the refusal to grant judicial assistance as an unfriendly act which may entail retribution by the requesting state towards the requested state. The requesting state may, for instance, reject future requests for judicial assistance emanating from the requested state.¹⁵⁹

2. International Judicial Assistance Based on International Treaties

In case of a treaty or convention on mutual cooperation, contracting states undertake an international obligation to render judicial assistance in accordance with the rules laid down in the agreement.¹⁶⁰ By entering into such agreement, a state partially waives its sovereignty, as it is no longer free to decide whether it renders judicial assistance or not. A state, that refuses to execute a request for judicial assistance without good cause, that is, for reasons not provided for in the relevant treaty or convention, violates public international law.

International judicial assistance is regarded as an intergovernmental matter. As a result, only a contracting state may demand judicial assistance from another state based on the relevant treaty or convention. Litigants domiciled in the requesting state cannot claim judicial assistance from the requested state. The same holds true for the trial court; it is powerless towards a requested state that refuses judicial assistance. Based on the national law of the requesting state, litigants may, however, be able to demand from the requesting state to seek international judicial assistance.¹⁶¹

As has been mentioned earlier,¹⁶² the number of treaties and conventions on the cross-border taking of evidence in civil and commercial matters has increased in the last few decades. In this regard, the most important multilateral conventions are the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters (“Hague Evidence Convention”)¹⁶³ and the Convention of 1 March 1954 on Civil Procedure (“Hague Procedure Conven-

¹⁵⁹ Dahm G, Delbrück J, and Wolfrum R *Völkerrecht I/1* 1989 74; Nagel H and Gottwald P *Internationales Zivilprozessrecht* 2007 343 n. 34; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 57 et seq.; ZR 97 (1998) no. 116 consideration 4.

¹⁶⁰ Geimer R *Internationales Zivilprozessrecht* 2009 856 n. 2440; Geimer E *Internationale Beweisaufnahme* 1998 52.

¹⁶¹ Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 7 n. 19 et seqq.; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 31; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 61.

¹⁶² See para. V.A.

¹⁶³ Initiated by the Hague Conference on Private International Law. For the text of the Hague Evidence Convention, cf. <http://www.hcch.net/upload/conventions/txt20en.pdf> (date of use: 31 January 2013).

tion”).¹⁶⁴ Mention must also be made of the European Council Regulation of 28 May 2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters (“European Evidence Regulation”),¹⁶⁵ the Inter-American Convention on the Taking of Evidence Abroad of 30 January 1975 between several Central and South American countries (“Inter-American Evidence Convention”)¹⁶⁶ and the Mercosur Protocol on Cooperation and Jurisdictional Assistance in Civil, Commercial, Labour and Administrative Matters of 27 June 1992 between Argentina, Brazil, Paraguay, Uruguay and Venezuela (“Mercosur Protocol”).¹⁶⁷ Countries, that are not party to any multilateral convention on taking evidence abroad, may sign relevant bilateral treaties.¹⁶⁸ A multilateral convention may also allow contracting states to enter into bilateral agreements with other member states in order to supplement or alter the regulations of the convention in relation to a particular state.¹⁶⁹

C. International Judicial Assistance and Applicable Law

As a general principle, requested states apply their own law when rendering active judicial assistance. This is true in particular for executed requests that are based on *courtoisie internationale*. In absence of any international rules on cross-border taking of evidence in civil and commercial matters, the domestic law of the requested state determines, *inter alia*, the methods

¹⁶⁴ Initiated by the Hague Conference on Private International Law. For the text of the Hague Procedure Convention, see <http://www.hcch.net/upload/conventions/txt02en.pdf> (date of use: 31 January 2013).

¹⁶⁵ For the text of the European Evidence Regulation, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:174:0001:0024:EN:PDF> (date of use: 31 January 2013).

¹⁶⁶ For the text of the Inter-American Evidence Convention, cf. <http://www.oas.org/juridico/english/treaties/b-37.html> (date of use: 31 January 2013). With regard to the list of member states of the said Convention, see <http://www.oas.org/juridico/english/sigs/b-37.html> (date of use: 31 January 2013).

¹⁶⁷ “Mercosur” stands for “*Mercado Común del Sur*” (English: Southern Common Market). The original title of the Protocol in Spanish is “*Protocolo de Cooperación y Asistencia Jurisdiccional en Materia Civil, Comercial, Laboral y Administrativa*”. For the text of the Mercosur Protocol, see http://www.mercosur.int/t_ligaenmarco.jsp?contentid=4823&site=1&channel=secretaria (Dec. No. 05/92) (date of use: 31 January 2013).

¹⁶⁸ See, for instance, the Agreement on Judicial Assistance in Civil and Commercial Matters and Co-operation in Arbitration between the Kingdom of Thailand and Australia of 2 October 1997, [http://www.coj.go.th/jla/userfiles/file/Thai-Australia%20agreement%20\(english\).pdf](http://www.coj.go.th/jla/userfiles/file/Thai-Australia%20agreement%20(english).pdf) (date of use: 31 January 2013), or the Treaty on Judicial Assistance in Civil and Commercial Matters between Australia and the Republic of Korea of 17 September 1999.

¹⁶⁹ See, for example, Article 28 of the Hague Evidence Convention. Cf. also the “*Erklärung vom 1./13. Dezember 1878 zwischen der Schweiz und dem Deutschen Reiche betreffend den unmittelbaren Geschäftsverkehr zwischen den beiderseitigen Gerichtsbehörden*” (Treaty on Direct Communication between Courts between Switzerland and Germany of 1/13 December 1878), <http://www.admin.ch/ch/d/sr/i2/0.274.181.361.de.pdf> (date of use: 31 January 2013), or “*Vertrag vom 26. August 1968 zwischen der Schweizerischen Eidgenossenschaft und der Republik Österreich zur Ergänzung des Haager Übereinkommens vom 1. März 1954 betreffend Zivilprozessrecht*” (Treaty on Amendment of the Hague Convention of 1 March 1954 between Switzerland and Austria of 26 August 1968), <http://www.admin.ch/ch/d/sr/i2/0.274.181.631.de.pdf> (date of use: 31 January 2013).

and procedures for the taking of evidence, the means of proof that are available, the privileges of witnesses, and the measures of compulsion towards recalcitrant witnesses.¹⁷⁰

The above also holds true for the rendering of judicial assistance based on a treaty or convention. The latter do not provide for an autonomous set of rules on the taking of evidence. Rather, they stipulate the conditions under which a requested state is obliged to render judicial assistance, as well as the forms of such assistance.¹⁷¹ The methods and procedures to be followed when taking evidence in response to a request for judicial assistance are thus not governed by treaties or conventions, but by the domestic law of the requested state or, as an exception, by that of the requesting state.¹⁷² To put it differently, conventions and treaties do not supersede the relevant domestic rules of the requested state by creating uniform rules on the procedure for the taking of evidence, means of proof, privileges of witnesses, or the measures of compulsion. The absence of such homogeneous rules is one of the reasons that, in practice, international judicial assistance may not always fully succeed, even when fully granted by the requested state. Differences in the approach of evidence-taking in the states involved may compromise the use of evidence obtained in the requested state in the civil proceedings pending in the requesting state.¹⁷³

The foregoing comments also apply with regard to passive judicial assistance. Here, however, the evidence-taking is not governed by the domestic law of the requested state, but by the relevant rules of the requesting state. It goes without saying that compared to active judicial assistance, the potential for conflict between the domestic law of the requesting state and that of the requested state is reduced in the case of passive judicial assistance.¹⁷⁴

In the light of the above, it is evident that both active and passive international judicial assistance have a dual nature, as public international law as well as the domestic law of the requested and requesting state determine the preconditions and constraints for granting judicial assistance.¹⁷⁵ While the public international law specifies the restrictions resulting from the concept

¹⁷⁰ Walter G and Domej T *Internationales Zivilprozessrecht der Schweiz* 2012 364.

¹⁷¹ Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 62.

¹⁷² Article 9(1) and (2) of the Hague Evidence Convention. See also Chapter 4 para. II.B.3.

¹⁷³ Such differences may, for instance, stem from the way in which witnesses are examined (questioning by the judge *versus* cross-examination by parties). See further on this subject Chapter 5 paras. II.B.4, II.C.4, III.A.3.a), IV.A.3.a), V.A.3.a), VI.A.3.a), and VII.A.3.a).

¹⁷⁴ In this context, see also para. V.D.4 below.

¹⁷⁵ Breitenmoser S '§ 23 Internationale Amts- und Rechtshilfe' in Uebersax P *et al* (eds) *Ausländerrecht: Eine umfassende Darstellung der Rechtsstellung von Ausländerinnen und Ausländern in der Schweiz – von A(syl) bis Z(ivilrecht)* 2009 1187 n. 23.6.

of sovereignty, the domestic law determines, amongst others, whether witnesses are cross-examined or not.

D. Forms of International Judicial Assistance for the Taking of Evidence in Civil and Commercial Matters

The three classical methods for obtaining foreign evidence in civil and commercial matters by means of international judicial assistance are the taking of evidence (i) by means of a so-called “letter of request”,¹⁷⁶ (ii) through commissioners, and (iii) by diplomatic officers or consular agents.

1. Taking of Evidence by Letter of Request

In the case of a letter of request, the requesting state asks the requested state to take evidence that is located in the latter’s jurisdiction. It is the requested state that executes the letter of request by, for instance, questioning the foreign witness, and then transmits the results of such examination to the requesting state. The authority of the requested state, which takes the evidence, thus acts as the eyes, ears and mouth of the trial court.¹⁷⁷ Having said this, it is evident that international judicial assistance *via* a letter of request constitutes active judicial assistance, as the evidence is taken by the authorities of the requested state. As explained above,¹⁷⁸ the requested state usually applies its own law with regard to the procedures and methods to be followed for the procurement of evidence, and can, in particular, use coercive measures towards recalcitrant witnesses as provided in its domestic law.¹⁷⁹

2. Taking of Evidence through Commissioners

Where the requesting state asks the requested state to obtain foreign evidence through a commissioner, it is not the requested state that takes the evidence on its territory, but a commissioner. The latter is usually appointed by the trial court and applies the law of the requesting state. The commissioner, however, is not allowed to apply any coercive measures in the re-

¹⁷⁶ Also called “letter rogatory” or “*commission rogatoire*”.

¹⁷⁷ Davies M ‘Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation’ 2007 *American Journal of Comparative Law* 207. Cf. also Article 1(1) of the Hague Evidence Convention; Article 8 of the Hague Procedure Convention; Article 10 of the European Evidence Regulation.

¹⁷⁸ See para. V.C.

¹⁷⁹ Cf. Articles 9(1) and 10 of the Hague Evidence Convention; Articles 14(1) and 11(1) of the Hague Procedure Convention; Articles 5 and 3(3) of the Inter-American Evidence Convention; Articles 12(1) and 13 of the Mercosur Protocol. For more on the taking of evidence by letter of request under the Hague Evidence Convention and the Hague Procedure Convention, see below Chapter 4 paras. II.B.3.a), II.C.2, and III.B.3.a).

requested state, as such compulsion would interfere with the latter's sovereignty.¹⁸⁰ Contrary to judicial assistance *via* a letter of request, obtaining evidence through a commissioner constitutes passive judicial assistance.

3. Taking of Evidence through Diplomatic Officers and Consular Agents

Judicial assistance through diplomatic officers and consular agents is similar to that conducted by commissioners. The former, who represent the requesting state in the requested state, take the evidence in accordance with the rules of the requesting state. Like commissioners, diplomatic officers and consular agents are not allowed to use any coercive measures in the requested state. It goes without saying that the taking of evidence by diplomatic officers or consular agents is regarded as passive judicial assistance.

4. Advantages and Disadvantages of the Different Forms of International Judicial Assistance

Obtaining evidence by means of a letter of request does not usually interfere with the sovereignty of the requested state, as it is the latter that takes the evidence on its territory.¹⁸¹ Consequently, this form of international judicial assistance is the traditional method of obtaining evidence abroad and applies, irrespective of whether the requesting and requested state are party to a relevant international treaty. In other words, international judicial assistance *via* a letter of request usually applies in those cases where the states involved have not joined a treaty or convention on cross-border taking of evidence, that is, where the requested state renders judicial assistance based on *courtoisie internationale*. In contrast, judicial assistance through a commissioner, diplomatic officer, or consular agent implicates the sovereignty issue,¹⁸² at least if the requested state follows the civil-law tradition. These forms of judicial assistance are therefore often only permitted, if there is a treaty or convention allowing such methods, or if such practices are authorised by the requested state, common, or at least tolerated by the latter.¹⁸³

¹⁸⁰ Articles 17(1) and 21(d) of the Hague Evidence Convention. For the use of coercive measures on foreign territory, see below Chapter 3 paras. IV.C.2 and IV.C.3.

¹⁸¹ Oxman BH 'The Choice between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Convention' 1982-1983 *University of Miami Law Review* 762.

¹⁸² As it is the commissioner, the diplomatic officer, or the consular agent who takes the evidence on the territory of the requested state.

¹⁸³ Oxman BH 'The Choice between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Convention' 1982-1983 *University of Miami Law Review* 762 *et seq.*; Rechberger WH and McGuire M-R 'Die Umsetzung der EuBewVO im österreichischen Zivilprozessrecht: Der Vorrang der traditionellen Rechtshilfe im Spannungsverhältnis mit dem Unmittelbarkeitsgrundsatz' 2005 *Zeitschrift für Zivilprozeß International* 93 *et seq.* Hess B *Europäisches Zivilprozessrecht* 2010 471.

From the point of view of the trial court and the litigant seeking evidentiary material abroad, the taking of evidence through a commissioner is the preferable method. Since the commissioner acts on the authority of the trial court, the evidence-taking is conducted by an agent of the requesting state. Moreover, the commissioner applies the law of the requesting state when procuring evidence in the requested state. Consequently, the evidence taken in the jurisdiction of the requested state is governed by the same rules as the evidentiary material located in the requesting state. The fact that the taking of evidence is governed by uniform rules, irrespective of where the evidence is located, in the requesting or requested state, overcomes most of the divergences resulting from the different approach the respective states may adopt regarding evidence-taking.¹⁸⁴ This holds particularly true for cases where the requested state shares the common-law tradition while the requesting state follows the civil-law model and *vice versa*. Here, the differences between the two legal systems may result in a limited probative value or even inadmissibility of foreign evidence in the proceedings of the trial court. The departure from the law of the requested state governing the taking of foreign evidence eliminates such risk.

In comparison with a letter of request, however, international judicial assistance through commissioners has a considerable drawback. A commissioner is usually not allowed to use any compulsion when taking evidence in the requested state.¹⁸⁵ Where the commissioner cannot apply to the requested state for appropriate assistance to obtain the evidence by compulsion,¹⁸⁶ judicial assistance *via* a commissioner is only successful if the witness in the requested state voluntarily cooperates. Before issuing a request for taking evidence by a commissioner, the trial court or the litigant wishing to obtain evidence abroad should make sure that the foreign witness is willing to collaborate. If the latter is reluctant to do so, the trial court has no choice but to seek judicial assistance by means of a letter of request. This is particularly true where a witness who at first voluntarily agreed to cooperate, then changes his mind when confronted by the commissioner. The fact that a request for taking evidence by a commissioner was unsuccessful should not preclude the trial court from resorting to a letter of request at a later stage.¹⁸⁷

What has been said with regard to judicial assistance by a commissioner applies *mutatis mutandis* to assistance by a diplomatic officer or consular agent of the requesting state. Compared

¹⁸⁴ Geimer R *Internationales Zivilprozessrecht* 2009 223 n. 457.

¹⁸⁵ Cf. Articles 17(1) and 18(1) of the Hague Evidence Convention.

¹⁸⁶ Based on the domestic law of the requested state, a bilateral treaty or multilateral convention. See in this regard Article 18(1) of the Hague Evidence Convention.

¹⁸⁷ Cf. Article 22 of the Hague Evidence Convention.

to the evidence-taking by commissioners, however, judicial assistance by diplomatic officers or consular agents may, if permitted at all, be limited to witnesses who have the nationality of the state which the diplomatic officer or consular agent represents, and may thus exclude nationals of the requested state or any third state.¹⁸⁸

In the light of the above, the advantages and disadvantages of a letter of request are evident. The requested state may use measures of compulsion if the evidence is not obtainable on a voluntary basis. In such cases, the evidence can usually only be obtained by means of a letter of request. The requested state, however, applies its own law when executing the request for judicial assistance which may, particularly in cases where judicial assistance among civil- and common-law countries is requested, result in the aforementioned limited probative value or inadmissibility of the foreign evidence in the proceedings before the trial court.

E. International Judicial Assistance in the Civil- and Common-law Systems

Due to the principle of judicial control over the procurement of evidence and the qualification of evidence-taking as a judicial act, civil-law jurisdictions usually favour the active international judicial assistance where the evidence is gathered by a judicial authority of the requested state. As a consequence, the taking of foreign evidence by way of a letter of request is the method most preferred by countries sharing the civil-law tradition.¹⁸⁹

In contrast, party control dominates the evidence-taking in common-law countries that regard the procurement of evidence as a purely private matter. It is therefore not surprising that these countries prefer those forms of international judicial assistance where the foreign courts are not actively involved in obtaining evidentiary material. As a result, passive judicial assistance, and in particular the procurement of evidence through commissioners, prevails in common-law countries.¹⁹⁰

In practice, difficulties may arise where a common-law judge is confronted with a letter of request emanating from a civil-law country wherein the former is expected to take evidence like a civil-law judge in the inquisitorial system. Here, the common-law judge is faced with a pro-

¹⁸⁸ See Articles 15-16 of the Hague Evidence Convention.

¹⁸⁹ De Vos WL 'International Aspects of Civil Procedural Law' 1996 *Stellenbosch Law Review* 177.

¹⁹⁰ De Vos WL 'International Aspects of Civil Procedural Law' 1996 *Stellenbosch Law Review* 173, 177; Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 22; Nagel H and Gottwald P *Internationales Zivilprozessrecht* 2007 344 n. 38; Markees C 'Die Vornahme von Prozeßhandlungen auf schweizerischem Gebiet zuhanden eines ausländischen Verfahrens im Lichte des Art. 271 StGB' 1969 *Schweizerische Juristenzeitung* 33; McClean D *International Judicial Assistance* 1992 101.

cedure he is usually unfamiliar with, as he is not accustomed to play an active role in evidence-taking.¹⁹¹ This may result in uncertainties on the side of the common-law judge as to how to execute the request for judicial assistance. Such uncertainties may ultimately culminate in a limited probative value or even inadmissibility of the foreign evidence in the proceedings pending before the civil-law court. How to best deal with such situations depends on the particularities of the individual case. One option may be the appointment of a person by the common-law judge who is familiar with the procurement of evidence as requested in the letter of request.¹⁹² If, however, it is reasonably foreseeable for the civil-law court that the evidence obtained by the common-law judge will most likely be of only limited probative value or even inadmissible, the former should refrain from pursuing the execution of the letter of request and instead consider alternatives, such as evidence-taking by a commissioner, provided evidence obtained by such a method is admissible under the laws of the requesting state.

Similar problems may occur where a civil-law judge is faced with a request emanating from a common-law country to obtain evidence based on the relevant rules of the requesting state which, for instance, include the cross-examination of witnesses. A civil-law judge, who is not in a position to execute such a request, may, for example, appoint a sole commissioner who chairs the witness examination or may nominate the counsel of the parties as commissioners.¹⁹³

F. Failure of Requested State to Grant International Judicial Assistance

In a perfect legal world, a requested state renders international judicial assistance, provided there are no valid grounds to refuse the execution of the relevant request¹⁹⁴ and, in the case of an international agreement, provided the request is in accordance with the relevant convention or treaty.¹⁹⁵ In practice, however, requests for international judicial assistance often remain unanswered, be it that the requested state does not react to a request at all, or explicitly refuses to execute it. The reasons for such non-execution are manifold and may, *inter alia*, include con-

¹⁹¹ Cf. Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 27.

¹⁹² See, for instance, Article 14(3) of the Hague Evidence Convention. Under this provision, the relevant authority of the requested state whose law obliges the parties themselves to secure evidence, and which is not able itself to execute a letter of request, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so.

¹⁹³ Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 32 (date of use: 31 January 2013).

¹⁹⁴ A valid ground may, for instance, be if the security of the requested state is prejudiced by the execution of the request. Cf. Article 12(1) of the Hague Evidence Convention; Article 11(3) of the Hague Procedure Convention; Article 8 of the Mercosur Protocol; Article 16 of the Inter-American Evidence Convention.

¹⁹⁵ Cf. Articles 3-4 of the Hague Evidence Convention; Article 10 of the Hague Procedure Convention; Articles 4, 5, and 8 of the European Evidence Regulation.

gestion or lack of competent authorities for the execution of requests, retaliation for the past non-execution of requests by the requested state submitted to the requesting state, the invocation of an *ordre public* by the requested state, the latter's political isolation, or the protection of information whose furnishing is restricted by the requested state.¹⁹⁶

Against this background, the question arises for the trial court as to how to pursue the pending proceedings, if the requested state does not execute the former's request for judicial assistance. As has been explained earlier,¹⁹⁷ the trial court cannot claim judicial assistance from the requested state. It goes without saying that the proceedings before the trial court have to be concluded, even though the foreign evidence cannot be obtained from the requested state. Where the latter informs the requesting state that it will not execute the request, and there are no other means to obtain the foreign evidence,¹⁹⁸ the trial court should proceed in the same way as in the case where a litigant bearing the burden of proof fails to adduce evidence.¹⁹⁹ This may be deemed as not entirely fair, as the litigants have no influence on whether judicial assistance is granted by the requested state or not. As mentioned above, the proceedings before the trial court must continue which requires that an assumption has to be made regarding the facts for which evidence was sought abroad. To presume that the relevant facts cannot be proven and thus impose the risk of lack of evidence to the party bearing the *onus* is the only feasible solution.²⁰⁰

How, therefore, should the trial court proceed in cases where the requested state does not explicitly refuse to execute a request for judicial assistance, and yet does not react to the request at all? In a case before the Commercial Court of the Canton of Zurich, a request for the examination of two non-party witnesses was sent to the relevant authorities in Canada. After the Canadian authorities did not respond to the request for more than a year, the Swiss authorities asked the former to inform them about the progress of the execution of the request. Again, the Canadian authorities did not respond. The Commercial Court held that in cases where a request for judicial assistance has not been executed for two years despite sending a reminder to the relevant foreign authorities, it can be assumed that the testimony sought abroad is unobtainable.

¹⁹⁶ In this context, see Chapter 4 paras. III.C.1.d) and V.B.1.c).

¹⁹⁷ See para. V.B.2 above.

¹⁹⁸ For instance *via* a transfer of foreign evidence. Cf. in this regard Chapter 3.

¹⁹⁹ Walter G and Domej T *Internationales Zivilprozessrecht der Schweiz* 2012 360 with reference to Guldener M *Das internationale und interkantonale Zivilprozessrecht der Schweiz* 1951 21 fn. 22; Nagel H and Gottwald P *Internationales Zivilprozessrecht* 2007 341 n. 24; Hauser R and Schweri E *GVG, Kommentar zum zürcherischen Gerichtsverfassungsgesetz vom 13. Juni 1976 mit den seitherigen Änderungen* 2002 413 n. 14.

²⁰⁰ Cf. also Meier AL *Die Anwendung des Haager Beweisübereinkommens in der Schweiz unter besonderer Berücksichtigung der Beweisaufnahme für U.S.-amerikanische Zivilprozesse* 1999 61.

ble, and the proceedings should continue as if the domicile of the particular non-party witness is unknown or the latter has died.²⁰¹ Although this decision makes sense, the period of two years should not be regarded as absolute, but it should depend on the particular state to which the request for judicial assistance was addressed, especially on the experience gained from requests sent to such state in the past.²⁰²

VI. Conclusion

Based on the public international law concept of sovereignty, each state has, to the exclusion of any other state, the competence to exercise governmental power on its own territory. At the same time, however, a state must also refrain from conducting acts of state on the territory of a foreign state. The sovereignty of a state is thus limited by the sovereignty of other states or, to put it differently, the exercise of power by one state on the territory of another state infringes the latter's sovereignty and violates public international law. The extent to which a trial court, litigants or their counsel are, if at all, allowed to gather evidence abroad under public international law depends on whether the foreign state, where the evidentiary material is located, regards the evidence-taking in civil and commercial matters as an act of state whose performance is reserved to its own authorities; in other words, whether the foreign state considers the evidence-taking on its territory by a trial court, litigant, his counsel, or any other individual as an intrusion upon its sovereignty.

In absence of any international rule on whether evidence-taking constitutes an act of state or not, the legal world can be divided into two groups, namely on the one hand, the countries sharing the civil-law tradition, and, on the other, those adopting the common-law system. In Switzerland, a civil-law country, the taking of evidence in civil and commercial matters is seen as a judicial act, irrespective of whether it is performed by members of the trial court or a private individual. It is also irrelevant whether the trial court applies any measures of compulsion on Swiss soil, or whether the witness located in Switzerland voluntarily collaborates or not. This is in sharp contrast with the approach taken by common-law countries, such as South Af-

²⁰¹ ZR 89 (1990) no. 75. See also Meier AL *Die Anwendung des Haager Beweisübereinkommens in der Schweiz unter besonderer Berücksichtigung der Beweisaufnahme für U.S.-amerikanische Zivilprozesse* 1999 62.

²⁰² See Federal Office of Justice *Länderindex* <http://www.rhf.admin.ch/rhf/de/home/rhf/index/laenderindex.html> (date of use: 31 January 2013) which for many countries lists, amongst other things, the time period between the transmission of a request for international judicial assistance for the taking of evidence in civil matters from Swiss authorities to the competent authorities of the requested state and the receipt of the executed request by Swiss authorities. The period of time is based on the experience the relevant Swiss authorities had with the states listed in the *Länderindex* in the past and varies considerably (for instance, United States of America: 12 months; Germany: 3 months; South Africa: 6 months. With regard to Botswana, Namibia, Nigeria and Uganda, no details are given due to the lack of experience with these countries.).

rica,²⁰³ Botswana, Namibia, Nigeria, and Uganda, where the collection of evidence is regarded as a non-judicial act, provided no compulsion is applied. This distinct approach in civil and common law rests on the peculiarities of civil procedure in the two legal traditions, in particular the question of who is in control of gathering the evidence, that is, the court or the parties.

In the civil-law tradition, civil proceedings are under the control of the court. This holds true in particular for the development of evidence, as the judge decides what evidence proffered by the litigants is taken for proof. It is also the judge who conducts the examination of witnesses. The parties and their counsel are confined to posing additional questions to witnesses once the court has concluded its interrogation. This principle of judicial control over the procurement of evidence is often referred to as the “inquisitorial system”. In clear contrast to this system is the so-called “adversarial system” that prevails in common-law countries. Here, the litigants, or rather their counsel, dominate the process of evidence-taking. The litigants collect the evidence without the involvement of the court, unless a party does not comply with a relevant request from his opponent. This holds true for the pre-trial discovery of documents where the litigants inform each other of all relevant documents relating to the matter in dispute. The litigants furthermore control the examination of the witnesses who are subject to examination-in-chief, cross-examination, and re-examination by the parties’ counsel. In contrast to civil-law countries, the common-law judge plays a passive and receptive role and, as a mere umpire or referee, supervises the proceedings in order to guarantee a fair trial and ensure the litigants’ compliance with the relevant procedural rules. Based on the above, it is evident that the divergent qualification of evidence-taking in civil and common law is ultimately a corollary of the inquisitorial and adversarial systems. Under the former, the procurement of evidence is entrusted to judicial authorities and is thus seen as a judicial act. In contrast, by leaving the collection of evidence to the parties, the adversarial system qualifies the evidence-taking as a purely private act.

In Switzerland, the taking of evidence on Swiss territory for the benefit of civil proceedings pending abroad without the authorisation of the competent Swiss authorities is not only seen as a violation of public international law, but also as a criminal offence under Article 271(1) of the Swiss Criminal Code. As a result, a member of a trial court or a litigant in foreign civil proceedings who, for instance, questions a non-party witness in Switzerland without the permission of the relevant Swiss authorities, violates the said provision. Exempt from punishment un-

²⁰³ See fns. 40 and 41 above.

der Article 271(1) of the Swiss Criminal Code are, however, activities of private individuals that merely serve to evaluate the chances of a lawsuit or to prepare the latter, as such activities are not regarded as acts reserved to Swiss authorities, but as a matter for the parties.

Whenever a state intends to perform an act that interferes with the sovereignty of another state, it must request international judicial assistance from the latter. In this context, international judicial assistance can be seen as a vehicle to overcome the restrictions imposed by the concept of sovereignty. In the context of the cross-border taking of evidence in civil and commercial matters, it prevents the exclusion of evidence in civil proceedings pending before a trial court because a particular means of proof is located in a foreign state. International judicial assistance in evidence-taking is thus crucial for a lawsuit not to fail merely on the grounds that evidence is situated in a foreign state. International judicial assistance includes, on the one hand, the so-called “active judicial assistance” where the requested state performs the requested acts on its territory and transmits the relevant outcome to the requesting state or, on the other hand, the so-called “passive judicial assistance” where the requested state authorises the requesting state to perform the relevant acts on its territory. Due to the principle of judicial control over the procurement of evidence, civil-law countries prefer active judicial assistance, as the evidence is taken by the courts of the requested state. In contrast, in common-law countries, where the development of evidence is in the hands of the parties, passive judicial assistance prevails.

Requested states either render judicial assistance based on an international treaty of mutual legal cooperation or, in the absence of the latter, on the so-called “*courtoisie internationale*”. In the former case, the requested state is under a public international law obligation to grant judicial assistance, provided the request from the requesting state complies with the treaty or convention, and there are no valid grounds to refuse the execution of the request. By contrast, in the case of “*courtoisie internationale*”, the requested state is not obliged to render judicial assistance under public international law, but usually does so in expectation that the requesting state will reciprocate.

When rendering active judicial assistance in cross-border taking of evidence, the requested state usually applies its domestic rules on the form and procedure of taking evidence. In cases of passive judicial assistance, however, the requesting state takes evidence in the requested state based on its own law. Trial courts seeking evidence abroad usually favour passive judicial assistance, as in this case, the taking of evidence is, irrespective of whether the evidentiary material is located in the requesting or requested state, governed by the same rules, namely those

of the requesting state. This minimises the risk that evidence obtained in the requested state is merely of limited probative value or even inadmissible in the proceedings before the trial court due to any discrepancies in the rules on evidence-taking in the requesting and requested state.

The three classical methods for obtaining foreign evidence in civil and commercial matters by means of international judicial assistance are the taking of evidence by way of letter of request, through commissioners, and by diplomatic officers or consular agents. In the first case, the requested state is asked to take the foreign evidence for the benefit of civil proceedings pending before a trial court on its territory. Evidence-taking by means of letter of request thus constitutes active judicial assistance, and the requested state usually applies its own law when executing the request. In contrast, the taking of evidence through commissioners, diplomatic officers, or consular agents is seen as passive judicial assistance. Here, it is the commissioner, usually appointed by the trial court, the diplomatic officer or the consular agent of the requesting state who obtains the evidence on the territory of the requested state in accordance with the relevant rules of the requesting state. Due to the aforesaid preference of passive judicial assistance by trial courts and the fact that evidence-taking by a diplomatic officer and consular agent may be confined to nationals of the requesting state, trial courts usually favour evidence-taking through a commissioner. Compared to a letter of request, however, this form of judicial assistance, as well as evidence-taking by a diplomatic officer or consular agent has a considerable drawback: a commissioner, a diplomatic officer and a consular agent cannot apply any compulsion on the territory of the requested state. A letter of request is thus the vehicle to obtain evidence from individuals who do not voluntarily cooperate with a commissioner, diplomatic officer or consular agent, as the courts of the requested state may use measures of compulsion provided for in their domestic law.

In practice, a trial court sometimes faces a situation where its request for judicial assistance remains unanswered by the requested state. It goes without saying that the trial court has to pursue the pending proceedings and to adjudicate even though foreign evidence cannot be obtained by means of international judicial assistance. In case the requested state expressly refuses to execute the request for judicial assistance, the trial court should proceed in the same manner as if the litigant bearing the burden of proof fails to adduce evidence. Where there is no formal rejection of the request by the foreign state, the trial court should be able to continue the proceedings on the assumption that the evidence sought abroad is not obtainable, provided a reminder was sent to the requested state and remained unanswered for a reasonable period of time.

CHAPTER 3

TRANSFER OF FOREIGN EVIDENCE IN CIVIL AND COMMERCIAL MATTERS

I. Introduction

In a lawsuit pending in South Africa, the plaintiff calls A, a Swiss national residing in Switzerland, as a witness. As the members of the South African court or the parties' counsel are not allowed to travel to Switzerland to interrogate A without the permission of the competent Swiss authorities, the South African court may request international judicial assistance from Switzerland.¹ Since obtaining foreign evidence through channels of international judicial assistance is often a time-consuming and cumbersome process,² the South African court may try to obtain A's testimony without the involvement of the Swiss authorities, namely by summoning A to appear in court in South Africa, by examining him by videolink or telephone, or by requesting A to answer the relevant questions in writing. Furthermore, the South African court may try to obtain A's testimony through the party who called A as witness, namely by ordering such party to submit the written testimony of A. By so doing, the South African court attempts to transfer the evidence, which is originally located in Switzerland, to its own jurisdiction. This so-called "transfer of foreign evidence"³ means that the evidence is no longer examined in Switzerland, but in South Africa.⁴

This Chapter focuses on the transfer of evidence from abroad to the trial court's jurisdiction as an alternative method to obtain foreign means of proof. It first explains the nature of such transfer, analyses its advantages and disadvantages in comparison with the procurement of evidence through means of international judicial assistance and examines whether the latter prevails over a transfer of foreign evidence under public international law. The Chapter then investigates whether or not, and, if so, to what extent, a transfer of foreign evidence is limited by the concept of sovereignty. In this context, it is examined whether foreign litigants and third parties are under an obligation to cooperate with the trial court regarding a transfer of foreign evidence and whether the court may apply measures of compulsion towards recalcitrant witnesses. Once the relationship between a transfer of foreign evidence and the sovereignty of the

¹ See Chapter 2 paras. IV.B.3, IV.B.4, and V.A.

² Cf. para. III.A below.

³ In German called "*Beweismitteltransfer*" or "*Beweisbeschaffung aus dem Ausland*".

⁴ See also Stadler A *Der Schutz des Unternehmensgeheimnisses im deutschen und US-amerikanischen Zivilprozess und im Rechtshilfeverfahren* 1989 279.

state, where the evidence is originally located, is highlighted, the Chapter analyses the different forms of transfer of foreign evidence. Finally, the transmission of a request for transfer of foreign evidence from the trial court to the foreign witness is briefly discussed.

II. Nature of a Transfer of Foreign Evidence

A trial court has two options when faced with evidence located abroad: either to obtain the evidentiary material through means of international judicial assistance, or *via* a transfer of foreign evidence.⁵ In the first case, the evidence-taking occurs outside the trial court's jurisdiction on the territory of the foreign state where the evidentiary material is located. The foreign court, for instance, interrogates the foreign witness and subsequently sends the transcript of the hearing to the state of the trial court. From the latter's perspective, such evidence-taking is of an extra-territorial nature.

By comparison, a transfer of foreign evidence constitutes, again from the viewpoint of the trial court, a purely domestic taking of evidence. The evidence originally situated in a foreign state is transferred to the jurisdiction of the trial court where it is examined by the latter. The trial court, for example, will order a foreign litigant to attend court in order to testify before it.⁶ As a result, the evidence is no longer taken in the foreign state, but in the jurisdiction of the trial court. By means of a transfer of foreign evidence, the evidence-taking thus mutates into a purely domestic process which is under the exclusive control of the trial court.⁷ In other words, the trial court takes the evidence directly from the foreign witness and does not, as in the case of international judicial assistance, ask a foreign authority to obtain the evidence from the relevant witness.

⁵ See Geimer E *Internationale Beweisaufnahme* 1998 2; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 32; Musielak H-J 'Beweiserhebung bei auslandsbelegenen Beweismitteln' in Schütze R (ed) *Einheit und Vielfalt des Rechts: Festschrift für Reinhold Geimer zum 65. Geburtstag* 2002 762; Geimer R *Internationales Zivilprozessrecht* 2009 47 n. 121 *et seq.*

⁶ For other forms of transfer of foreign evidence, see paras. V.C-V.H below.

⁷ Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 32, 141; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozess: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 55; Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeßrechts* 1989 49.

III. Transfer of Foreign Evidence versus International Judicial Assistance in Civil and Commercial Matters

A. Advantages and Disadvantages of a Transfer of Foreign Evidence

Based on the foregoing comments,⁸ the fundamental differences between international judicial assistance and a transfer of foreign evidence are evident. While in the case of international judicial assistance, the evidence is obtained in the foreign state where it is originally located, the evidence-taking by means of a transfer of foreign evidence occurs in the state where the lawsuit is pending. In the first case, it is the foreign court, a commissioner, a diplomatic officer or consular agent acting on foreign territory, who will examine the evidence. The trial court is usually not involved in the actual examination, but merely receives a written report on the evidence-taking abroad.⁹ In the case of a transfer of foreign evidence, however, the transferred evidence is examined by the trial court in its jurisdiction. As a result, the foreign state, from whose territory the evidentiary material was transferred, is not involved in the taking of evidence. Consequently, there is no need for the trial court to seek international judicial assistance from the foreign state. Unlike in the course of active judicial assistance where the evidence-taking is usually governed by the law of the requested state,¹⁰ the trial court applies its own rules with regard to transferred evidence.¹¹

The collection of foreign evidence through channels of international judicial assistance can be a time-consuming and cumbersome process. In the worst case scenario, requests for international judicial assistance remain unanswered, and the evidence located abroad cannot be obtained through the authorities of the foreign state. This is particularly true with regard to foreign states that are not party to an international agreement on evidence-taking in civil and commercial matters and are thus under no public international law obligation to render judicial assistance.¹² Here, the trial court is at the mercy of the foreign state, as it cannot be sure whether in a pending lawsuit, the latter will render judicial assistance or not. Also in cases where the foreign state is, based on a convention or treaty, in principle obliged to grant judicial assis-

⁸ See para. II.

⁹ For more on the forms of international judicial assistance for the taking of evidence in civil and commercial matters, see Chapter 2 para IV.D.

¹⁰ With regard to active judicial assistance, see Chapter 2 para. V.B.

¹¹ Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 32; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 55; Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeßrechts* 1989 49.

¹² Cf. Chapter 2 para. V.B.1 above.

tance, it may refuse the execution of a request for judicial assistance for reasons stipulated in the relevant agreement.¹³ Even though a foreign state is willing to grant assistance, the execution of a request may take several months and considerably delay the course of procedure before the trial court.¹⁴ Moreover, the distinct difference of approach in evidence-taking in civil and commercial matters in civil- and common-law countries,¹⁵ as well as the divergences in the procedure for the taking of evidence and in the means of proof in the laws of the requesting and requested state may cause difficulties.¹⁶ These differences may, in the last resort, result in a limited probative value or even in the inadmissibility of foreign evidence in the proceedings before the trial court.¹⁷

To overcome these hurdles, trial courts often tend to avoid international judicial assistance and instead try to transfer evidence from abroad to their jurisdiction. Such transfer not only prevents delay in the proceedings before the trial court, but it offers, at least from the latter's perspective, additional benefits. The evidence is taken in the presence of the judge who ultimately decides the case and who is thus in a position to observe the witness' demeanour with his own eyes.¹⁸ This results in a better assessment of the witness' credibility rather than relying purely on a written witness report prepared by the foreign court, a commissioner, diplomatic officer or consular agent that questioned the witness abroad.¹⁹ Moreover, the examination of a witness by the trial court often leads to a better establishment of the facts, as such court is, at least in civil-law jurisdictions, more familiar with the case than the foreign court, a commissioner, diplomatic officer or consular agent.²⁰ Accordingly, the trial court is in a better position to identify any ambiguity or omission in a witness' testimony and can, if necessary, change the flow of ques-

¹³ See, for instance, Article 12 of the Hague Evidence Convention; Article 11(3) of the Hague Procedure Convention.

¹⁴ For the time period between the transmission of a request for international judicial assistance for the taking of evidence in civil and commercial matters from Swiss authorities to a foreign state and the receipt of the executed request by Swiss authorities, see Federal Office of Justice *Länderindex* <http://www.rhf.admin.ch/rhf/de/home/rhf/index/laenderindex.html> (date of use: 31 January 2013). See also Chapter 2 fn. 202.

¹⁵ See Chapter 2 para. IV.B.2.d) above.

¹⁶ Regarding the procedure for the taking of evidence and the means of proof in civil and commercial matters in Switzerland, South Africa, Botswana, Namibia, Nigeria, and Uganda, see Chapter 5.

¹⁷ See Chapter 2 para. V.D.4 above.

¹⁸ This is the case at least where the witness gives evidence in the state of the trial court or by videolink.

¹⁹ Berger C 'Die EG-Verordnung über die Zusammenarbeit der Gerichte auf dem Gebiet der Beweisaufnahme in Zivil- und Handelssachen (EuBVO)' 2001 *Praxis des Internationalen Privat- und Verfahrensrechts* 532; Davies M 'Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation' 2007 *American Journal of Comparative Law* 236; Heß B and Müller A 'Die Verordnung 1206/01/EG zur Beweisaufnahme im Ausland' 2001 *Zeitschrift für Zivilprozess International* 175.

²⁰ See Chapter 2 para. IV.B.2.b) above.

tions in the light of the responses of the witness.²¹ The fact, that a foreign witness is interrogated by an authority of the requested state or one of the aforesaid individuals and not by the trial court that ultimately decides the case, may furthermore reduce the witness' threshold of self-restraint to tell the truth.²²

In case of a transfer of foreign evidence, the evidence-taking is, as mentioned earlier, no longer governed by the laws of the state where the evidence was originally located, but by the rules of the trial court.²³ The departure from foreign law eliminates the aforesaid risk that evidence taken in the course of active judicial assistance may be inadmissible, or of merely limited probative value due to discrepancies in the procedural laws of the foreign state and the state of the trial court.

In the light of the above, it is evident that, compared to evidence-taking through international judicial assistance, a transfer of foreign evidence has, at least from the perspective of the trial court and the plaintiff who both are interested in speedy proceedings, many advantages. The downside of such transfer, however, is the limited use of coercive measures by the trial court towards uncooperative foreign witnesses, as the use of compulsion may interfere with the sovereignty of the foreign state. Where the trial court is not allowed to apply compulsion, a transfer of foreign evidence only succeeds if the foreign witness voluntarily collaborates.²⁴ In the absence of the voluntary cooperation of the witness, international judicial assistance is the only means to obtain foreign evidence.

From the perspective of a foreign defendant or third party, however, a transfer of foreign evidence may be disadvantageous. Compared to an examination by way of international judicial

²¹ Markus AR 'Neue Entwicklungen bei der internationalen Rechtshilfe in Zivil- und Handelssachen' 2002 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 77; Berger C 'Die EG-Verordnung über die Zusammenarbeit der Gerichte auf dem Gebiet der Beweisaufnahme in Zivil- und Handelssachen (EuBVO)' 2001 *Praxis des Internationalen Privat- und Verfahrensrechts* 532; Küttler A *Das Erlangen von Beweisen in den USA zur Verwertung im deutschen Zivilprozeß* 2007 158; Davies M 'Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation' 2007 *American Journal of Comparative Law* 206, 235; Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 120; Permanent Bureau of the Hague Conference on Private International Law *The Taking of Evidence by Video-link Under the Hague Evidence Convention* (December 2008) <http://www.hcch.net/upload/wop/2008pd06e.pdf> 3 paras. 3, 5 and 15 (date of use: 31 January 2013).

²² Schulze G 'Dialogische Beweisaufnahmen im internationalen Rechtshilfeverkehr: Beweisaufnahmen im Ausland durch und im Beisein des Prozeßgerichts' 2001 *Praxis des Internationalen Privat- und Verfahrensrechts* 532; Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 120.

²³ Schulze G 'Dialogische Beweisaufnahmen im internationalen Rechtshilfeverkehr: Beweisaufnahmen im Ausland durch und im Beisein des Prozeßgerichts' 2001 *Praxis des Internationalen Privat- und Verfahrensrechts* 532; Heß B and Müller A 'Die Verordnung 1206/01/EG zur Beweisaufnahme im Ausland' 2001 *Zeitschrift für Zivilprozeß International* 175.

²⁴ For more on this subject, see paras. IV.C and IV.D below.

assistance where the witness is questioned at his foreign domicile based on the rules of his state of residence,²⁵ he may have to travel abroad and/or may be confronted with a legal system he is not familiar with and court proceedings that are conducted in a foreign language.²⁶

B. Primacy of International Judicial Assistance over a Transfer of Foreign Evidence?

As has been explained earlier,²⁷ trial courts often prefer to obtain foreign means of proof *via* a transfer of foreign evidence than through means of international judicial assistance. When choosing between these two procedures, the trial court must take into consideration the following points: first, whether there is a convention or treaty governing the particular taking of evidence and, if so, second, whether such international treaty contains any rules on transfer of foreign evidence. In case the latter is excluded by an international convention or treaty, the trial court violates public international law when procuring evidence from abroad without the involvement of the foreign state.²⁸ Where the international agreement allows for a transfer of foreign evidence, or where there is no such agreement between the state of the trial court and the foreign state, the transfer of foreign evidence is solely subject to the rules of the trial court. One must, however, bear in mind that the trial court always has, in particular in the absence of any international treaty, to take into consideration the sovereignty of another state when deciding to obtain evidence *via* a transfer of foreign evidence.

IV. Transfer of Foreign Evidence and Sovereignty

A. General Remarks

In the course of a transfer of foreign evidence, neither a member of the trial court nor any other public official of the state of the trial court travels to the foreign state to take evidence on the latter's territory. Nevertheless, the order of the trial court for a transfer of foreign evidence has an impact beyond the area of its national jurisdiction on the territory of the foreign state where the evidence is originally located.²⁹ The question therefore arises whether such a court order

²⁵ At least in cases where the requested state renders active judicial assistance and applies its own law.

²⁶ Heß B and Müller A 'Die Verordnung 1206/01/EG zur Beweisaufnahme im Ausland' 2001 *Zeitschrift für Zivilprozeß International* 175 *et seq.* It goes without saying that the same applies to a foreign plaintiff. Here, however, one has to keep in mind that it was the plaintiff who brought the action and selected the (foreign) *forum*.

²⁷ See para. III.A above.

²⁸ With regard to a transfer of foreign evidence under the Hague Evidence Convention, see Chapter 4 para. II.B.2 below.

²⁹ Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 32 *et seq.*, 141; Stadler A *Der Schutz des Unternehmensgeheimnisses im deutschen und US-amerikanischen Zivilprozess und im Rechtshilfeverfahren* 1989 284; Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeß-*

infringes foreign sovereignty. Since in the civil-law tradition, the gathering of evidence in civil and commercial matters is usually entrusted to the courts,³⁰ the said question has been repeatedly discussed with regard to the transfer of foreign evidence situated in civil-law jurisdictions

When assessing the admissibility of a transfer of foreign evidence under public international law, one has to distinguish between two issues. The first question that arises is whether a state is allowed to extend the application of its domestic rules on evidence-taking to means of proof located abroad. Provided such an extension is allowed, it has to be examined whether the order of the trial court for a transfer of foreign evidence interferes with foreign sovereignty.³¹

It is well established that under public international law, a state may apply its own law on facts that materialise abroad, provided there is a genuine link between such facts and the respective state. Such a connection exists particularly where civil court proceedings involve means of proof that are located in a foreign state. Accordingly, the trial court does not infringe public international law when extending the application of its rules on evidence situated on foreign territory.³² In this context, the Permanent Court of International Justice stated the following in the *Lotus*-case:³³

“It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in

rechts 1989 50; Rechberger WH and McGuire M-R ‘Die Umsetzung der EuBewVO im österreichischen Zivilprozessrecht: Der Vorrang der traditionellen Rechtshilfe im Spannungsverhältnis mit dem Unmittelbarkeitsgrundsatz’ 2005 *Zeitschrift für Zivilprozeß International* 114 *et seq.*

³⁰ See Chapter 2 para. IV.B.3 above.

³¹ Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeßrechts* 1989 49 *et seq.*

³² Steinberger H ‘Sovereignty’ in Bernhardt R (ed) *Encyclopedia of Public International Law Volume IV* 2000 516; Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeßrechts* 1989 49 *et seq.*; Geimer R *Internationales Zivilprozessrecht* 2009 184 n. 374; Dahm R, Delbrück J, and Wolfrum R *Völkerrecht Band I/1: Die Grundlagen. Die Völkerrechtssubjekte* 1989 483; Ipsen K *Völkerrecht* 2004 320 n. 88 *et seq.* Cf. also the comments on the jurisdiction to prescribe in Chapter 2 para. III.B.3. For more on the genuine link, see, amongst others, Geimer R *Internationales Zivilprozessrecht* 2009 63 n. 166 *et seq.*, 184 n. 374; Seidl-Hohenveldern and Stein T *Völkerrecht* 2000 249 n. 1366 *et seq.*; Ipsen K *Völkerrecht* 2004 321 n. 90 *et seq.*; Adolphsen J ‘Das Territorialitätsprinzip im europäischen Patentrecht’ in 2006 *Zeitschrift für Zivilprozeß International* 139; VPB 45.47 253 *et seq.*

³³ S.S. *Lotus* 1927 PCIJ (ser. A) no. 10 19 *et seq.*

this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.”

It is also generally recognised that not every court order with extraterritorial effect interferes with public international law. By way of example, a court decision wherein the losing party is ordered to perform a particular action on foreign territory is compatible with public international law. Such a decision does not impair the sovereignty of the foreign state, as the latter is free to recognise and enforce the decision in its jurisdiction.³⁴ Similarly, the order of a trial court regarding a transfer of foreign evidence is not *per se* regarded as encroachment on foreign sovereignty.³⁵ The admissibility of such a court order under public international law rather depends on two factors, namely the addressee of the court order, litigants or third parties, and whether the order includes any measures of compulsion towards its addressees.³⁶ In this context, the question arises to what extent, if at all, foreign witnesses are under a public international law obligation to collaborate with the trial court. Provided such obligation exists, it has to be examined whether and, if so, to what extent the trial court is allowed to compel foreign witnesses to cooperate.

B. Obligation of Foreign Witnesses to Cooperate with the Trial Court

The outcome of a transfer of foreign evidence largely depends on the extent to which a foreign witness is under an obligation to collaborate with the trial court.³⁷ In the absence of such an obligation, a transfer of foreign evidence is only successful with regard to litigants and third parties who voluntarily cooperate, but is ineffective with recalcitrant witnesses.

³⁴ Geimer R *Internationales Zivilprozessrecht* 2009 70 n. 176, 194 n. 396; Schlosser P *Der Justizkonflikt zwischen den USA und Europa - Erweiterte Fassung eines Vortrags gehalten vor der Juristischen Gesellschaft zu Berlin am 10. Juli 1985* 1985 21; Schlosser P ‘Extraterritoriale Rechtsdurchsetzung im Zivilprozess’ in Pfister B and Will MR (eds) *Festschrift für Werner Lorenz zum siebzigsten Geburtstag* 1991 499, 504 *et seq.*; Gottwald P ‘Grenzen zivilgerichtlicher Massnahmen mit Auslandswirkung’ in Lindacher WF *et al* (eds) *Festschrift für Walther J. Habscheid* 1989 120; Schack H *Internationales Zivilverfahrensrecht* 2010 272 n. 792; Dahm R, Delbrück J, and Wolfrum R *Völkerrecht Band I/1: Die Grundlagen. Die Völkerrechtssubjekte* 1989 483 *et seq.*; Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeßrechts* 1989 54; Geimer E *Internationale Beweisaufnahme* 1998 25 *et seq.*; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 147; Küttler A *Das Erlangen von Beweisen in den USA zur Verwertung im deutschen Zivilprozeß* 2007 127. See also Meier AL *Die Anwendung des Haager Beweisübereinkommens in der Schweiz unter besonderer Berücksichtigung der Beweisaufnahme für U.S.-amerikanische Zivilprozesse* 1999 61. See also the comments on the jurisdiction to adjudicate in Chapter 2 para. III.B.3.

³⁵ The following remarks on the admissibility of a transfer of foreign evidence under public international law focus on the relevant discussion in Germany, as Germany is the country where the transfer of foreign evidence has been the most debated in recent years.

³⁶ Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeßrechts* 1989 54; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 81, 91.

³⁷ Mössle KP *Extraterritoriale Beweisbeschaffung im internationalen Wirtschaftsrecht: Eine vergleichende Untersuchung unter besonderer Berücksichtigung des US-amerikanischen und deutschen Rechts* 1990 100 *et seq.*

Since a court order for a transfer of foreign evidence either aims at foreign litigants or third parties. Thus the following addresses first the obligation of foreign litigants to cooperate and, secondly, deals with the respective obligation of foreign non-party witnesses.³⁸

1. Obligation of Foreign Litigants to Cooperate

It is well established that under public international law, foreign litigants are under an obligation to cooperate with the trial court. The reasons given for this obligation, however, vary.³⁹ Leipold's arguments are based on the so-called "*lex-foi* principle". According to this principle, court proceedings are governed by the rules of the court where the lawsuit is pending, the so-called "*lex foii*".⁴⁰ In the opinion of Leipold, the *lex-foi* principle is of an international nature and is an expression of the sovereignty of states. This follows, according to Leipold, from the fact that each state recognises the right of another state to apply its own law in court proceedings pending in its jurisdiction. Accordingly, Leipold maintains that orders of a trial court towards foreign litigants are justified by the *lex-foi* principle which establishes, *inter alia*, a special procedural relation between the trial court and foreign litigants.⁴¹ He concludes that parties domiciled abroad have the same duties as domestic litigants.⁴²

Schlosser maintains that, based on what he calls the "*Annexzuständigkeit*", literally "annex jurisdiction", foreign litigants have the same duties as domestic parties, provided the trial court is competent to decide the relevant case under public international law. In this context, he points to the fact that there is no international rule that prevents a trial court from ordering the losing party to perform a particular action in a foreign state. Schlosser furthermore emphasises that a different treatment of foreign and domestic litigants is not justified and would impair the "*prozessuale Waffengleichheit*", that is, the equal fighting chances of plaintiffs and defendants.⁴³

³⁸ The following remarks on the obligation of foreign litigants and third parties to cooperate with the trial court are based on the relevant discussion in Germany. See in this regard fn. 35 above.

³⁹ Cf. fn. 35 above.

⁴⁰ For more on the *lex-foi* principle, see, amongst others, Leipold D *Lex foii, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozessrechts* 1989 25 *et seq.*; Geimer R *Internationales Zivilprozessrecht* 2009 165 n. 319 *et seq.*

⁴¹ In German, the so-called "*Prozessverhältnis*". For the notion of "*Prozessverhältnis*" see, *inter alia*, Spühler K, Dolge A, and Gehri M *Schweizerisches Zivilprozessrecht und Grundzüge des internationalen Zivilprozessrechts* 2010 34 n. 8.

⁴² Leipold D *Lex foii, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozessrechts* 1989 55 *et seq.*, 64 *et seq.*

⁴³ Schlosser P 'Extraterritoriale Rechtsdurchsetzung im Zivilprozess' in Pfister B and Will MR (eds) *Festschrift für Werner Lorenz zum siebzigsten Geburtstag* 1991 497, 510 *et seq.*; Schlosser P *Der Justizkonflikt zwischen den USA und Europa – Erweiterte Fassung eines Vortrags gehalten vor der Juristischen Gesellschaft zu Ber-*

Mössle refers to the so-called “*internationale Beweiszuständigkeit*”, literally “international jurisdiction over evidence”, which includes the trial court’s power to request means of proof located abroad *via* a transfer of foreign evidence without having to resort to international judicial assistance.⁴⁴ In comparison with Schlosser’s “*Annexzuständigkeit*”, Mössle considers the “*internationale Beweiszuständigkeit*” as a “separate phenomenon”. He maintains that merely by virtue of the “*Annexzuständigkeit*”, the trial court is not allowed to request a transfer of foreign evidence. When defining the prerequisites for the “*internationale Beweiszuständigkeit*”, Mössle follows the relevant doctrine in the United States which includes three requirements, namely the personal jurisdiction, the control, and the comity. The first requirement describes the trial court’s international jurisdiction over the addressee of the request for a transfer of foreign evidence. In other words, the trial court must have the power to order a respective transfer towards a foreign litigant. The second requirement, the control, refers to the power of the addressee to deal with the foreign evidence. The comity serves the purpose to define the limits of a transfer of foreign evidence and includes two elements. Firstly, a transfer is, as claimed by Mössle, only permitted if there is a close link between the foreign evidence and the state of the trial court. According to Mössle, such a link exists where the activities, to which the foreign evidence refers, have a domestic *nexus* which justifies that they are covered by the state of the trial court. The second element includes the public international law obligation of states to show consideration for each other, which particularly applies to a transfer of foreign evidence.⁴⁵

From a practical viewpoint, it is irrelevant which of the foregoing theories prevails, as they all advocate the obligation of foreign litigants to cooperate with the trial court. The prevailing view in Germany, however, which is shared by the author, bases this obligation on the said “*Annexzuständigkeit*”.⁴⁶ With regard to the abovementioned *lex-fori* principle, it is criticised

lin am 10. Juli 1985 1985 19 *et seqq.* See also Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozess: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 84; Geimer R *Internationales Zivilprozessrecht* 2009 211 n. 431; Nagel H and Gottwald P *Internationales Zivilprozessrecht* 2007 399 n. 4; Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 147 *et seq.*; Schack H *Internationales Zivilverfahrensrecht* 2010 272 n. 791; Gottwald P ‘Grenzen zivilgerichtlicher Massnahmen mit Auslandswirkung’ in Lindacher WF *et al* (eds) *Festschrift für Walther J. Habscheid* 1989 125; Berger C ‘§ 363’ in Stein F and Jonas M (ed) *Kommentar zur Zivilprozessordnung Band 5 §§ 328-510b* 2006 316 n. 9.

⁴⁴ Mössle KP *Extraterritoriale Beweisbeschaffung im internationalen Wirtschaftsrecht: Eine vergleichende Untersuchung unter besonderer Berücksichtigung des US-amerikanischen und deutschen Rechts* 1990 200.

⁴⁵ Mössle KP *Extraterritoriale Beweisbeschaffung im internationalen Wirtschaftsrecht: Eine vergleichende Untersuchung unter besonderer Berücksichtigung des US-amerikanischen und deutschen Rechts* 1990 207 *et seqq.*, 433 *et seqq.*, 459 *et seqq.* See also Geimer R *Internationales Zivilprozessrecht* 2009 835 n. 2382.

⁴⁶ Mössle KP *Extraterritoriale Beweisbeschaffung im internationalen Wirtschaftsrecht: Eine vergleichende Untersuchung unter besonderer Berücksichtigung des US-amerikanischen und deutschen Rechts* 1990 331 *et*

that, according to Leipold, the concept should only apply to foreign litigants, but not to foreign third parties.⁴⁷ Based on Leipold's assumption that each state recognises the right of another state to apply its *lex fori* in court proceedings, the differentiation between foreign litigants and foreign third parties is not deemed justified; there is no reason why states should recognise the *lex-fori* principle with respect to foreign litigants, but not regarding foreign third parties.⁴⁸ The predominant view furthermore rejects the approach taken by Mössle, as it does not see the need to introduce the "*internationale Beweiszuständigkeit*" as a separate element to the "*Annexzuständigkeit*". Such an element is, according to the prevailing view, not necessary, because in the opinion of Mössle, the trial court has "*internationale Beweiszuständigkeit*" whenever there is personal jurisdiction over the foreign litigant. It is therefore argued that if the personal jurisdiction, being the first requirement in the approach of Mössle, already results in the "*internationale Beweiszuständigkeit*", the further prerequisites of control and comity are superfluous.⁴⁹

2. Obligation of Foreign Third Parties to Cooperate

While under public international law, the obligation of foreign litigants to cooperate with the trial court in the course of a transfer of foreign evidence is recognised,⁵⁰ there is no *consensus* as to what extent foreign third parties have to collaborate.⁵¹ Leipold argues that unlike in the case of foreign litigants, the *lex-fori* principle does not apply to foreign third parties.⁵² He maintains that in contrast to litigants, the *lis pendens* of a lawsuit does not *per se* establish a relation between the trial court and foreign third parties, but that a respective connection only exists once the trial court has ordered a third party to cooperate. According to Leipold, such an order infringes the sovereignty of the foreign state, irrespective of the nationality of the third

seq.; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 88; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 148.

⁴⁷ See para. IV.B.2 below.

⁴⁸ Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 89; Schlosser P 'Extraterritoriale Rechtsdurchsetzung im Zivilprozess' in Pfister B and Will MR (eds) *Festschrift für Werner Lorenz zum siebzigsten Geburtstag* 1991 508; Geimer E *Internationale Beweisaufnahme* 1998 41 *et seq.*; Bertele J *Souveränität und Verfahrensrecht: Eine Untersuchung der aus dem Völkerrecht ableitbaren Grenzen staatlicher extraterritorialer Jurisdiktion im Verfahrensrecht* 1998 411 *et seq.*

⁴⁹ Geimer R *Internationales Zivilprozessrecht* 2009 836 n. 2383; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 88; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 148 *et seq.*; Schlosser P 'Extraterritoriale Rechtsdurchsetzung im Zivilprozess' in Pfister B and Will MR (eds) *Festschrift für Werner Lorenz zum siebzigsten Geburtstag* 1991 509 *et seq.*

⁵⁰ See para. IV.B.1 above.

⁵¹ Cf. fn. 35 above.

⁵² With regard to the *lex-fori* principle, see para. IV.B.1 above.

party and whether the trial court uses any compulsion or not. As a result, Leipold rejects any obligation of foreign non-party witnesses to collaborate with the trial court in the course of a transfer of foreign evidence.⁵³

By contrast, Schlosser holds that, based on the aforementioned “*Annexzuständigkeit*”,⁵⁴ third parties have the same obligation to cooperate as litigants, provided the trial court is competent to decide the relevant case. The mere fact that a foreign non-party witness has information, which is relevant for the proceedings pending before the trial court, however, does, according to Schlosser, not suffice to establish a respective obligation to cooperate. Rather, there must be a genuine link that justifies the involvement of the foreign third party into the domestic proceedings. While Schlosser rejects such connection in the case of a transient tourist, he, for instance, advocates an obligation to cooperate for a foreign third party who possesses property items in a lawsuit involving the estate of a deceased person who was domiciled in the trial court’s jurisdiction.⁵⁵

Mössle, whose argument is based on the aforesaid “*internationale Beweiszuständigkeit*”,⁵⁶ only distinguishes between foreign litigants and third parties when examining the third requirement of comity. He maintains that, as a general principle, a foreign non-party witness is, like a foreign litigant, under an obligation to cooperate with the trial court, provided there is a close link between the third party and the state of the trial court which justifies the latter having personal jurisdiction over the non-party witness. Compared to a foreign litigant, however, Mössle emphasises that a foreign third party must be better protected, because his interests are more affected by the trial court’s order for a transfer of foreign evidence, as he is not a party to the lawsuit.⁵⁷

According to Geimer and Schack, the question of whether a foreign third party is under an obligation to collaborate with the trial court depends on his nationality. They argue that based on

⁵³ Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeßrechts* 1989 56, 63. See also Berger C ‘§ 363’ in Stein F and Jonas M (ed) *Kommentar zur Zivilprozeßordnung Band 5 §§ 328-510b* 2006 317 n. 11; Markus AR ‘Neue Entwicklungen bei der internationalen Rechtshilfe in Zivil- und Handelssachen’ 2002 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 78.

⁵⁴ See para. IV.B.1.

⁵⁵ Schlosser P ‘Extraterritoriale Rechtsdurchsetzung im Zivilprozess’ in Pfister B and Will MR (eds) *Festschrift für Werner Lorenz zum siebzigsten Geburtstag* 1991 511. For criticism on Schlosser’s view, see Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 154; Stadler A *Der Schutz des Unternehmensheimnisses im deutschen und US-amerikanischen Zivilprozess und im Rechtshilfverfahren* 1989 282, 284.

⁵⁶ Cf. para. IV.B.1 above.

⁵⁷ Mössle KP *Extraterritoriale Beweisbeschaffung im internationalen Wirtschaftsrecht: Eine vergleichende Untersuchung unter besonderer Berücksichtigung des US-amerikanischen und deutschen Rechts* 1990 439, 458. See also Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 85 *et seq.*

the personal sovereignty,⁵⁸ foreign third parties, who have the same nationality as the state of the trial court, are under an obligation to cooperate.⁵⁹ Geimer emphasises that this obligation may be limited by virtue of the rule of reasonableness,⁶⁰ and that the trial court therefore has to consider on a case-by-case basis whether the non-party witness is exempt from appearing in court due to a too long distance between his domicile and the location of the trial court, or due to other good causes. If such a cause exists, the trial court has, according to Geimer, to contemplate less incisive means than ordering the non-party witness to attend court, such as a written testimony, or an examination *via* international judicial assistance.⁶¹ With regard to foreign third parties having a different nationality than that of the state of the trial court, Geimer and Schack reject an obligation to cooperate, as the said court is not in a position to invoke personal sovereignty over foreign nationals.⁶²

Müller maintains that an obligation of foreign third parties to cooperate requires a sufficient relation between the state of the trial court and the non-party witness. In the opinion of Müller, such relation exists if the third party has the same nationality as the state of the trial court. Specific connecting factors, however, are, as claimed by Müller, necessary in cases where the third party has a different nationality to that of the trial court. According to Müller, such factors may, for instance, exist where the third party has a right to the subject of the dispute or carries out business activities in the state of the trial court.⁶³

Finally, Daoudi applies, unlike Leipold, the *lex-fori* principle to foreign third parties. He maintains that, based on the personal sovereignty of the state of the trial court, this principle serves as a basis for the said court to order a transfer of foreign evidence towards non-party witnesses who are of the same nationality as the state of the trial court.⁶⁴ With regard to non-party witnesses who have a different nationality, Daoudi argues that, in the absence of the personal sov-

⁵⁸ For more on personal sovereignty, see Chapter 2 para. II.B.2 above.

⁵⁹ Schack H *Internationales Zivilverfahrensrecht* 2010 273 n. 795; Geimer R *Internationales Zivilprozessrecht* 2009 189 n. 381, 210 n. 427 *et seq.*

⁶⁰ In German, such rule is called “Übermassverbot”.

⁶¹ Geimer R *Internationales Zivilprozessrecht* 2009 210 n. 428.

⁶² Schack H *Internationales Zivilverfahrensrecht* 2010 273 n. 796; Geimer R *Internationales Zivilprozessrecht* 2009 211 n. 431. See also Nagel H and Gottwald P *Internationales Zivilprozessrecht* 2007 399 n. 4, 438 n. 123; Geimer E *Internationale Beweisaufnahme* 1998 42 *et seq.*, 47.

⁶³ Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 148. See also Mössle KP *Extraterritoriale Beweisbeschaffung im internationalen Wirtschaftsrecht: Eine vergleichende Untersuchung unter besonderer Berücksichtigung des US-amerikanischen und deutschen Rechts* 1990 341.

⁶⁴ Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 88 *et seq.* See also Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeßrechts* 1989 56, 63; Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 148.

ereignty of the trial court, the admissibility of a court order for a transfer of foreign evidence depends on the content of the court order without, however, specifying such content.⁶⁵

Leipold's approach, which rejects any obligation to cooperate, irrespective of the nationality of the foreign third party, has been rejected by the majority of the German legal scholars. The same applies to the position taken by Mössle. Based on the personal sovereignty of the state of the trial court over its nationals, the prevailing view advocates an obligation of foreign third parties to collaborate, provided the latter have the same nationality as the said court.⁶⁶ In other words, in the case of a transfer of foreign evidence aiming at a third party with the same nationality as the state of the trial court, the latter's personal sovereignty prevails over the territorial sovereignty of the state where the witness is domiciled.⁶⁷ With regard to foreign third parties having another nationality than the state of the trial court, the latter, however, cannot invoke personal sovereignty. Consequently, the predominant view rejects an obligation of the said third parties to cooperate with the trial court.⁶⁸ This view is shared by the author.

C. Measures of Compulsion by the Trial Court towards Foreign Witnesses

1. General Remarks

In cases where a foreign witness has an obligation to cooperate with the trial court in the course of a transfer of foreign evidence,⁶⁹ the question arises as to whether the said court can use measures of compulsion if the witness refuses to collaborate. Whether and, if so, to what extent such coercive measures are allowed under public international law depends on two factors: the addressee of the measure, foreign litigant or foreign third party, and the content of the measure.

⁶⁵ Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 90 *et seq.*

⁶⁶ See, amongst others, Geimer E *Internationale Beweisaufnahme* 42 *et seq.*; Schack H *Internationales Zivilverfahrensrecht* 2010 273 n. 795; Geimer R *Internationales Zivilprozessrecht* 2009 210 n. 428; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 91; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 154 *et seq.*; Mössle KP *Extraterritoriale Beweisbeschaffung im internationalen Wirtschaftsrecht: Eine vergleichende Untersuchung unter besonderer Berücksichtigung des US-amerikanischen und deutschen Rechts* 1990 341; Eschenfelder ED *Beweiserhebung im Ausland und ihre Verwertung im inländischen Zivilprozess: Zur Bedeutung des US-amerikanischen discovery-Verfahrens für das deutsche Erkenntnisverfahren* 2002 73; Nagel H and Gottwald P *Internationales Zivilprozessrecht* 2007 399 n. 5; Schlosser P 'Extraterritoriale Rechtsdurchsetzung im Zivilprozess' in Pfister B and Will MR (eds) *Festschrift für Werner Lorenz zum siebzigsten Geburtstag* 1991 508.

⁶⁷ Cf. also in this regard Chapter 2 paras. II.B.1 and II.B.2.

⁶⁸ See, amongst others, Geimer E *Internationale Beweisaufnahme* 1998 47; Schack H *Internationales Zivilverfahrensrecht* 2010 273 n. 795 *et seq.*; Geimer R *Internationales Zivilprozessrecht* 2009 210 n. 427 *et seqq.*; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 91.

⁶⁹ See para. IV.B above.

This question is of great practical importance, as the obligation of a foreign witness to cooperate holds good to the extent that the trial court is in a position to enforce that obligation upon the recalcitrant witness.⁷⁰ This is all the more true as, in practice, foreign witnesses, in particular defendants and third parties, are often reluctant to cooperate with the trial court. If the latter, however, is not able to compel the collaboration of a recalcitrant foreign witness, the transfer of the respective evidence is not possible. In this event, the trial court has no other option, but to try to obtain the evidence through channels of international judicial assistance. Needless to say, the question as to the admissibility of compulsion becomes obsolete in cases where the foreign witness is under no obligation to cooperate with the trial court.

This subchapter deals first with the different types of coercive measures as well as their impacts on foreign territory. It then examines their admissibility under public international law, in other words, their relation to the sovereignty of the foreign state, and investigates to what extent, if at all, a trial court may compel foreign witnesses to collaborate.⁷¹

2. Types and Impacts of Measures of Compulsion

With regard to coercive measures, one distinguishes between direct and indirect compulsion. Direct compulsion includes measures that are aimed either at the assets of the recalcitrant foreign witness, by imposition of a fine, or at the witness himself, for example, by means of confinement for contempt of court. By contrast, indirect compulsion can be equated with consequences of a merely procedural nature.⁷² Here, an uncooperative litigant may, for instance, be sanctioned with the dismissal of his claim.⁷³

The impacts of coercive measures are either limited to the jurisdiction of the trial court, or they extend to foreign states. The effects of measures of indirect compulsion are confined to the state of the trial court. By contrast, direct compulsion may take effect either in the jurisdiction of the trial court,⁷⁴ or in a foreign state.⁷⁵

⁷⁰ Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 150; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 156.

⁷¹ Once again, the following comments focus on the relevant discussion in Germany. See also fn. 35.

⁷² In German, so-called “*Prozessnachteile*”.

⁷³ Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 92.

⁷⁴ This is, for instance, the case where assets of the foreign witness, which are seized for a fine imposed by the trial court, are located in the latter’s jurisdiction.

⁷⁵ This applies, for example, where the assets of the foreign witness are situated outside the state of the trial court.

3. Measures of Compulsion and Sovereignty

It is well established that under public international law, a state is not allowed to apply direct compulsion on foreign territory. This holds true not only for cases where a trial court performs a judicial act in a foreign state, but also with regard to a transfer of foreign evidence, that is, where the said court does not become physically active on foreign territory. Consequently, foreign sovereignty is infringed where the trial court uses direct compulsion which takes effect abroad.⁷⁶

With regard to direct compulsion of which the impact is limited to the jurisdiction of the trial court, it is the prevailing view that a trial court is allowed to use such measures.⁷⁷ In contrast, Leipold argues that the mere threat of direct compulsion puts pressure on the foreign witness and that such pressure takes effect in the foreign state. Accordingly, Leipold considers the use of direct compulsion by the trial court, be it limited to the state of the trial court or not, as violation of foreign sovereignty.⁷⁸ Stadler maintains that the sovereignty of a state not only includes its territorial integrity, but also the protection of the state's nationals against acts of other states. In this context, she holds that in case of indirect compulsion, the foreign litigant bears the normal risk of losing a case and can decide freely, that is, without the pressure of the trial court, whether he procures the evidence, or whether he accepts the possible procedural consequences when not complying with an order for a transfer of foreign evidence. Accordingly, Stadler qualifies the use of indirect compulsion as not being a violation of foreign sovereignty as the trial court does not apply any pressure or compulsion towards the foreign litigant. Where the trial court, however, uses direct compulsion, the foreign witness has, in the opinion of Stadler, no real choice between giving in to the court order and, if not doing so, accepting the

⁷⁶ See, amongst others, Bertele J *Souveränität und Verfahrensrecht: Eine Untersuchung der aus dem Völkerrecht ableitbaren Grenzen staatlicher extraterritorialer Jurisdiktion im Verfahrensrecht* 1998 82; Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 150; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 151, 156; Eschenfelder ED *Beweiserhebung im Ausland und ihre Verwertung im inländischen Zivilprozess: Zur Bedeutung des US-amerikanischen discovery-Verfahrens für das deutsche Erkenntnisverfahren* 2002 72; Pfeiffer T 'Internationale Zusammenarbeit bei der Vornahme innerstaatlicher Rechtshandlungen – International cooperation in the making of interior jurisdictional measures' in Gilles P (ed) *Transnationales Prozeßrecht – Transnational Aspects of Procedural Law* 1995 90.

⁷⁷ See, amongst others, Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 151; Geimer E *Internationale Beweisaufnahme* 1998 29; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfsweges* 2000 93; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 157; Geimer R 'Verfassung, Völkerrecht und Internationales Zivilverfahrensrecht' 1992 *Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung* 337.

⁷⁸ Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeßrechts* 1989 51. See also Gottwald P 'Grenzen zivilgerichtlicher Massnahmen mit Auslandswirkung' in Lindacher WF *et al* (eds) *Festschrift für Walther J. Habscheid* 1989 127 *et seq.*

respective coercive measure. In this regard, Stadler argues that the trial court compels the foreign witness to perform actions on foreign territory which such court could not have taken without violating foreign sovereignty. According to Stadler, however, not all direct coercive measures interfere with public international law, but only those which, from the perspective of the trial court, aim at penalising the foreign witness for not complying with the court order. In contrast, measures that serve the purpose of concluding the proceedings and not as punishment or enforcement of procedural duties, do, according to Stadler, not infringe foreign sovereignty.⁷⁹

Neither Leipold's or Stadler's position is fully convincing. With regard to the former, one has to keep in mind that the use of direct compulsion limited to the trial court's jurisdiction is of a purely domestic nature. The threat of compulsion occurs in the state of the trial court. The same holds true for the execution of the respective court order which can only be enforced within that court's jurisdiction. Following Leipold's approach would furthermore impair the equal fighting chances between domestic and foreign litigants, as only the former could be compelled to collaborate with the trial court. Such unequal treatment, however, should be avoided.⁸⁰ Stadler's differentiation regarding direct coercive measures appears to be rather artificial, as a respective court order always includes the court's intention to enforce the procedural duties of the foreign witness in case he fails to comply with the court's request.

Measures of indirect compulsion do not interfere with the sovereignty of the state where the foreign litigant is domiciled and are thus compatible with public international law.⁸¹ As has been noted above, the impacts of such measures are limited to the jurisdiction of the trial court. Moreover, such measures result from the procedural relation between the trial court and the foreign litigant, in other words, from a relation that is of a purely domestic nature.

⁷⁹ Stadler A *Der Schutz des Unternehmensgeheimnisses im deutschen und US-amerikanischen Zivilprozess und im Rechtshilfeverfahren* 1989 288 *et seq.*, 298 *et seq.*; Stadler A '§ 363' in Musielak H-J (ed) *Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz* 2012 1255 n. 12.

⁸⁰ Cf. also Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 93; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 152.

⁸¹ See, amongst others, Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 92; Müller A *Grenzüberschreitende Beweisaufnahme im Europäischen Justizraum* 2004 152; Geimer E *Internationale Beweisaufnahme* 1998 26 *et seq.*; Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeßrechts* 1989 65 *et seq.*; Eschenfelder ED *Beweiserhebung im Ausland und ihre Verwertung im inländischen Zivilprozess: Zur Bedeutung des US-amerikanischen discovery-Verfahrens für das deutsche Erkenntnisverfahren* 2002 72; Pfeiffer T 'Internationale Zusammenarbeit bei der Vornahme innerstaatlicher Rechtshandlungen – International cooperation in the making of interior jurisdictional measures' in Gilles P (ed) *Transnationales Prozeßrecht – Transnational Aspects of Procedural Law* 1995 89 *et seq.* See also Stadler's mentioned argument with regard to measures with direct compulsion.

4. Measures of Compulsion towards Foreign Litigants

In the light of the above, it becomes evident that under public international law, the measures of compulsion that a trial court may apply towards foreign litigants are twofold: measures of direct compulsion, provided they do not take effect outside the state of the trial court, and measures of indirect compulsion.⁸² Since the use of these measures is based on the procedural link between the trial court and the foreign litigant, they can be applied with regard to a foreign litigant having the same nationality as the state of the trial court as well as a party having a different nationality. The admissibility of such measures of compulsion, be they direct or indirect, ultimately serve the purpose of guaranteeing the equal fighting chances between domestic and foreign litigants.⁸³

From a practical point of view, the use of direct compulsion limited to the state of the trial court only makes sense if the foreign witness has assets in such state that can be seized once he fails to collaborate with the trial court.

5. Measures of Compulsion towards Foreign Third Parties

As has been explained earlier,⁸⁴ the use of direct compulsion taking effect outside the state of the trial court interferes with the sovereignty of the foreign state. This also holds true with regard to foreign third parties. Compared to a foreign litigant, the coercive measures the trial court may apply towards a foreign third party are more restricted. This follows from the fact that the latter is not party to the proceedings. Consequently, there is no procedural relation between the trial court and the foreign third party. The impacts of this are twofold: first, the trial court cannot apply any indirect compulsion towards foreign non-party witnesses, as such compulsion requires a procedural relation. Second, the use of direct compulsion limited to the state

⁸² See, amongst others Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 93 *et seq.*; Küttler A *Das Erlangen von Beweisen in den USA zur Verwertung im deutschen Zivilprozeß* 2007 129 *et seq.*; Pfeiffer T 'Internationale Zusammenarbeit bei der Vornahme innerstaatlicher Rechtshandlungen – International cooperation in the making of interior jurisdictional measures' in Gilles P (ed) *Transnationales Prozeßrecht – Transnational Aspects of Procedural Law* 1995 89 *et seq.* Cf. also Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 23 (date of use: 31 January 2013); Meier *Beweisübereinkommen* 62; Meier I "'Swiss-Worldwide-Mareva'" im Scheidungsprozess?' in Meier I and Siehr K (eds) *Rechtskollisionen: Festschrift für Anton Heini zum 65. Geburtstag* 280.

⁸³ Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 151; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 93. See also Meier AL *Die Anwendung des Haager Beweisübereinkommens in der Schweiz unter besonderer Berücksichtigung der Beweisaufnahme für U.S.-amerikanische Zivilprozesse* 1999 62.

⁸⁴ Cf. para. IV.C.3.

of the trial court cannot be founded on a procedural link. Instead, the criterion to be considered is the personal sovereignty of the state where the trial court is situated. As the personal sovereignty only extends to individuals having the same nationality as the state of the trial court, there are differences in approach regarding the use of direct compulsion (taking effect in the trial court's jurisdiction) depending on the nationality of the foreign third party. While a trial court may apply direct measures towards non-party witnesses having the same nationality as the trial court, the use of such compulsion regarding third parties with another nationality is not compatible with public international law.⁸⁵

The preceding conclusion is consistent with the aforementioned obligations of foreign third parties to collaborate with the trial court in the course of a transfer of foreign evidence, as the use of compulsion requires a respective obligation to cooperate. In other words, where there is no respective obligation of the foreign non-party witness, the trial court cannot compel him to collaborate. As in the case of foreign litigants,⁸⁶ the use of indirect compulsion towards third parties makes sense only if the latter have assets in the trial court's jurisdiction.

6. Summary

In the light of the above, the following picture emerges regarding the admissibility of an order of the trial court for a transfer of foreign evidence under public international law: with respect to foreign litigants, such court order is allowed, provided indirect compulsion or direct compulsion limited to the state of trial court is applied. Moreover, the trial court may issue an order towards foreign third parties having the same nationality as the state where the trial court is located, provided it merely uses direct compulsion taking effect in its jurisdiction. By contrast, a court order for a transfer of foreign evidence, which includes direct coercive measures taking effect abroad, interferes with foreign sovereignty, irrespective of whether it aims at foreign liti-

⁸⁵ See, amongst others, Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 35, 157; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 94; Küttler A *Das Erlangen von Beweisen in den USA zur Verwertung im deutschen Zivilprozeß* 2007 129 *et seq.*; Pfeiffer T 'Internationale Zusammenarbeit bei der Vornahme innerstaatlicher Rechtshandlungen – International cooperation in the making of interior jurisdictional measures' in Gilles P (ed) *Transnationales Prozeßrecht – Transnational Aspects of Procedural Law* 1995 91. See, however, Gottwald P 'Grenzen zivilgerichtlicher Massnahmen mit Auslandswirkung' in Lindacher WF *et al* (eds) *Festschrift für Walther J. Habscheid* 1989 128; Musielak H-J 'Beweiserhebung bei auslandsbelegenen Beweismitteln' in Schütze R (ed) *Einheit und Vielfalt des Rechts: Festschrift für Reinhold Geimer zum 65. Geburtstag* 2002 770. See also Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 23 (date of use: 31 January 2013); Meier AL *Die Anwendung des Haager Beweisübereinkommens in der Schweiz unter besonderer Berücksichtigung der Beweisaufnahme für U.S.-amerikanische Zivilprozesse* 1999 62.

⁸⁶ Cf. para. IV.C.4 above.

gants or foreign third parties. The same holds true for any measures of compulsion towards foreign non-party witnesses having a nationality different from that of the state of the trial court.

D. Request of the Trial Court for Voluntary Cooperation of Foreign Witnesses

In cases where a trial court cannot compel a foreign witness to collaborate, the question arises whether the former is allowed to ask the witness for his voluntary cooperation. In other words, can the trial court solicit evidence from a foreign witness without the involvement of the foreign state, provided no compulsion is involved? Or does such a request already interfere with foreign sovereignty so that the trial court has no other choice than seeking international judicial assistance?

In practice, a trial court will hardly request foreign litigants for their voluntary cooperation, as it has sufficient means to compel them to collaborate. This particularly holds true for cases where a litigant does not have any assets in the state of the trial court, as the latter can still apply indirect compulsion. The prospect of such compulsion usually suffices to ensure the litigant's cooperation. In contrast, the voluntary cooperation of foreign third parties plays a more important role, as the extent to which a trial court is allowed to use compulsion is more limited.⁸⁷ Accordingly, a voluntary cooperation of a non-party witness becomes relevant whenever the latter has a nationality different from that of the state of the trial court. The same holds true with regard to third parties who have the same nationality as the trial court, but do not have any assets in the court's jurisdiction. Nevertheless, one has to keep in mind that even in cases where the trial court could theoretically apply coercive measures, a request for voluntary cooperation may be the more promising strategy to obtain foreign evidence. In practice, foreign third parties are often more motivated to cooperate with a trial court when requested for their voluntary cooperation than when ordered by a court decision to procure evidence. Having said this, the following comments focus on the voluntary cooperation of third party witnesses.

The question of whether the trial court is allowed to request the voluntary cooperation of third parties without the involvement of the foreign state has been controversially discussed.⁸⁸ According to one school of thought, such request interferes with foreign sovereignty and is thus incompatible with public international law. In this context, Leipold maintains that by soliciting a voluntary transfer of foreign evidence, the trial court performs a judicial act taking effect on

⁸⁷ Cf. para. IV.C.5 above.

⁸⁸ Again, the following remarks focus on the relevant discussion in Germany. See also in this regard fn. 35.

foreign territory, as it aims at a third party located abroad. He opines that, although the trial court neither acts on foreign soil nor uses any measures of compulsion, the request nevertheless interferes with foreign sovereignty because it ultimately aims at bypassing international judicial assistance.⁸⁹ Geiger points out that, in this context, the fact that the foreign third party voluntarily cooperates is irrelevant, as the latter cannot waive the sovereignty of the foreign state.⁹⁰

The prevailing view, however, regards the request for voluntary cooperation as compatible with public international law, albeit based on different arguments. Schack notes that such a request does not constitute a judicial act of the trial court on foreign territory and therefore does not interfere with foreign sovereignty.⁹¹ Mann maintains that by issuing the said request, the trial court merely informs the foreign third party about the pending lawsuit and that it is at the discretion of the third party whether to collaborate or not.⁹² Schabenberger qualifies the request for voluntary cooperation as a judicial act, as it is issued by a court in support of court proceedings. Notwithstanding the foregoing, Schabenberger opines that the request does not infringe foreign sovereignty, because the third party is free to decide whether he wants to cooperate or not. In this context, Schabenberger compares the request with a notification issued by a court where a foreign third party is informed about measures that were already taken in the respective court's jurisdiction and which he considers as allowed under public international law. In this regard, Schabenberger points out that like notifications, requests for voluntary cooperation do not entail any legal consequences, as they do not include any compulsion.⁹³

Following the prevailing view, it is submitted that the trial court's request for voluntary cooperation does not interfere with the sovereignty of the foreign state. As has been explained earlier

⁸⁹ Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeßrechts* 1989 58 *et seq.*, 63. See also Leipold D 'ZPO §§ 286, 355, 363' 1992 *Zeitschrift für Zivilprozeß* 511.

⁹⁰ Geiger R *Grundgesetz und Völkerrecht: mit Europarecht: die Bezüge des Staatsrechts zum Völkerrecht und Europarecht* 2010 233.

⁹¹ Schack H *Internationales Zivilverfahrensrecht* 2010 275 n. 804.

⁹² Mann FA 'Prozeßhandlungen gegenüber ausländischen Staaten und Staatsorganen' 1990 *Neue Juristische Wochenzeitschrift* 618.

⁹³ Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 159. See also Geimer R *Internationales Zivilprozessrecht* 2009 839 n. 2389; Gottwald P 'Grenzen zivilgerichtlicher Massnahmen mit Auslandswirkung' in Lindacher WF *et al* (eds) *Festschrift für Walther J. Habscheid* 1989 128; Schlosser P *Der Justizkonflikt zwischen den USA und Europa – Erweiterte Fassung eines Vortrags gehalten vor der Juristischen Gesellschaft zu Berlin am 10. Juli 1985* 1985 28; Nagel H and Gottwald P *Internationales Zivilprozessrecht* 2007 399 n. 5, 438 n. 124; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 97 *et seq.*; Schlosser P *EU-Zivilprozessrecht: EuGVVO, AVAG, VTVO MahnVO, BagatellVO, HZÜ, EuZVO, HBÜ, EuBVO* 2009 455 n. 7.

er,⁹⁴ the use of compulsion by a trial court towards foreign third parties is permitted under certain circumstances. A request for voluntary cooperation should therefore be allowed at least to the same extent. In addition, one has to bear in mind that, unlike in the case where direct compulsion is used, such a request does not entail any detrimental legal consequences for the foreign third party, but merely informs the latter that a lawsuit is pending before the trial court and that his cooperation may benefit these proceedings. Consequently, a request for voluntary cooperation should not only be allowed towards non-party witnesses having the same nationality as the trial court, but also regarding third parties with a different nationality. For the avoidance of doubt, the request should clearly point out that the foreign third party is under no obligation to collaborate with the trial court and that the disregard of the request is not accompanied by any kind of coercive measures or any other negative consequences.⁹⁵

V. Different Forms of a Transfer of Foreign Evidence

A. General Remarks

This subchapter deals with the different options a trial court has when trying to obtain the evidence of foreign witnesses directly, that is, without the involvement of the foreign state. The focus is on the oral and written testimony of litigants and third parties, as well as documents and movable property that are under their control.⁹⁶ Having said this, a trial court may order a foreign witness to appear in court, to testify *via* videolink or telephone, to give evidence in writing or to submit documents or movable property. Where the opinion of an expert is necessary and has to be based on foreign evidence, the trial court may furthermore appoint a domestic expert who collects the evidence abroad.

The following outlines the nature of each of the aforementioned options, including their advantages and disadvantages compared to the evidence-taking through international judicial assistance as well as in comparison with each other. With regard to most of the said methods, it is

⁹⁴ Cf. para. IV.C.5 above.

⁹⁵ See also Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozess: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 98. Cf. also Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 23 (date of use: 31 January 2013).

⁹⁶ Theoretically, an inspection of a location or an immovable property abroad by means of a transfer of foreign evidence, namely by videoconferencing, is possible. In practice, however, such inspection rarely occurs, as it is hardly suitable to give the trial court a sufficient impression of the relevant location or immovable property.

controversial whether they qualify as a transfer of foreign evidence,⁹⁷ or rather whether they constitute a judicial act of the trial court on foreign territory. This qualification is, as has been mentioned before, essential, as in the latter case, the evidence-taking without authorisation of the relevant foreign authority is *per se* impermissible under public international law, irrespective of whether the trial court applies compulsion or not. In contrast, a transfer of foreign evidence, with the exception of third parties having a different nationality to the state of the trial court, does not interfere with public international law, unless the trial court applies compulsion that infringes foreign sovereignty.⁹⁸ Finally, it is investigated whether the said methods contravene Article 271(1) of the Swiss Criminal Code.

In connection with a request for a transfer of foreign evidence, it is not only the question of whether that transfer interferes with foreign sovereignty that arises, but also how a respective request is to be served upon foreign witnesses under public international law.⁹⁹ Having said this, the conclusion that public international law allows the aforesaid forms of evidence-taking does not imply that the service of the relevant request abroad does not require the assistance of the foreign authorities.¹⁰⁰

There is no doubt that under public international law, the trial court is allowed to order a litigant or third party residing in its jurisdiction to submit documents or movable property located in a foreign state that are under the witnesses' control. As has been explained earlier,¹⁰¹ cross-border taking of evidence only occurs where the witness administering the evidence to be obtained is located in a different state than the trial court. Since in the constellation at hand, the witnesses controlling the evidence are located in the state of the trial court, there is no cross-border taking of evidence, let alone a transfer of foreign evidence.¹⁰²

⁹⁷ The following remarks focus on the relevant debate in Germany. See also in this regard fn. 35 above. For the nature of a transfer of foreign evidence, *cf.* para. II. above.

⁹⁸ *Cf.* para. IV.C.6 above.

⁹⁹ Geimer R *Internationales Zivilprozessrecht* 2009 209 n. 424; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 161, 190; Mössle KP *Extraterritoriale Beweisbeschaffung im internationalen Wirtschaftsrecht: Eine vergleichende Untersuchung unter besonderer Berücksichtigung des US-amerikanischen und deutschen Rechts* 1990 52.

¹⁰⁰ For more on the service of process, see para. V.K below.

¹⁰¹ See Chapter 2 para. II.

¹⁰² *Cf.* also Küttler A *Das Erlangen von Beweisen in den USA zur Verwertung im deutschen Zivilprozeß* 2007 128; Schlosser P *Der Justizkonflikt zwischen den USA und Europa – Erweiterte Fassung eines Vortrags gehalten vor der Juristischen Gesellschaft zu Berlin am 10. Juli 1985* 1985 17 *et seqq.*

B. Summons of a Foreign Witness to Appear before the Trial Court

1. Nature of a Summons to Appear before the Trial Court

This subchapter deals with the situation where a trial court requests a foreign witness to appear and testify before it. Based on the said summons, the witness travels to the state of the trial court and testifies before the competent judge in the presence of the litigants and their counsel.

The advantages and disadvantages of an examination of a foreign witness through the trial court without the involvement of the foreign state in comparison with questioning by means of international judicial assistance have already been outlined:¹⁰³ the time-consuming and burdensome process of international judicial assistance can be avoided, the trial court is able to see and hear the witness, the examination is governed by the law of the trial court, and the use of compulsion by the trial court is limited.

2. Summons to Appear before the Trial Court as a Transfer of Foreign Evidence?

There is no doubt that the summons of a foreign witness to testify before the trial court constitutes a transfer of foreign evidence. The examination of the foreign witness occurs fully in the state of the trial court, as both the questioning of the witness by the trial court, the litigants or their counsel and the answering of these questions by the witness happen in the jurisdiction of the trial court. As a consequence, the summons by the trial court does not interfere with the sovereignty of the foreign state and does therefore not require a request for international judicial assistance.¹⁰⁴

3. Summons to Appear before the Trial Court and Article 271 of the Swiss Criminal Code

An examination of a witness residing in Switzerland that is conducted in the foreign state where the civil proceedings are pending does not involve a violation of Article 271(1) of the

¹⁰³ See para. III.A above.

¹⁰⁴ This holds true for international judicial assistance in evidence-taking. It may, however, be necessary to transmit the request of the trial court through channels of international judicial assistance. See in this regard, amongst others, Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 100 *et seq.* For more on service of process, *cf.* para. V.K below.

Swiss Criminal Code.¹⁰⁵ As the questioning of the witness does not take place on Swiss soil, it does not fall under the aforesaid provision.

C. Examination of a Foreign Witness by the Trial Court by Videolink

1. Nature of an Examination by Videolink

The development of new technologies has created novel forms of communication which may considerably enhance the taking of evidence across national frontiers. This is particularly true with regard to the use of videolink technology that enables the trial court to communicate with litigants, their counsel and non-party witnesses residing abroad instantaneously with real-time audio and visual display.¹⁰⁶ In other words, videoconferencing allows foreign witnesses to testify “live” during a trial.¹⁰⁷

Depending on where the participants of such examination are located, one can distinguish different situations. The classical case is where the non-party witness to be questioned is domiciled in a state other than that where the lawsuit is pending while the members of the trial court, the litigants and their counsel are located in the state of the said court. It is, however, also conceivable that the litigants and their counsel attend the witness examination by videolink outside the state of the trial court, that is, either in the state where the foreign non-party witness is domiciled, or in a third country. Where a foreign litigant is to be examined *via* videolink, the above applies accordingly. While he is located outside the state of the trial court, the judge, the opponent and the latter’s counsel are situated in the state where the lawsuit is pending. With regard to the location of the counsel of the litigant to be questioned, one has to keep in mind that in practice, foreign litigants usually engage attorneys who practise in the trial court’s jurisdiction and are thus not only familiar with the procedural laws of such court, but also how such laws are applied by the said court. It is advisable for the respective counsel to be located at the same venue as the foreign litigant during the latter’s examination. This is the only way that suf-

¹⁰⁵ For the wording of Article 271(1) of the Swiss Criminal Code, see Chapter 2 para. III.B.4.a.

¹⁰⁶ Permanent Bureau of the Hague Conference on Private International Law *The Taking of Evidence by Videolink Under the Hague Evidence Convention* (December 2008) <http://www.hcch.net/upload/wop/2008pd06e.pdf> 3 para. 3 (date of use: 31 January 2013).

¹⁰⁷ Gertner N ‘Videoconference: Learning through Screens’ 2003-2004 *William & Mary Bill of Rights Journal* 773.

ficient consultation between the litigant and his attorney can be ensured throughout the interrogation.¹⁰⁸

The following focuses on the case where a foreign third party is questioned by videolink, and the judge, the litigants and their counsel are located in the state of the trial court. In practice, this is the most common situation, as in most cases, a trial court can compel foreign litigants to attend court to give testimony and thus it is only in exceptional cases that the court allows them to testify by videolink.¹⁰⁹

The advantages and disadvantages of a witness examination conducted by the trial court without the involvement of the foreign state in comparison to questioning through channels of international judicial assistance have already been outlined.¹¹⁰ Compared to the foregoing summons of a foreign witness to appear before the trial court,¹¹¹ the interrogation *via* videolink has the advantage that the witness does not have to travel to the state of the trial court. Rather, he can “appear” before the trial court from any place in the world where suitable audio- and video-equipment as well as networks to transmit information are available. This not only reduces costs and difficulty usually associated with bringing evidence from one country to another, but it may also motivate foreign non-party witnesses, in particular those who are under no obligation to cooperate with the trial court, to voluntarily collaborate.¹¹² It may also expedite the pro-

¹⁰⁸ Where the counsel is situated in the trial court’s jurisdiction, counselling between the former and the foreign litigant is only possible *via* indirect means (e.g. by telephone). Needless to say, such counselling is far from being optimal.

¹⁰⁹ This may be the case, for instance, where due to ill health a foreign litigant is unable to travel to the state of the trial court. For more on the use of compulsion towards foreign litigants, see para. IV.C.4 above.

¹¹⁰ See para. III.A above. See also Markus AR ‘Neue Entwicklungen bei der internationalen Rechtshilfe in Zivil- und Handelssachen’ 2002 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 77; Rechberger WH and McGuire M-R ‘Die Umsetzung der EuBewVO im österreichischen Zivilprozessrecht: Der Vorrang der traditionellen Rechtshilfe im Spannungsverhältnis mit dem Unmittelbarkeitsgrundsatz’ 2005 *Zeitschrift für Zivilprozeß International* 99.

¹¹¹ Cf. para. V.B.1 above.

¹¹² Davies M ‘Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation’ 2007 *American Journal of Comparative Law* 206; Markus AR ‘Neue Entwicklungen bei der internationalen Rechtshilfe in Zivil- und Handelssachen’ 2002 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 77; Stadler A ‘§ 128a’ in Musielak H-J (ed) *Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz* 2012 651 n. 1. With regard to the technical requirements for an examination by videolink, see, amongst others, Kodek GE ‘Der Zivilprozeß und neue Formen der Informationstechnik’ 2002 *Zeitschrift für Zivilprozeß International* 458 *et seq.*; Rechberger WH and McGuire M-R ‘Die Umsetzung der EuBewVO im österreichischen Zivilprozessrecht: Der Vorrang der traditionellen Rechtshilfe im Spannungsverhältnis mit dem Unmittelbarkeitsgrundsatz’ 2005 *Zeitschrift für Zivilprozeß International* 99.

ceedings pending before the trial court, as foreign third parties no longer have to dovetail court appearances in a remote country with their schedules.¹¹³

From a practical viewpoint, no major logistical problems should arise, provided the aforesaid equipment and networks are available at the location of the foreign non-party witness and that of the trial court, and any time difference issues between these venues can be solved. The same applies with regard to the verification of the identity of the foreign third party. The fact that the witness and the judge are not in the same room does not usually cause any problems, as a visual verification of the witness' identity is nevertheless possible. Where the identity of the witness cannot be verified by videolink,¹¹⁴ it can be arranged for a suitable individual¹¹⁵ to identify the witness at the latter's location prior to the beginning of the examination. Such a person may also ensure that the foreign third party is not influenced by any other person during the questioning, or uses documents or any other aids that are not visible to the trial court.¹¹⁶ Where the foreign third party requires an interpreter, the latter can either be located in the courtroom or at the venue of the non-party witness.

In connection with evidence given by videolink, the question arises whether the fact that the examination does not take place in a courtroom has any detrimental consequences for the witness' testimony; this is because the transmission from commercial videoconferencing centres or offices lacks the traditional judicial surroundings thought to convey the seriousness of court testimony.¹¹⁷ It has furthermore to be kept in mind that the examination by videolink may influence the trial court's perception of the witness, in particular with regard to the latter's non-verbal demeanour.¹¹⁸ In some cases, the summons of a foreign third party to appear before the

¹¹³ Gertner N 'Videoconference: Learning through Screens' 2003-2004 *William & Mary Bill of Rights Journal* 773.

¹¹⁴ For instance, where neither the plaintiff nor the defendant knows the foreign witness, and the passport photograph of the latter provided to the trial court is out of date.

¹¹⁵ For example a public official of the foreign state, or a diplomatic officer or consular agent of the state of the trial court.

¹¹⁶ See in this regard Stadler A '§ 128a' in Musielak H-J (ed) *Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz* 2012 653 n. 6.

¹¹⁷ Gertner N 'Videoconference: Learning through Screens' 2003-2004 *William & Mary Bill of Rights Journal* 784; Stadler A '§ 128a' in Musielak H-J (ed) *Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz* 2012 653 n. 7.

¹¹⁸ Schumacher P 'Einvernahmeteknik im Zivilprozess' 2005 *Aktuelle Juristische Praxis* 695; Carrington PD 'Virtuelles Zivilverfahren in den USA: Ein Besuch in John Bunyans Himmlischer Stadt' 1998 *Zeitschrift für Zivilprozeß International* 347; Stadler A '§ 128a' in Musielak H-J (ed) *Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz* 2012 653 n. 6.

trial court may thus be the better option than an examination by videolink, in particular where several witnesses are likely to give a divergent testimony on the same issue.¹¹⁹

2. Examination by Videolink as a Transfer of Foreign Evidence?

Compared to the preceding case where a foreign witness is summoned to appear before the trial court,¹²⁰ the situation regarding an examination *via* videolink is different. The foreign witness does not travel to the state of the trial court, but is located abroad when giving evidence. In other words, it is not the witness who travels to the state of the trial court, rather it is the witness' testimony that is brought to the trial court by videolink. Having said this, the question arises as to whether an examination by videolink does nevertheless qualify as a transfer of foreign evidence.¹²¹ It appears that, thus far, this question has not been widely discussed.¹²²

According to Stadler, the examination of foreign third parties by the trial court *via* videolink interferes with foreign sovereignty. She maintains that the fact that the trial court conducts the questioning in its own jurisdiction is irrelevant, as the trial court becomes virtually active across national borders.¹²³

Schack also holds that an examination by videolink has to be performed by means of international judicial assistance. In this context, he refers to Articles 10(4) and 17(4)(3) of the European Evidence Regulation where it is mentioned that the requested state may use videoconferencing when rendering active judicial assistance and that, in case of passive judicial assistance, the requested state shall encourage the use of videolink technologies.¹²⁴ This view is shared by Schulze and Hess who note that the fact that the European Evidence Regulation includes the examination *via* videolink shows that the European legislator considers such questioning not as

¹¹⁹ Carrington PD 'Virtuelles Zivilverfahren in den USA: Ein Besuch in John Bunyans Himmlischer Stadt' 1998 *Zeitschrift für Zivilprozeß International* 347 *et seq.*; Stadler A '§ 128a' in Musielak H-J (ed) *Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz* 2012 653 n. 7.

¹²⁰ See para. V.B.1 above.

¹²¹ Cf. also Markus AR 'Neue Entwicklungen bei der internationalen Rechtshilfe in Zivil- und Handelssachen' 2002 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 78.

¹²² The following comments focus on the few legal scholars in Germany and Switzerland who have discussed this issue.

¹²³ Stadler A '§ 128a' in Musielak H-J (ed) *Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz* 2012 653 n. 8; Stadler A 'Der Zivilprozeß und neue Formen der Informationstechnik' 2002 *Zeitschrift für Zivilprozeß* 441.

¹²⁴ Schack H *Internationales Zivilverfahrensrecht* 2010 276 n. 807.

a transfer of foreign evidence, but as evidence-taking on foreign territory which requires international judicial assistance.¹²⁵

Markus compares the examination by videolink with the written reply a foreign witness submits to the trial court in response to a questionnaire issued by the latter¹²⁶ and considers such reply as a transfer of foreign evidence. He argues that if one merely takes into account the answers given by the foreign witness by videolink, such responses would not constitute a judicial act on foreign territory. Markus, however, emphasises that the examination by videolink is, unlike the written reply to a questionnaire, an interactive process between the witness and the trial court which includes an element of immediacy.¹²⁷ The answers given by the witness *via* videolink can, according to Markus, not be considered in isolation, but have to be seen as part of the witness examination which is a homogenous process that includes both the questions put to the witness and the answers given by him. Against this background, Markus argues that the domiciles of all respective participants have to be taken into account and regards the examination by videolink as evidence-taking on foreign territory.¹²⁸

A similar view is shared by Küttler who maintains that in the context of an examination by videolink, the location where the evidence is taken extends from the domicile of the trial court to the state where the witness to be questioned is domiciled.¹²⁹

In contrast, Geimer and Berger consider the said examination not as interference with foreign sovereignty without, however, giving any reasons for his position.¹³⁰

It is submitted that the approach taken by Markus is not fully convincing. It is correct that the witness is located in the foreign state when answering the questions put to him by videolink. However, it should also be noted that the trial court is situated outside the foreign state when asking the questions and receiving the witness' answers. A considerable part of the witness ex-

¹²⁵ Hess B *Europäisches Zivilprozessrecht* 2010 474 n. 55; Schulze G 'Dialogische Beweisaufnahmen im internationalen Rechtshilfeverkehr: Beweisaufnahmen im Ausland durch und im Beisein des Prozeßgerichts' 2001 *Praxis des Internationalen Privat- und Verfahrensrechts* 529.

¹²⁶ See in this regard para. V.E below.

¹²⁷ In German called "Unmittelbarkeit".

¹²⁸ Markus AR 'Neue Entwicklungen bei der internationalen Rechtshilfe in Zivil- und Handelssachen' 2002 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 78 *et seq.*; Markus AR 'Rechtshilfe in Zivilsachen: Ausgewählte Auszüge aus der neuen Wegleitung des Bundesamtes für Justiz' in Leuenberger C and Guy J-A (eds) *Rechtshilfe und Vollstreckung: Zivilsachen, Kindesentführungen und Konkurs* 2004 26 *et seq.* See also Hopf T 'Art. 271' in Niggli MA and Wiprächtiger H (eds) *Basler Kommentar Strafrecht II Art. 111-392 StGB* 1927 n. 23.

¹²⁹ Küttler A *Das Erlangen von Beweisen in den USA zur Verwertung im deutschen Zivilprozeß* 2007 153.

¹³⁰ Geimer R *Internationales Zivilprozessrecht* 2009 215 n. 437; Berger C '§ 363' in Stein F and Jonas M (ed) *Kommentar zur Zivilprozeßordnung Band 5 §§ 328-510b* 2006 318 n. 14.

amination thus occurs in the jurisdiction of the trial court. Moreover, the differentiation between the written reply of a witness to a questionnaire issued by the trial court and a respective oral testimony in the course of an examination by videolink, as outlined by Markus, seems rather artificial. The way the questions by the trial court and the answers of the witness are transmitted, that is, usually by physical mail in case of a testimony based on a questionnaire or *via* videolink, should not be the crucial point. Rather, regard should be had to the question whether and, if so, to what extent these two forms of evidence-taking impair foreign sovereignty. It is submitted that a testimony based on a questionnaire and an examination by videolink may affect foreign sovereignty to the same extent, as in both cases, a witness answers questions by a trial court located in a different state. The interference with foreign sovereignty is, if at all, only marginal, as the trial court does not become physically active on foreign territory. Moreover, one can argue that the witness examination is only concluded once the trial court has taken notice of the testimony, and that such notice takes place in the trial court's jurisdiction and not at the foreign domicile of the witness.¹³¹

In the light of the above, it is submitted that the examination by videolink constitutes a transfer of foreign evidence.¹³² The testimony by videoconference should be treated the same way as evidence based on a questionnaire.¹³³ In this context, one has to bear in mind that the qualification of an examination by videolink as a transfer of foreign evidence does not give the trial court unconditional and unrestricted access to witnesses residing abroad. Rather, such access is limited by the fact that certain foreign witnesses are under no obligation to cooperate with the trial court and that, with regard to those witnesses who are obliged to collaborate, the compulsion a trial court may use is restricted.¹³⁴ These limitations take sufficient account of the sovereign interests of the foreign state and, at the same time, contribute to the much needed facilitation of cross-border taking of evidence in civil and commercial matters. This is all the more true, as the examination by videolink is best suited to serve as an alternative to those cases where a foreign witness cannot be interrogated in the jurisdiction of the trial court. Finally, one has to keep in mind that the hostile stance civil-law countries generally take towards a request of a trial court for a transfer of foreign evidence is often not rooted in concerns of the respective states about their sovereignty, but rather with an eye to protect their nationals and/or residents from getting involved with foreign procedural laws with which the latter are unfamil-

¹³¹ *Cf.* in this regard para. V.E.2.

¹³² See also in this regard fn. 104 above.

¹³³ Which is to be regarded as a transfer of foreign evidence. See in this regard para. V.E.2 below.

¹³⁴ *Cf.* para. IV.C.6 above.

iar.¹³⁵ The foregoing comments not only apply to the examination of foreign witnesses by videolink, but to all other forms of transfer of foreign evidence.¹³⁶

3. Examination by Videolink and Article 271 of the Swiss Criminal Code

It appears that to date, the question of whether an examination of a witness residing in Switzerland by a trial court abroad *via* videolink infringes Article 271(1) of the Swiss Criminal Code has neither been addressed by the Swiss Federal Court nor any of the Swiss authorities competent for granting a waiver under the respective provision, at least not in a decision that was made public.¹³⁷ Hopf maintains that the examination *via* videolink is a violation of Article 271(1) of the Swiss Criminal Code, as it ultimately aims at the circumvention of international judicial assistance.¹³⁸

The view of Hopf is shared by this author. Given the restrictive interpretation of Article 271(1) of the Swiss Criminal Code by the Swiss Federal Court and the aforesaid other Swiss authorities,¹³⁹ it is very likely that an examination by videolink is considered a violation of Swiss sovereignty. As explained earlier,¹⁴⁰ it is sufficient under the said provision that the “*activities on behalf of a foreign state*” partly take place in Switzerland. This is the case with a witness domiciled in Switzerland when interrogated by a trial court abroad *via* videolink. This is in conflict with the approach the author has taken earlier with regard to the qualification of an examination by videolink as a transfer of foreign evidence.¹⁴¹ Such contradiction results from the aforesaid narrow interpretation of Article 271(1) of the Swiss Criminal Code by the relevant Swiss authorities which aims at the most extensive protection of Swiss sovereignty.

D. Examination of a Foreign Witness by the Trial Court by Telephone

1. Nature of an Examination by Telephone

This subchapter deals with the situation where a witness located abroad gives testimony to the trial court *via* telephone. Like in the case of videoconferencing,¹⁴² the examination by tele-

¹³⁵ Stadler A ‘§ 363’ in Musielak H-J (ed) *Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz* 2012 1254 n. 9.

¹³⁶ See in this regard fn. 104 above.

¹³⁷ For more on Article 271 of the Swiss Criminal Code, see Chapter 2 para. IV.B.4.

¹³⁸ Hopf T ‘Art. 271’ in Niggli MA and Wiprächtiger H (eds) *Basler Kommentar Strafrecht II Art. 111-392 StGB* 2007 1928 n. 23 *et seq.*

¹³⁹ See in this regard Chapter 2 paras. IV.B.4.a) and IV.B.b).

¹⁴⁰ Cf. Chapter 2 para. IV.B.4.a).

¹⁴¹ See para. V.C.2.

¹⁴² Cf. para. V.C.1 above.

phone allows the trial court, the litigants and their counsel to communicate instantaneously with the foreign third party. In contrast to questioning by videolink, however, there is no visual display, but only real-time audio when examining witnesses *via* telephone.

As in the case of an examination by videolink, one can distinguish different configurations, depending on where the participants of the telephone conference are located. Where the foreign witness to be questioned is a third party, all participants, apart from the non-party witness, may be located in the state of the trial court. It is, however, also possible that one or both litigants are situated outside the state of the trial court, be it in the same country as the foreign third party or in a third country. Where a litigant gives evidence *via* telephone, he and his counsel are located in the foreign state while the judge, the opponent and his counsel attend the telephone conference in the state of the trial court.¹⁴³ Since in most cases, the trial court can compel foreign litigants to attend court to testify, the following comments focus on the examination of a foreign third party by telephone.¹⁴⁴

The advantages and disadvantages of a witness examination conducted by the trial court without the involvement of the foreign state in comparison with a questioning by means of international judicial assistance have already been outlined.¹⁴⁵ Furthermore, the abovementioned advantages and disadvantages of an examination by videolink apply *mutatis mutandis* to the questioning *via* telephone.¹⁴⁶ It has, however, to be kept in mind that, unlike cases in which a foreign witness is summoned¹⁴⁷ or examined *via* videolink, a court is not in a position to observe the witness' demeanour with its own eyes during a telephonic interrogation, but is limited to what it hears over the telephone. The absence of visual perception by the trial court also hampers the verification of the witness' identity. Consequently, special measures have to be taken, for instance by arranging a suitable person¹⁴⁸ to be present at the location of the foreign third party in order to verify the latter's identity.¹⁴⁹ The presence of such individual may also make sense in order to ensure that the foreign non-party witness is not influenced by any other person while testifying. The same holds true with regard to the use of documents or other aids

¹⁴³ For more on the location of the counsel of the foreign litigant, see para. V.C.1 above.

¹⁴⁴ See in this regard para. V.C.1 above.

¹⁴⁵ Cf. para. III.A above.

¹⁴⁶ See para. V.C.1 above.

¹⁴⁷ Cf. para. V.B.1 above.

¹⁴⁸ For instance a public official of the foreign state, or a diplomatic officer or consular agent representing the state of the trial court in the respective country.

¹⁴⁹ Thus, the need for the verification of identity applies not only to the foreign witness, but also to the members of the trial court, the litigants, and their counsel. In other words, the foreign witness must be assured that he is dealing with the correct persons.

by the third party during the course of his examination and of which the trial court is not aware.¹⁵⁰ Moreover, the aforementioned concerns regarding the absence of a formal hearing in a courtroom¹⁵¹ become even more acute in a questioning by telephone than in the case of an examination by videolink.¹⁵² However, compared to videoconferencing, the witness examination by telephone offers one substantial advantage. No technical equipment other than a telephone and telephone line at the venue of the third party and the trial court are required. This allows a testimony by telephone in cases where the equipment for videoconferencing is not available at the aforesaid locations.

Given the aforementioned drawbacks of a witness examination by telephone, the latter should not be the norm for questioning foreign witnesses. It may, however, be suitable for information provided by a member of a foreign authority in official matters, as the accuracy of such statements can usually be assumed. The testimony of private individuals, in particular those who may have an interest in the outcome of the particular lawsuit, should be taken by other means than *via* telephone. The aforesaid fact that the examination is not conducted in the courtroom of the trial court and the latter is not in a position to see the witness may reduce the latter's threshold of self-restraint to tell the truth.

2. Examination by Telephone as a Transfer of Foreign Evidence?

The questioning of a foreign witness by telephone is, apart from the fact that there is no visual contact between the witness and the trial court, very similar to the examination *via* videolink. Hence, the same question arises as in the case of an interrogation by videoconference, namely whether the examination of a foreign witness by telephone constitutes a transfer of foreign evidence.¹⁵³ To date, this question has hardly been discussed.¹⁵⁴ Geimer regards the said interrogation as compatible with public international law without, however, giving any reasons for his position.¹⁵⁵

¹⁵⁰ Markus AR 'Neue Entwicklungen bei der internationalen Rechtshilfe in Zivil- und Handelssachen' 2002 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 81 *et seq.*

¹⁵¹ See para. V.C.1 above.

¹⁵² Federal Office of Justice *International Judicial Assistance in Civil Matters* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 37 (date of use: 31 January 2013); Markus AR 'Neue Entwicklungen bei der internationalen Rechtshilfe in Zivil- und Handelssachen' 2002 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 82; Markus AR 'Rechtshilfe in Zivilsachen: Ausgewählte Auszüge aus der neuen Wegleitung des Bundesamtes für Justiz' in Leuenberger C and Guy J-A (eds) *Rechtshilfe und Vollstreckung: Zivilsachen, Kindesentführungen und Konkurs* 2004 28.

¹⁵³ For more in this regard, see para. V.C.2 above.

¹⁵⁴ *Cf.* fn. 35 above.

¹⁵⁵ Geimer R *Internationales Zivilprozessrecht* 2009 214 n. 436b, 837 n. 2385.

Having regard to the parallels between an examination by telephone and that *via* videolink,¹⁵⁶ the two forms of questioning a foreign witness should be treated in the same way when determining their qualification as a transfer of foreign evidence. Based on what has been said earlier with respect to a testimony by videoconference,¹⁵⁷ it is submitted that the examination of a foreign witness by telephone constitutes a transfer of foreign evidence.¹⁵⁸

3. Examination by Telephone and Article 271 of the Swiss Criminal Code

It appears that neither the Swiss Federal Court nor any other relevant Swiss authority¹⁵⁹ has dealt with the question whether an examination of a witness domiciled in Switzerland by a trial court abroad by telephone contravenes Article 271(1) of the Swiss Criminal Code. Hopf and Honegger consider such questioning as violation of the said provision, as it aims at bypassing the general rules on international judicial assistance.¹⁶⁰

Based on the aforesaid narrow interpretation of Article 271(1) of the Swiss Criminal Code by the relevant Swiss authorities,¹⁶¹ it is again highly probable that the latter regard the examination by telephone without the assistance of the competent Swiss officials as contravention of the said provision. As in the case of an examination by videolink, this contrasts with the foregoing qualification of an interrogation by telephone as a transfer of foreign evidence.¹⁶² Such contradiction, however, is the consequence of the said restricted interpretation of Article 271(1) of the Swiss Criminal Code.

E. Examination of a Foreign Witness by Questionnaire Issued by the Trial Court

1. Nature of an Examination by Questionnaire

This subchapter deals with the configuration where the trial court sends a questionnaire prepared by the court and/or the litigants to a foreign witness. The latter answers the questions in writing at his foreign domicile and then returns the completed questionnaire to the trial court.

¹⁵⁶ See paras. V.C.1 and V.D.1 above.

¹⁵⁷ Cf. para. V.C.2.

¹⁵⁸ See in this regard fn. 104 above.

¹⁵⁹ Cf. Chapter 2 para. IV.B.4.b).

¹⁶⁰ Hopf T 'Art. 271' in Niggli MA and Wiprächtiger H (eds) *Basler Kommentar Strafrecht II Art. 111-392 StGB* 2007 1928 n. 23 *et seq.*; Honegger PC *Amerikanische Offenlegungspflichten in Konflikt mit schweizerischen Geheimhaltungspflichten unter besonderer Berücksichtigung der Rechtshilfe bei Steuerhinterziehungen und Insidergeschäften* 1986 137. The view of Hopf and Honegger is also shared by Frei 'The Service of Process and the Taking of Evidence on Behalf of U.S. Proceedings – the Problem of Granting Assistance' 1983 *Wirtschaft und Recht* 202.

¹⁶¹ See Chapter 2 para. IV.B.4.a).

¹⁶² Cf. para. V.D.2 above.

The examination of a foreign witness by way of questionnaire or as a result of a letter of request in the course of active judicial assistance reveal certain analogies. In the latter case, the competent authority of the requested state usually interrogates the witness based on a list of questions drafted by the trial court and the litigants.¹⁶³ In contrast to the aforesaid questionnaire, which the foreign witness completes by himself, it is, however, the authority of the requested state that records the witness' answers which are then transmitted in the form of a transcript to the trial court. The fact that such a transcript is drafted by the foreign authority may have an impact on the content of the reply of the foreign witness that is forwarded to the trial court. This particularly applies where the law of the requested state generally governing the execution of the letter of request does not provide for a *verbatim*, but only a summary transcript.¹⁶⁴ In the latter case, a member of the foreign authority usually dictates for each question of the list provided by the trial court a summary of the relevant answer given by the foreign witness.¹⁶⁵ By contrast, where the answers of the witness are recorded in a *verbatim* transcript, the witness' reply is unfiltered. The same holds true for the answers of a witness in response to a questionnaire.¹⁶⁶

The content of the answers of a foreign witness may furthermore be influenced by the *modus operandi* of his examination. Where a witness completes a questionnaire, he does so in surroundings familiar to him and without time constraint. The latter allows him to revisit his answers and, if necessary, complete or rectify them before he transmits the completed questionnaire to the trial court. One, however, has to bear in mind that an interrogation based on a questionnaire lacks the surprise effect which makes it easier for a witness to "doctor" his testimony.¹⁶⁷ On the other hand, in cases where the witness testifies before the competent authority of the requested state based on a letter of request, usually a court, there is often only limited time available for the questioning. This may result in incomplete answers, in particular in those cases where prior to his examination, the witness is not informed about the subject of the hearing of evidence. The witness is, however, hardly able to amend any incomplete replies once his examination before the foreign authority is concluded. On the other hand, the said authority

¹⁶³ In the following, the term "questionnaire" refers to the situation where the trial court sends a questionnaire to the foreign witness without requesting international judicial assistance.

¹⁶⁴ With regard to the applicable law governing the execution of a letter of request, see Chapter 2 para. V.D.1.

¹⁶⁵ For Switzerland, see Weibel H and Nägeli S 'Art. 176' in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1059 n. 8.

¹⁶⁶ Where only a translation of the answers given by the foreign witness is included in a "verbatim" transcript, the question arises as to whether such a transcript is truly *verbatim*.

¹⁶⁷ Stadler A 'Schriftliche Zeugenaussagen und pre-trial discovery im deutschen Zivilprozess' 1997 *Zeitschrift für Zivilprozess* 148.

may clarify incomplete or ambiguous answers of the foreign witness by posing additional questions. Here, however, one has to keep in mind that the foreign authority has only a limited knowledge about the facts underlying the case pending before the trial court. In most cases, it is thus difficult for the said authority to detect inconsistencies in the testimony of the foreign witness, unless there are obvious contradictions in the latter's statements.¹⁶⁸ Finally, a witness who testifies before a foreign court does so in a courtroom, that is, in unfamiliar surroundings which intimidate most witnesses, at least if they appear in court for the first time. This may have a negative impact on the quality of the witness' answers.¹⁶⁹ On the other hand, the *gravitas* of a testimony in a courtroom may encourage a witness to respond more carefully to the questions put to him, an aspect that lacks in the case of the completion of a questionnaire by the witness.¹⁷⁰

The above shows that both the witness examination by means of a letter of request and by questionnaire have their advantages and disadvantages.¹⁷¹ Considering the time-consuming process of international judicial assistance and the fact that the examination of a witness based on a letter of request is usually governed by the law of the requested state, the trial court usually prefers the interrogation of the foreign witness based on a questionnaire, unless the assistance of the requested state for measures of compulsion is required. In any event, one has to keep in mind that the testimony of a witness is only as good as the questions with which the foreign authority or the witness is provided. In case of an examination based on a letter of request, it is furthermore important to give the foreign authority the facts of the case to which the questions refer. This enables the said authority to better assess the answers given by the foreign witness and clarify any ambiguities or contradictions in the witness' testimony.

The trial court's decision whether the testimony of a foreign witness is to be obtained by means of a questionnaire, based on a summons to appear before the court, or *via* videoconference¹⁷² should largely depend on the extent of the contribution the witness is expected to make. The more crucial the testimony of the witness and the more complex the subject of the hearing of

¹⁶⁸ Stadler A 'Schriftliche Zeugenaussagen und pre-trial discovery im deutschen Zivilprozess' 1997 *Zeitschrift für Zivilprozess* 139.

¹⁶⁹ Stadler A 'Schriftliche Zeugenaussagen und pre-trial discovery im deutschen Zivilprozess' 1997 *Zeitschrift für Zivilprozess* 149.

¹⁷⁰ Gertner N 'Videoconference: Learning through Screens' 2003-2004 *William & Mary Bill of Rights Journal* 784.

¹⁷¹ The foregoing comments on the questioning of a foreign witness based on a letter of request apply *mutatis mutandis* to an examination by commissioners, diplomatic officers and consular agents. Here, the witness is also interrogated based on a list of questions prepared by the trial court or by the parties.

¹⁷² With regard to the considerable disadvantages associated with an examination by telephone, see para. V.D.1.

evidence is, the more important is it for the trial court to consider whether an examination by questionnaire is the best method to secure the witness' evidence. In addition, the trial court has not only to consider the subject of the hearing of evidence, but also the respective witness. In other words, the court must take into account the witness' intellectual abilities as well as his capacity of expressing himself in writing. It goes without saying that in the absence of the respective capabilities, a trial court should refrain from interrogating a witness by way of questionnaire. Moreover, the said court has to take into consideration any relationship between the witness and the litigants. The closer such a relationship is, the more important it is for the trial court to get a personal impression of the witness by questioning him *via* videolink or, even better, summoning him to attend court.¹⁷³ A trial court should furthermore show restraint with questionnaires if the subject of the hearing of evidence is strongly contested, and the testimony of the foreign witness is expected to be challenged.¹⁷⁴ Here also, a videoconference examination or a summons for the witness to appear before the trial court is better suited. In both cases, the examination is conducted in the presence of the trial court and is interactive, that is, the trial court, the litigants or their counsel may immediately clarify any issues that arise in the course of the questioning without having to send back and forth further questionnaires to elucidate any obscurities in the witness' testimony. Finally, one has to bear in mind that there is no guarantee that the witness completes a questionnaire without the assistance of other persons, or using documents or other aids.¹⁷⁵ Such support is problematic if it is not disclosed by the foreign witness.

2. Examination by Questionnaire as a Transfer of Foreign Evidence?

As in the case of a witness examination by videolink or telephone, it is only the testimony of the foreign witness that is transferred to the trial court while throughout the entire examination, the witness remains at his foreign domicile. Again, the question is therefore whether the examination of a foreign witness by questionnaire is to be regarded as a transfer of foreign evidence or not.¹⁷⁶

¹⁷³ Stadler A 'Schriftliche Zeugenaussagen und pre-trial discovery im deutschen Zivilprozess' 1997 *Zeitschrift für Zivilprozess* 140 *et seq.*

¹⁷⁴ Stadler A 'Schriftliche Zeugenaussagen und pre-trial discovery im deutschen Zivilprozess' 1997 *Zeitschrift für Zivilprozess* 141 *et seq.*

¹⁷⁵ Stadler A 'Schriftliche Zeugenaussagen und pre-trial discovery im deutschen Zivilprozess' 1997 *Zeitschrift für Zivilprozess* 148 *et seq.*

¹⁷⁶ The following remarks on the qualification of a testimony based on a questionnaire focus on the relevant discussion in Germany. See also fn. 35 above.

The prevailing view considers the examination of a foreign witness by questionnaire as a transfer of foreign evidence which is allowed under public international law, provided the respective rules on the use of compulsion are followed.¹⁷⁷ In this context, Daoudi emphasises that it is not the completion of the questionnaire by the witness at his foreign domicile that is to be regarded as evidence-taking, but rather the acknowledgement of the witness' answers by the trial court. Daoudi moreover points out that it is the trial court, and not any foreign authority, that hears the evidence. This shows, according to Daoudi, that the testimony of the foreign witness is transferred from the latter's domicile to the trial court's jurisdiction.¹⁷⁸

A similar view is shared by Schabenberger who points out that the examination of a witness is only concluded once the court has taken note of the witness' testimony. According to Schabenberger, this particularly applies to cases where a witness completes the questionnaire abroad and then forwards his reply to the trial court. Consequently, Schabenberger maintains that the testimony of a witness based on a questionnaire takes place in the jurisdiction of the trial court.¹⁷⁹

In contrast, Leipold argues that the question where the decisive act of the witness examination takes place, at the witness' domicile or in the trial court's jurisdiction, is not the crucial point. Rather it is, according to Leipold, the "*Sollensanordnung*", that is, the fact that the trial court orders a foreign witness to do something, that must be taken into account when considering whether foreign sovereignty is infringed or not.¹⁸⁰

The aforesaid prevailing view, which qualifies the testimony by a questionnaire as a transfer of foreign evidence, is shared by the author. Since the testimony by a questionnaire should be

¹⁷⁷ See, amongst others, Geimer R *Internationales Zivilprozessrecht* 2009 837 n. 2384; Nagel H and Gottwald P *Internationales Zivilprozessrecht* 2007 438 n. 124; Stadler A 'Grenzüberschreitende Beweisaufnahmen in der Europäischen Union – die Zukunft der Rechtshilfe in Beweissachen' in Schütze RA (ed) *Einheit und Vielfalt des Rechts: Festschrift für Reinhold Geimer zum 65. Geburtstag* 2002 1291. See also Markus AR 'Neue Entwicklungen bei der internationalen Rechtshilfe in Zivil- und Handelssachen' 2002 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 78. Regarding the use of compulsion towards foreign witnesses, see para. IV.C.

¹⁷⁸ Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 123 *et seq.* See also Stadler A 'Schriftliche Zeugenaussagen und pre-trial discovery im deutschen Zivilprozess' 1997 *Zeitschrift für Zivilprozess* 144 *et seq.*

¹⁷⁹ Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 198 *et seq.* See also Schulze G 'Dialogische Beweisaufnahmen im internationalen Rechtshilfeverkehr: Beweisaufnahmen im Ausland durch und im Beisein des Prozeßgerichts' 2001 *Praxis des Internationalen Privat- und Verfahrensrechts* 528; Musielak H-J 'Beweiserhebung bei auslandsbelegenen Beweismitteln' in Schütze R (ed) *Einheit und Vielfalt des Rechts: Festschrift für Reinhold Geimer zum 65. Geburtstag* 2002 768 *et seq.*

¹⁸⁰ Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeßrechts* 1989 48 *et seq.* See also Küttler A *Das Erlangen von Beweisen in den USA zur Verwertung im deutschen Zivilprozeß* 2007 124 *et seq.*

treated in the same way as an examination *via* videoconference, reference can be made to the comments in this regard.¹⁸¹

3. Examination by Questionnaire and Article 271 of the Swiss Criminal Code

The gathering of information through a trial court located outside Switzerland by way of questionnaire is regarded as an infringement of Article 271(1) of the Swiss Criminal Code, provided such collection serves procedural purposes and may entail procedural consequences for the witness domiciled in Switzerland. Needless to say, the trial court is not allowed to apply any measures of compulsion towards the said witness.¹⁸² The above contradicts the position the author has taken with regard to the qualification of the examination by questionnaire as a transfer of foreign evidence.¹⁸³ Again, this conflict results from the aforesaid restrictive interpretation of Article 271(1) of the Swiss Criminal Code.¹⁸⁴

F. Order of the Trial Court to Produce Evidence Controlled by a Foreign Witness

1. Nature of a Court Order to Produce Evidence

This subchapter deals with the configuration where a trial court orders a foreign litigant or third party to produce documents or movable property that are under the foreign witness' control.¹⁸⁵ The litigant or third party does not appear in person before the trial court in order to present the evidence, but merely transmits it to the trial court by postal mail, courier, or other similar means.¹⁸⁶

Compared to a production of documents through channels of international judicial assistance, the submission without the involvement of any foreign authority has, from the perspective of the trial court, two advantages, namely the saving of time and the application of its own rules

¹⁸¹ Cf. para. V.C.2. See furthermore also fn. 104 above.

¹⁸² VPB 40 (1976) no. 49, decision of the Directorate of International Law of the Swiss Federal Department of Foreign Affairs. In this context, it has to be noted that the opinion of the Directorate of International Law is merely the view of the executive and is thus not binding on any judicial authority. Cf. also Trechsel S and Vest H 'Art. 271' in Trechsel S and Pieth M (eds) *Schweizerisches Strafgesetzbuch Praxiskommentar* 2013 8 1161 n. 3.

¹⁸³ See para. V.E.2.

¹⁸⁴ Cf. Chapter 2 para. IV.B.4.a).

¹⁸⁵ As has been explained earlier, cross-border taking of evidence only occurs if the person controlling the document or movable property is located in a state other than that of the trial court. See in this regard Chapter 2 para. II.

¹⁸⁶ With respect to the so-called "*subpoena duces tecum*" see Chapter 5 fn. 231. For the sake of simplicity, the following comments focus on the production of documents being the most common configuration in practice. The remarks, however, apply equally to movable property.

on the production of evidence. The disadvantage of such a procedure without the assistance of the relevant foreign state is, however, the limited use of coercive measures by the trial court.¹⁸⁷

It has been explained above, that the fact, that a foreign witness is questioned through channels of international judicial assistance, may influence the content of the witness' testimony.¹⁸⁸

Where, however, the trial court obtains documents controlled by a foreign witness, be it with or without the involvement of the foreign state, the result is the same, as the fact that a foreign state is involved in the procurement of the said evidence does not have any influence on its content.

2. Court Order to Produce Evidence as a Transfer of Foreign Evidence?

Where a trial court orders a witness located in a foreign state to produce documents, the witness collects the relevant evidence and forwards it to the trial court. The question therefore arises as to whether such evidence-taking is to be qualified as a judicial act performed on foreign territory or as a transfer of foreign evidence.¹⁸⁹

In the context of the so-called "*Justizkonflikt*" between the United States and several civil-law countries regarding the mandatory character of the Hague Evidence Convention,¹⁹⁰ the German government maintained that the request of a trial court located abroad to produce documents located in Germany is to be regarded as a judicial act and, as such, interferes with German sovereignty. It emphasised that the said court seizes evidence that is subject to foreign sovereignty and that the collection of the documents on foreign soil is the crucial act.¹⁹¹

In contrast, Daoudi considers the respective request as a transfer of foreign evidence which does not violate foreign sovereignty. He maintains that the decisive act is not performed on foreign territory, as it is not the collection of the documents that is crucial, but the hearing of evidence which only begins once the trial court reviews the evidence. According to Daoudi, the gathering of documents by the litigant merely constitutes a preparatory measure which is a

¹⁸⁷ Cf. in this regard para. IV.C.6 above. For more on the advantages and disadvantages of a transfer of evidence, see also para. III.A.

¹⁸⁸ Cf. para. V.E.1.

¹⁸⁹ The following remarks focus on the relevant debate in Germany. See also fn. 35 above.

¹⁹⁰ For more on the "*Justizkonflikt*", see Chapter 4 para. II.B.2 below.

¹⁹¹ Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 134; Küttler A *Das Erlangen von Beweisen in den USA zur Verwertung im deutschen Zivilprozeß* 2007 124 *et seq.*; Federal Republic of Germany 'Brief of the Federal Republic of Germany as Amicus Curiae' 1986 *International Legal Materials* 1546. See also Stadler A 'Grenzüberschreitende Beweisnahmen in der Europäischen Union – die Zukunft der Rechtshilfe in Beweissachen' in Schütze RA (ed) *Einheit und Vielfalt des Rechts: Festschrift für Reinhold Geimer zum 65. Geburtstag* 2002 1282 *et seq.*

purely private matter, as the litigants, and not the trial court, are responsible for collecting the documents. Daoudi emphasises that the order of the trial court does not aim at the documents to be submitted, but at the person controlling the documents.¹⁹² A similar opinion is voiced by Küttler who maintains that the collection of documents is a preparatory measure which is not taken by the trial court, but by the person who gathers the documents and who forwards them to the said court.¹⁹³ Stadler emphasises that the collection of documents by an individual residing in a state other than that of the trial court merely constitutes a preparatory measure while the actual taking of evidence ultimately occurs in the jurisdiction of the trial court.¹⁹⁴

The aforesaid view, which regards a request for the production of documents from foreign witnesses, as a transfer of foreign evidence is shared by the author. As in the aforementioned cases of testimony given by videolink, telephone or in response to a questionnaire, the examination of evidence is only concluded once the trial court has reviewed the documents,¹⁹⁵ while the gathering by the individual residing abroad merely constitutes a preparatory measure. Such an approach overcomes the outdated perceptions that some civil-law countries have in cases where the trial court does not become active on foreign territory. One has furthermore to keep in mind that the position against a transfer of foreign evidence is more deeply rooted in the concern of the said countries to protect their nationals and/or residents and less so in their concern to safeguard their sovereignty.

3. Court Order to Produce Evidence and Article 271 of the Swiss Criminal Code

To date, the Swiss Federal Court has not yet decided, at least not in a published case, whether a witness located in Switzerland violates Article 271(1) of the Swiss Criminal Code when transmitting documents abroad in response to a respective request of a court located in a foreign country. In a decision of 1988, however, the Swiss Federal Court insinuated that in contrast to examining witnesses, filing documents is a party measure and not an “*activity on behalf of a*

¹⁹² Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 134, 150.

¹⁹³ Küttler A *Das Erlangen von Beweisen in den USA zur Verwertung im deutschen Zivilprozeß* 2007 125. See also Musielak H-J ‘Beweiserhebung bei auslandsbelegenen Beweismitteln’ in Schütze R (ed) *Einheit und Vielfalt des Rechts: Festschrift für Reinhold Geimer zum 65. Geburtstag* 2002 773; Linke H and Hau W *Internationales Zivilverfahrensrecht* 2011 47 n. 98.

¹⁹⁴ Stadler A ‘§ 363’ in Musielak H-J (ed) *Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz* 2012 1255 n. 12. See also Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeßrechts* 1989 48; Geimer R *Internationales Zivilprozessrecht* 2009 215 n. 440; Gottwald P ‘Grenzen zivilgerichtlicher Massnahmen mit Auslandswirkung’ in Lindacher WF *et al* (eds) *Festschrift für Walther J. Habscheid* 1989 125.

¹⁹⁵ See paras. V.C.2, V.D.2, and V.E.2.

foreign state” in the sense of Article 271(1) of the said Code.¹⁹⁶ In contrast, in 1997, the Swiss Federal Council opined in a case where two defendants domiciled in Switzerland were ordered by a court in the United States to submit certain documents that such transmission is about assisting a foreign court in the taking of evidence and thus infringes Article 271(1) of the Swiss Criminal Code.¹⁹⁷ This view is shared by Hopf.¹⁹⁸ In this context, one has to keep in mind that the decision of the Swiss Federal Council is not binding on any judicial authority in Switzerland, as it merely reflects the view of the executive. Given the absence of a published decision of the Swiss Federal Court which expressly deals with the aforesaid transmission of documents to a court abroad, it is unclear whether the witness’ activities in question are regarded as violation of Article 271(1). In order to avoid any risk of prosecution under the said provision, litigants and third parties domiciled in Switzerland should refrain from handing over documents to a court abroad.

G. Collection of Information Abroad by a Domestic Expert

1. Nature of a Collection of Information Abroad by a Domestic Expert

In cases where a trial court lacks the expertise necessary to determine the material facts of a lawsuit, the specialised knowledge of an expert is required.¹⁹⁹ In international litigation, the trial court and parties are often faced with the situation where information, which is essential for the expert to prepare his opinion, is located in a foreign state. This may, for instance, be the case where immovable property involved in the dispute is situated outside of the state of the trial court. In such cases, it is often necessary for an expert to make investigations in the foreign state.

¹⁹⁶ BGE 114 IV 131 consideration 2.c. See also Eidgenössisches Justiz- und Polizeidepartement EJPD *Bericht des Bundesamtes für Justiz zu Rechtsfragen im Zusammenhang mit der Zusammenarbeit mit ausländischen Behörden (Amtshilfe, Rechtshilfe, Souveränitätsschutz)* (14 March 2011) <http://www.bj.admin.ch/content/dam/data/sicherheit/rechtshilfe/ber-auslandszusammenarbeit-d.pdf> 29 (date of use: 31 January 2013); Meier AL *Die Anwendung des Haager Beweisübereinkommens in der Schweiz unter besonderer Berücksichtigung der Beweisaufnahme für U.S.-amerikanische Zivilprozesse* 1999 72 who maintains that the collection of documents on Swiss soil does not violate Article 271(1) of the Swiss Criminal Code.

¹⁹⁷ VPB 61 (1997) no. 82 para. III.1.

¹⁹⁸ Hopf T ‘Art. 271’ in Niggli MA and Wiprächtiger H (eds) *Basler Kommentar Strafrecht II Art. 111-392 StGB* 2007 1922 n. 15.

¹⁹⁹ See, amongst others, Weibel TH ‘Art. 183’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1086 n. 2; Harms LTC *Civil Procedure in the Superior Courts* Students’ Edition 2003 242.

In civil proceedings, as will be explained in more detail below, Switzerland and other countries sharing the civil-law tradition distinguish between court- and party-appointed experts.²⁰⁰ Whenever a civil-law court requires expertise to assess the material facts of the case, it appoints a suitable expert. In other words, once the trial court lacks the respective special knowledge, the appointment of an expert by the court is the rule.²⁰¹ By contrast, in civil proceedings pending in common-law countries, experts are appointed by the parties.²⁰²

When appointing an expert for making investigations abroad, a civil-law court has two options, namely either nominating an expert who is located in the trial court's jurisdiction, but gathers information abroad,²⁰³ or an expert domiciled in the foreign state where the required information is located.²⁰⁴ In the majority of the cases, the judge prefers to appoint a domestic expert. From the perspective of the civil-law court, such an appointment is, unlike in the case of a foreign expert, a purely national matter, as the expert is located in the state of the trial court. Moreover, for the said court, it is easier to locate a suitable domestic expert than it is a foreign expert, particularly as, in Switzerland for instance, many trial courts have a list of domestic experts and naturally prefer to appoint an expert with whom they have worked in the past and whom they trust. An expert opinion may also not only require investigations abroad, but also in the jurisdiction of the trial court.²⁰⁵ It may moreover be necessary for the expert to elucidate on his opinion at a hearing before the trial court. In exceptional cases, however, a trial court may appoint an expert located abroad, for instance in cases where only a foreign expert has the required special knowledge, or where, compared to the value being litigated, the travel expenses of a domestic expert are not justified.²⁰⁶ Given the fact that in the vast majority of cases, civil-law courts will appoint a domestic expert to gather information abroad, the following remarks focus on the activities of a domestic expert.

It goes without saying that an expert opinion can be obtained through channels of international judicial assistance. In this case, the trial court in the civil-law country requests the competent

²⁰⁰ Cf. para. V.G.2 and Chapter 5 para. II.F.1.

²⁰¹ See, amongst others, Timmerbeil S *Witness Coaching and Adversary System: Der Einfluss der Parteien und ihrer Prozessbevollmächtigten auf Zeugen und Sachverständige im deutschen und U.S.-amerikanischen Zivilprozess* 2004 152.

²⁰² Cf. para. V.G.2 below. For more on experts in civil proceedings in South Africa, Botswana, Namibia, Nigeria, and Uganda, see Chapter 5 paras. III.A.3.e), IV.A.3.e), V.A.3.e), VI.A.3.e), and VII.A.3.e).

²⁰³ In the following, such an expert is referred to as a "domestic expert".

²⁰⁴ In the following, such an expert is referred to as a "foreign expert".

²⁰⁵ This may, for instance, be the case where an expert has to assess the assets of a litigant which are not only located in the state of the trial court, but also abroad.

²⁰⁶ See Ahrens H-J 'Grenzüberschreitende selbständige Beweisverfahren – eine Skizze' in Geimer E (ed) *Wege zur Globalisierung des Rechts: Festschrift für Rolf A. Schütze zum 65. Geburtstag* 1990 3 et seq.

foreign authority for the appointment of a foreign expert. The said authority appoints the expert who furnishes his opinion to such authority, which then forwards it to the trial court. Considering the fact that in civil proceedings in common-law countries, experts are not appointed by the court, but by the parties, a civil-law court should think twice about issuing a respective request for judicial assistance to a common-law country. Compared to the appointment of an expert by the trial court, the disadvantages of obtaining an expert opinion through international judicial assistance are evident. Such a procedure is not only time-consuming, but the appointment of the expert and his activities are usually governed by the laws of the requested state. Moreover, there is no direct communication between the trial court and the foreign expert, in other words, the said court only liaises with the expert *via* the foreign authority. This not only prolongs the procedure, but also complicates it, particularly in cases where instructions are given to the expert by the trial court²⁰⁷ or the expert opinion needs clarification. The obtaining of an expert opinion by means of international judicial assistance has, however, one significant advantage: the foreign authority may apply compulsion in its territory if a foreign litigant or third party refuses to cooperate with the expert. In contrast, neither the trial court nor the expert appointed by it is allowed to use coercive measures on foreign territory.²⁰⁸

2. Collection of Information Abroad by a Domestic Expert as a Transfer of Evidence?

Where an expert, whether appointed by a trial court or a party, collects evidence abroad, the question arises as to whether the expert's activities infringe foreign sovereignty. The response to this question depends on the nature of the activity of the expert, namely whether he acts in a private manner or in a judicial function. The qualification of the expert's activities largely hinges on who appoints the expert under the relevant national rules, the trial court or the litigants. The following thus briefly outlines by whom experts are appointed in civil litigation in common- and civil-law countries.

As indicated above,²⁰⁹ the common- and civil-law traditions take a distinct approach with regard to the appointment of experts in civil litigation. In common-law countries, experts are generally appointed by the litigants and are regarded as ordinary non-party witnesses. Accordingly, from a common-law perspective, the activities of such experts are considered as purely a

²⁰⁷ For more on the instructions given by a Swiss court to a court-appointed expert, see Chapter 5 para. II.F.1 below.

²⁰⁸ For more on the use of coercive measures by the trial court, see para. IV.C.6 above.

²⁰⁹ *Cf.* para. G.1.

private matter which does not interfere with the sovereignty of the foreign state when performed abroad. By contrast, in most countries following the civil-law model, experts are selected and appointed by the court and are thus not regarded as ordinary non-party witnesses. In Switzerland, experts are considered as so-called “*verlängerter Arm des Gerichts*”, literally “extended arm of the court”, or, in this instance, aide of the court.²¹⁰ By contrast, experts who are not appointed by the court, but by the litigants are not regarded as experts in the aforesaid sense, but as mere non-party witnesses. Based on the close relationship between a party-appointed expert and the litigant calling him, the probative value of the evidence given by the former is, compared to a court-appointed expert, more limited.²¹¹ Irrespective of the fact that civil-law experts are appointed by the court, different approaches can be taken regarding the nature of the activities of such experts performed abroad. While one school of thought believes that such activities are compatible with public international law, another regards them as a violation of foreign sovereignty.²¹²

According to Daoudi, the activities of a domestic expert abroad do not constitute a judicial act and thus do not violate foreign sovereignty. He maintains that while making investigations in a foreign state, the expert acts as a private individual. Daoudi argues that the expert neither acts for the trial court, nor has any judicial power which is, as claimed by Daoudi, particularly shown by the fact that the expert is not authorised to use any measures of compulsion. In this context, Daoudi points out that the mere fact that the expert acts by order of the trial court does not mutate the expert’s activity into a judicial act. He moreover maintains that the collection of information through an expert cannot be regarded as the actual taking of evidence. Finally, Daoudi emphasises that the expert merely informs himself abroad and that he must remain free to determine how to gain the information that is necessary for the preparation of his opinion, even if such information is located on foreign territory.²¹³ Daoudi’s view is shared by other le-

²¹⁰ Dolge A ‘Art. 183’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* (Helbing Lichtenhahn Verlag Basel 2010) 848 n. 28; Pedrazzini MM ‘Die Gerichtsexpertise im Patentrecht’ 1985 *Schweizerische Mitteilungen über Immaterialgüterrecht* 156. See also Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeßrechts* 1989 47; Musielak H-J ‘Beweiserhebung bei auslandsbelegenen Beweismitteln’ in Schütze R (ed) *Einheit und Vielfalt des Rechts: Festschrift für Reinhold Geimer zum 65. Geburtstag* 2002 771; Langbein JH ‘The German Advantage in Civil Procedure’ 1985 *University of Chicago Law Review* 835.

²¹¹ See, amongst others, Dolge A ‘Art. 183’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 845 n. 17; Langbein JH ‘The German Advantage in Civil Procedure’ 1985 *University of Chicago Law Review* 835 *et seq.*, 840.

²¹² Again, the remarks focus on the relevant debate amongst German legal scholars. See in this regard also fn. 35 above. In the following the term “expert” is used for court-appointed experts.

²¹³ Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweeges* 2000 108, 126.

gal scholars. Schack, for instance, points out that no governmental authority is vested in the expert and that it is not the expert who ultimately takes the evidence.²¹⁴

According to Wussow, the evidence-taking based on an expert opinion includes two steps: on the one hand, the order wherein the trial court appoints the expert to make investigations abroad and, on the other, the investigations of the expert on foreign territory. With respect to the first step, Wussow argues that the respective court order constitutes a judicial act which, however, has no legal effect on the foreign state, as it only affects the litigants and the expert. Regarding the second step, Wussow opines that although the expert acts as an aide of the trial court, he does not exercise any governmental authority. He furthermore argues that the said two steps considered together do not interfere with foreign sovereignty. Wussow maintains that the trial court does not become active on foreign territory, as the expert merely gathers information abroad which he needs in order to prepare his opinion. In this context, Wussow points out that if the expert's activities were qualified as a violation of foreign sovereignty, the expert would not be allowed to collect any information located abroad which is, in Wussow's opinion, an unacceptable result.²¹⁵

Musielak argues that it is not the relation between the trial court and the expert that is crucial, but that between the expert and the witnesses. With regard to the latter, the expert does not act, according to Musielak, in an official function, but as a private individual who merely presents information collected on foreign territory to the trial court. In this context, Musielak emphasises that there is no difference between the gathering of information located abroad through an ordinary non-party witness and that by an expert, as in both cases, such information is presented to the trial court which ultimately weighs the evidence.²¹⁶

By contrast, Leipold regards the activities of an expert abroad as a violation of foreign sovereignty. Leipold acknowledges that the expert does not perform a judicial act on foreign territo-

²¹⁴ Schack H *Internationales Zivilverfahrensrecht* 2010 272 n. 790. See also Geimer E *Internationale Beweisaufnahme* 1998 49; Pfeiffer T 'Internationale Zusammenarbeit bei der Vornahme innerstaatlicher Rechtshandlungen – International cooperation in the making of interior jurisdictional measures' in Gilles P (ed) *Transnationales Prozeßrecht – Transnational Aspects of Procedural Law* 1995 90, 151; Geimer R *Internationales Zivilprozessrecht* 2009 218 n. 445; Bertele J *Souveränität und Verfahrensrecht: Eine Untersuchung der aus dem Völkerrecht ableitbaren Grenzen staatlicher extraterritorialer Jurisdiktion im Verfahrensrecht* 1998 409; Berger C '§ 363' in Stein F and Jonas M (ed) *Kommentar zur Zivilprozeßordnung Band 5 §§ 328-510b* 2006 318 n. 17.

²¹⁵ Wussow H 'Zur Sachverständigentätigkeit im Ausland bei anhängigen (deutschen) Beweissicherungsverfahren' in Pastor W (ed) *Einheit und Vielfalt des Rechts: Festschrift für Hermann zum 60. Geburtstag* 1986 494 et seq.

²¹⁶ Musielak H-J 'Beweiserhebung bei auslandsbelegenen Beweismitteln' in Schütze R (ed) *Einheit und Vielfalt des Rechts: Festschrift für Reinhold Geimer zum 65. Geburtstag* 2002 771 et seq., 775.

ry, but at the same time points out that the relation between the trial court and the expert falls within the scope of public international law and that the expert thus acts as “*verlängerter Arm des Gerichts*”. As a result, the expert is, according to Leipold, only allowed to gather information in a foreign state with the latter’s permission. Leipold finally argues that taking the opposite view may motivate trial courts to appoint experts for the sole purpose of by-passing international judicial assistance.²¹⁷

Like Leipold, Ahrens maintains that an expert is only allowed to gather information abroad once authorised to do so by the foreign state. According to Ahrens, this holds particularly true for the inspection of immovable property located outside the state of the trial court, as the expert does not act as a mere tourist when examining such property. Rather, there is, as claimed by Ahrens, some interaction between the expert and the litigants who are, for instance, entitled to be present at the inspection and whose cooperation may be necessary where the property is under their control. Ahrens furthermore emphasises that litigants, who refuse to collaborate with the expert, may face negative procedural consequences.²¹⁸

Stadler also considers the activity of an expert abroad as incompatible with the sovereignty of the foreign state, unless the latter gives its permission. She argues that although the information gathered by the expert is examined in the jurisdiction of the trial court, the expert’s activities cannot be seen as a purely private matter. Even though Stadler concedes that the expert does not exercise any governmental authority, she emphasises that the expert not only acts by order of the trial court, but also substitutes for the latter when collecting information on foreign territory.²¹⁹

It is submitted that the activities of a court-appointed expert abroad do not interfere with foreign sovereignty. In accordance with the arguments put forward by Daoudi, Wussow and

²¹⁷ Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeßrechts* 1989 47 *et seq.*

²¹⁸ Ahrens H-J ‘Grenzüberschreitende selbständige Beweisverfahren – eine Skizze’ in Geimer E (ed) *Wege zur Globalisierung des Rechts: Festschrift für Rolf A. Schütze zum 65. Geburtstag* 1990 5 *et seq.*

²¹⁹ Stadler A *Der Schutz des Unternehmensgeheimnisses im deutschen und US-amerikanischen Zivilprozess und im Rechtshilfeverfahren* 1989 276; Stadler A ‘§ 363’ in Musielak H-J (ed) *Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz* 2012 1255 n. 14. For other legal scholars who qualify the activities of an expert abroad as a violation of foreign sovereignty, see, amongst others, Linke H and Hau W *Internationales Zivilverfahrensrecht* 2011 47 n. 97, 169 n. 360; Hau W ‘Gerichtssachverständige in Fällen mit Auslandsbezug: Rahmenbedingungen der Tätigkeit und kollisionsrechtliche Haftungsfragen’ 2003 *Recht der Internationalen Wirtschaft* 823 *et seq.*; Heß B and Müller A ‘Die Verordnung 1206/01/EG zur Beweisaufnahme im Ausland’ 2001 *Zeitschrift für Zivilprozeß International* 174 *et seq.*; Berger C ‘Die EG-Verordnung über die Zusammenarbeit der Gerichte auf dem Gebiet der Beweisaufnahme in Zivil- und Handelssachen (EuBVO)’ 2001 *Praxis des Internationalen Privat- und Verfahrensrechts* 527; Schlosser P *EU-Zivilprozessrecht: EuGVVO, AVAG, VTVO MahnVO, BagatellVO, HZÜ, EuZVO, HBÜ, EuBVO* 2009 456 n. 9.

Musielak, one has to keep in mind that the trial court does not perform any judicial act on foreign soil, neither by itself nor *via* the expert. The collection of information abroad by the expert merely constitutes a preparatory measure while the evidence-taking ultimately occurs in the jurisdiction of the trial court once the latter reviews the written expert opinion and/or hears the expert's oral testimony. Also, it has to be borne in mind that the expert's main task is not the gathering of information, but the assessment of the relevant facts which culminates in the preparation of his opinion. In relation to litigants or third parties whose cooperation is necessary when collecting information abroad, the expert does not have any governmental authority and is, in particular, not allowed to use any compulsion. Having said this, it is difficult to comprehend how foreign sovereignty can be infringed, if no judicial act is performed abroad by the trial court or the expert.²²⁰ Moreover, the fact, that foreign litigants may face indirect compulsion when refusing to collaborate with the expert, does not prevent the expert's activities on foreign soil from qualifying as a transfer of foreign evidence. As has been explained earlier,²²¹ a trial court may apply indirect compulsion towards foreign litigants when issuing a court order for a transfer of foreign evidence. Finally, Leipold's argument, that if the expert's activities abroad are not regarded as a violation of foreign sovereignty, trial courts may be tempted to appoint experts for the sole purpose of circumventing international judicial assistance, is not entirely convincing. It is the trial court's discretion as to whether or not to appoint an expert, but this discretion is not absolute. The trial court is not allowed to appoint an expert with respect to any material facts, but only to those facts regarding which it lacks the necessary expertise to decide the case.²²² The risk of an abuse by trial courts is thus limited, if it exists at all.

The above holds true not only for court-appointed experts, but also with regard to experts selected by the parties. In other words, where the activities of court-appointed experts abroad are not regarded as a violation of foreign sovereignty, this is all the more true in relation to party-appointed experts.

3. Collection of Information Abroad by a Domestic Expert and Article 271 of the Swiss Criminal Code

Where an expert appointed by a court located outside Switzerland collects information on Swiss soil, the question arises of whether such activity violates Article 271(1) of the Swiss

²²⁰ See also Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 109.

²²¹ Cf. para. IV.C.6 above.

²²² Dolge A 'Art. 183' in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 841 n. 1 *et seq.*

Criminal Code. To date, this question has not been addressed either by the Swiss Federal Court or any of the Swiss authorities competent for granting a waiver under the said provision,²²³ at least not in a published case.

Given the narrow interpretation of Article 271(1) of the Swiss Criminal Code by the Swiss Federal Court and the other aforementioned Swiss authorities, it can be assumed that the activities of a court-appointed expert in Switzerland are regarded as a violation of the said provision. As has been explained earlier,²²⁴ private individuals are not allowed to interrogate witnesses, or to inspect documents, movable and immovable property on Swiss soil, if the information is used as evidence in proceedings pending outside Switzerland later on. Without the permission of the relevant Swiss authorities, such activities are only allowed in cases where they merely serve to assess the chances of success of a lawsuit or to prepare a case. It goes without saying that this is not the case where a court-appointed expert collects information on Swiss soil, as such information is used as evidence in the foreign proceedings. When deciding the case, the court abroad takes into consideration the expert opinion which is based on facts the expert collected in Switzerland. It is irrelevant if the expert prepares his opinion in or outside Switzerland as it suffices that some of the information, on which the expert opinion is based, is gathered on Swiss territory.²²⁵ It is submitted that the above also holds true with regard to an expert appointed by litigants in civil proceedings pending outside Switzerland. The above contradicts the approach that was taken earlier when discussing the nature of activities by an expert abroad.²²⁶ Again, the difference results from the narrow definition the Swiss authorities have attributed to the notion of “*activities on behalf of a foreign state*” in Article 271(1) of the Swiss Criminal Code.

²²³ For the relevant Swiss authorities, see Chapter 2 para. IV.B.4.b).

²²⁴ Cf. Chapter 2 para. IV.B.4.a).

²²⁵ See Chapter 2 para. IV.B.4.a). See, however, Meier AL *Die Anwendung des Haager Beweisübereinkommens in der Schweiz unter besonderer Berücksichtigung der Beweisaufnahme für U.S.-amerikanische Zivilprozesse* 1999 72 who maintains that the preparation of an expert opinion by private individuals does not infringe Article 271(1) of the Swiss Criminal Code.

²²⁶ Cf. para. V.G.2.

H. Obtaining of Evidence from a Third Party via a Litigant based on an Order of the Trial Court

1. Nature of Obtaining of Evidence from a Third Party via a Litigant

The aforementioned forms of transfer of foreign evidence²²⁷ focused on the configuration where a trial court directly contacts foreign third parties and requests them to cooperate in the taking of evidence.²²⁸ Instead of such direct dealing with foreign non-party witnesses, a trial court may order a litigant to procure the written testimony of a foreign third party or other evidence that is controlled by the latter. By doing so, the trial court shifts the responsibility for obtaining evidence located abroad onto the litigant who proffered the relevant means of proof. Accordingly, the litigant tries to obtain a written statement, specific documents or movable property from the third party which he then hands over to the trial court.²²⁹ As a result, it is the litigant, and not the trial court, who communicates with the foreign third party in order to obtain the relevant evidence.

Given the above, the question arises as to whether the fact that, in relation to the foreign third party, evidence is procured without the direct involvement of a court has any detrimental consequences for the evidence obtained from the non-party witness. As has been mentioned earlier, the fact that a witness examination is formally conducted by a court may encourage the third party to testify more carefully and ensure a more truthful and unbiased testimony.²³⁰ The same holds true where a trial court orders a foreign third party to give evidence by means of questionnaire.²³¹ Where, however, a litigant asks a foreign non-party witness to provide a written statement, the latter lacks the seriousness of court testimony which may increase the risk of a false testimony, or at least of the third party being influenced by the litigant.

With regard to the oral testimony of a foreign third party, the trial court usually prefers to deal directly with such a witness and tries to obtain his testimony by summoning him to attend court or examining him *via* videolink. This allows the court to observe the demeanour of the witness during his examination. Where the said forms of transfer of foreign evidence are not possible,

²²⁷ With the exception of the collection of information abroad through a domestic expert. See in this regard para. V.G.1 above.

²²⁸ Cf. paras. V.B.-V.F.

²²⁹ See also Schack H *Internationales Zivilverfahrensrecht* 2010 275 n. 805.

²³⁰ Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 37 (date of use: 31 January 2013).

²³¹ Cf. para. V.E.1 above.

the trial court may attempt to obtain the third party's testimony by means of questionnaire. From the perspective of the trial court, the obtaining of a witness statement from a foreign third party through a litigant thus makes sense only where the said court is not able to secure the evidence directly from the third party. This particularly holds true where the non-party witness refuses to cooperate with the trial court, and the latter is not allowed to use any measures of compulsion.²³² In this context, one has to bear in mind that a foreign third party may be more willing to testify when contacted by a litigant whom he normally knows than when approached by a court located abroad.

Where the trial court is not able to secure the testimony directly from the foreign third party by means of a transfer of foreign evidence, it has the option to either obtain the evidence *via* the litigant or through international judicial assistance. With regard to the latter, the said court has not only to take into account the expected time period for the execution of a request for international judicial assistance, but also the fact that the examination of the foreign third party is conducted in a formal hearing. This not only holds true where the witness is questioned by a judicial authority of the requested state, but also where the examination is conducted by a commissioner. This may, as has been explained above, increase the chances of the trial court to obtain a more truthful testimony. Moreover, the said court should also take into consideration the subject of the hearing of evidence, as well as the relation between the foreign third party and the litigant who called the former as witness. The more complex and contentious such a subject is and the closer the relationship between the aforesaid individuals, the less suitable it is to obtain the written testimony of a foreign third party through a litigant.²³³

Compared to the testimony of a foreign third party, the content of documents and movable property controlled by such party witness is less affected by the manner in which the trial court obtains the relevant evidence. In other words, the content of a document, for instance, is the same, irrespective of whether the latter is obtained from a non-party witness, be it directly, *via* international judicial assistance, or through a foreign litigant.

With respect to the use of compulsion, one has to bear in mind that the trial court may apply indirect compulsion towards litigants, be they domiciled within or outside the state of the said court, and that the use of such compulsion usually suffices to ensure the litigants' cooperation

²³² See in this regard para. IV.C.6 above.

²³³ *Cf.* in this regard also para. V.E.1 above.

to obtain evidence from the third party.²³⁴ In relation to the non-party witness, however, the trial court cannot apply any coercive measures, as there is no relation whatsoever between the third party and the trial court. In other words, where the non-party witness refuses to provide the litigant with the relevant evidence, the trial court may merely use compulsion towards the litigant. Needless to say, the litigant is not allowed to apply any compulsion towards the foreign third party. Where, however, the trial court decides to obtain the evidence directly from the non-party witness, the use of compulsion towards the latter is, to a limited extent, possible.

2. Obtaining of Evidence from a Third Party via a Litigant as a Transfer of Foreign Evidence?

Where a trial court requests a litigant to secure evidence from a foreign third party, the question arises whether such a court order interferes with foreign sovereignty. In this context, two schools of thought exist: while one considers such a request as a violation of the sovereignty of the foreign state where the third party is domiciled, the other regards such a court order as compatible with public international law.²³⁵

According to Leipold, a request wherein a trial court orders a litigant to procure evidence from a foreign third party constitutes a circumvention of international judicial assistance. Leipold maintains that without such assistance, the trial court is not able to obtain the evidence directly from the third party and thus tries to get the very same evidence *via* the litigant.²³⁶ This view is shared by Schabenberger who argues that, based on the trial court's order, the litigant performs a judicial act on foreign territory which the said court itself is not allowed to carry out due to the public international law restriction on taking evidence abroad.²³⁷

In contrast, Daoudi regards a respective request of a trial court as compatible with public international law and refers to the obligation of a litigant to cooperate with the trial court.²³⁸ It appears that a similar view is taken by Eschenfelder who maintains that the said court order to-

²³⁴ See also para. IV.C.6 above.

²³⁵ The following comments focus on the relevant discussion in Germany. See also fn. 35 above.

²³⁶ Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozeßrechts* 1989 66 *et seq.*

²³⁷ Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 207, 209.

²³⁸ Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 136. On page 136 fn. 120, Daoudi refers to the obligation of third parties to cooperate with the trial court. This reference, however, seems wrong as Daoudi clearly speaks of the litigant's obligation to collaborate. See also Schlosser P *Der Justizkonflikt zwischen den USA und Europa – Erweiterte Fassung eines Vortrags gehalten vor der Juristischen Gesellschaft zu Berlin am 10. Juli 1985* 1985 28; Stadler A '§ 363' in Musielak H-J (ed) *Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz* 2012 1254 n. 10; Schack H *Internationales Zivilverfahrensrecht* 2010 275 n. 805.

wards a litigant merely constitutes a preparatory measure that only takes effect in the jurisdiction of the trial court.²³⁹

It is submitted that an order wherein a trial court requests a litigant to obtain evidence from a non-party witness located abroad does not interfere with foreign sovereignty. Neither the trial court, nor the litigant or the foreign third party performs a judicial act in the foreign state. Since the respective court order is issued to the litigant, there is no relation between the trial court and the non-party witness. The litigant does not take any evidence on foreign territory, as he merely asks the third party for his voluntary cooperation. The same holds true for the foreign non-party witness who simply prepares a witness statement, or collects documents or movable property and forwards such evidence to the litigant. The latter may then submit the evidence to the trial court for its review. The evidence-taking thus ultimately occurs in the trial court's jurisdiction and not in the state where the third party is domiciled. One has furthermore to keep in mind that a trial court is, without the involvement of any foreign authority, allowed to interrogate a foreign non-party witness based on a questionnaire or to order him to hand over documents or movable property.²⁴⁰ The same holds true for a request wherein the said court asks a foreign third party for his voluntary cooperation.²⁴¹ Given the fact that under public international law, a trial court is allowed to request evidence directly from a foreign third party, the said court must also be able to obtain evidence from a third party *via* a litigant.²⁴²

3. Obtaining of Evidence from a Third Party via a Litigant and Article 271 of the Swiss Criminal Code

Where a litigant residing in Switzerland forwards evidence obtained from a third party to a court abroad based on a respective order issued by the said court, the question arises whether such activity falls under Article 271(1) of the Swiss Criminal Code. To this day, there is no published opinion of the Swiss Federal Court or any other competent Swiss authority²⁴³ addressing this issue.

²³⁹ Eschenfelder ED *Beweiserhebung im Ausland und ihre Verwertung im inländischen Zivilprozess: Zur Bedeutung des US-amerikanischen discovery-Verfahrens für das deutsche Erkenntnisverfahren* 2002 72. See also Stürner R 'Der Justizkonflikt zwischen U.S.A. und Europa (mit Summary)' in Stürner R, Lange DG and Taniguchi Y *Der Justizkonflikt mit den Vereinigten Staaten von Amerika – The Jurisdiction Conflict with the United States of America* 1986 26.

²⁴⁰ See in this regard paras. V.E.2 and V.F.2 above.

²⁴¹ Cf. para. IV.D above.

²⁴² See in this regard also fn. 104 above.

²⁴³ Cf. Chapter 2 para. IV.B.4.b).

As has been noted earlier,²⁴⁴ the Swiss Federal Court insinuated that in contrast to hearing witnesses, filing documents is a party measure and thus not an “*activity on behalf of a foreign state*” in the sense of Article 271(1) of the said Code.²⁴⁵ In this context, reference was also made to a decision of the Swiss Federal Council wherein the latter opined that the submission of documents by litigants residing in Switzerland based on a request of a court abroad contravenes the aforesaid provision.²⁴⁶ Given the absence of a published decision of the Swiss Federal Court, which explicitly deals with the question at hand, litigants domiciled in Switzerland should refrain from forwarding evidence obtained by a third party to a court abroad.

By contrast, it is submitted that a third party located in Switzerland does not violate Article 271(1) of the Swiss Criminal Code when forwarding evidence to a litigant in response to a request of the latter, even if the litigant submits such evidence to a court abroad later on. The third party does not act based on an order of a court located outside Switzerland, but on a mere request of the litigant.

I. Summary

From the above it follows that the request wherein a trial court orders a foreign witness to appear in court, to testify *via* videolink or telephone, to give evidence based on a questionnaire, or to produce documents is to be regarded as a transfer of foreign evidence. The same holds true where a trial court appoints an expert residing in its jurisdiction to make investigations abroad, or orders a litigant to procure evidence from a foreign non-party witness.

In all the aforesaid cases, no request for international judicial assistance in evidence-taking is necessary, if the trial court asks the foreign witness for his mere voluntary cooperation. The same holds true where the trial court uses indirect compulsion towards a foreign litigant,²⁴⁷ as well as direct coercive measures limited to its jurisdiction towards a foreign third party having the same nationality as the state of the said court and towards a foreign litigant.²⁴⁸ No transfer of foreign evidence, however, is allowed, and the competent authorities of the foreign state have to be involved where the trial court wishes direct compulsion taking effect on foreign territory to be applied, irrespective of whether they aim at litigants or third parties. The same ap-

²⁴⁴ See para. V.F.3.

²⁴⁵ Cf. BGE 114 IV 131 consideration 2.c *in fine*.

²⁴⁶ See VPB 61 (1997) no. 82 para. III.1. Again, in this context, one has to keep in mind that the decision of the Swiss Federal Council is not binding on any judicial authority in Switzerland, as it merely reflects the view of the executive.

²⁴⁷ Irrespective of his nationality.

²⁴⁸ Irrespective of his nationality.

plies to the use of direct compulsion limited to the jurisdiction of the trial court in relation to foreign third parties who have a different nationality than the state of the trial court.

J. Voluntary Production of Evidence by a Foreign Witness

1. Nature of a Voluntary Production of Evidence

In the preceding cases,²⁴⁹ the transfer of foreign evidence is initiated by the trial court. A foreign witness, however, may also furnish evidence to the trial court on his own initiative, that is, without having been requested by the trial court. Litigants, in particular plaintiffs, are usually eager to come forward with evidence supporting their claims and are thus willing to hand over the relevant means of proof of their own accord. A third party not being a party to a suit may produce evidence once he becomes aware of the pending proceedings, that is, usually when having been asked by one of the litigants to come forward with the relevant information.²⁵⁰ In practice, it is usually not the foreign third party who, for instance, submits the documents requested by the litigant to the trial court. Rather, it is the litigant, in whose favour the evidence of the third party will be, who volunteers the means of proof obtained by the non-party witness and submits them to the trial court.

2. Voluntary Production of Evidence and Sovereignty

There is no doubt that the voluntary production of evidence by a foreign party in civil proceedings pending before a trial court is allowed under public international law.²⁵¹ No judicial act is performed on foreign territory, neither by the trial court nor the foreign litigant. Rather, the voluntary furnishing of evidence by the party is a purely private act which cannot be imputed to the trial court.²⁵² The same holds true where a litigant asks a foreign third party for his voluntary cooperation.²⁵³ Schabenberger, for instance, compares such a request with preparatory measures that are taken before the *lis pendens* of the claim and which do not interfere with foreign sovereignty.²⁵⁴ In this context, it should also be recalled that a request by the trial court for

²⁴⁹ Paras. V.B-V.H.

²⁵⁰ Unlike in the case dealt with in para. V.H.1, the litigant asks the foreign third party to produce evidence without an order of the trial court.

²⁵¹ The following comments focus on the relevant discussion in Germany. See also in this regard fn. 35 above.

²⁵² See, amongst others, Leipold D *Lex fori, Souveränität, Discovery: Grundfragen des Internationalen Zivilprozessrechts* 1989 58; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 210; Schack H *Internationales Zivilverfahrensrecht* 2010 275 n. 805; Berger C ‘§ 363’ in Stein F and Jonas M (ed) *Kommentar zur Zivilprozeßordnung Band 5 §§ 328-510b* 2006 317 n. 11.

²⁵³ Without having been ordered to do so by the trial court. Cf. also para. V.H above.

²⁵⁴ Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 207. See also Stürner R ‘Der Justizkonflikt zwischen U.S.A. und Europa (mit Summary)’ in Stürner R, Lange DG and Taniguchi Y *Der Justizkon-*

voluntary cooperation of foreign witnesses is compatible with public international law. This is particularly true for the case at hand where the voluntary production of evidence is not based on a request of the trial court.

3. Voluntary Production of Evidence and Article 271 of the Swiss Criminal Code

Where a witness domiciled in Switzerland volunteers the production of evidence for the benefit of civil proceedings pending abroad, Article 271(1) of the Swiss Criminal Code is not violated. The witness does not carry out “*activities on behalf of a foreign state*” in the sense of the said provision.²⁵⁵ With regard to the voluntary submission of documents by a litigant, Hopf emphasises that it constitutes an act of a party which is not reserved to authorities and therefore does not require the involvement of any Swiss authority. The litigant must thus, according to Hopf, be allowed to voluntarily produce evidence supporting his claim, provided such evidence does not include means of proof controlled by a third party which can only be obtained through international judicial assistance.²⁵⁶

K. Excursus on the Service of Process to Foreign Witnesses

1. General Remarks

In connection with a transfer of foreign evidence, two questions arise, namely whether such transfer is compatible with foreign sovereignty,²⁵⁷ and how a request of a trial court is to be served upon foreign witnesses under public international law. In other words, once the admissibility of a request for a transfer of foreign evidence under public international law is established, the method of service out of the trial court’s jurisdiction has to be determined, that is, whether the trial court may send the request by postal channels directly to the foreign witness,²⁵⁸ or whether such transmission is only possible by means of international judicial assistance.²⁵⁹ Due service of process is essential, as it serves the purpose of guaranteeing the foreign

flikt mit den Vereinigten Staaten von Amerika – The Jurisdiction Conflict with the United States of America 1986 23.

²⁵⁵ See in this regard Chapter 2 para. IV.B.4.a).

²⁵⁶ Hopf T ‘Art. 271’ in Niggli MA and Wiprächtiger H (eds) *Basler Kommentar Strafrecht II Art. 111-392 StGB* 2007 1922 n. 15 *in fine*.

²⁵⁷ See in this regard paras. V.B-V.H.

²⁵⁸ From the perspective of the trial court, judicial documents should be sent by registered mail, as there is proof that the foreign witness has received the documents. Accordingly, the following comments on the direct transmission by postal channels focus on the forwarding by registered mail.

²⁵⁹ Cf., amongst others, Geimer R *Internationales Zivilprozessrecht* 2009 209 n. 424; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 161, 190; Mössle KP *Extraterritoriale Beweisbeschaffung im in-*

witness the opportunity of being heard and thus ultimately ensures a fair trial. In other words, in order to produce legal effects on litigants and third parties, judicial documents must be properly served.²⁶⁰

A detailed discussion of the service of process in international civil litigation goes beyond the scope of this thesis. The following thus only outlines briefly the major issues associated with the transmission of a request for a transfer of foreign evidence abroad. The focus lies thereby on civil-law jurisdictions which regard the service of judicial documents as a judicial act.²⁶¹

2. Service of Process in Civil-law Countries

a) Service of Process as a Judicial Act

As has already been explained in detail,²⁶² in countries sharing the civil-law tradition, it is the court that controls the conduct of civil proceedings. Such control, amongst others, not only includes the taking of evidence, but also the service of judicial documents that are related to the civil proceedings. Consequently, it is the court, and not the parties, that is responsible for serving documents on litigants, third parties, and experts. As a result, civil-law jurisdictions regard the service of process as a judicial act which is reserved to the competent authority of the state where the addressee of the judicial document is domiciled.²⁶³ By contrast, in countries applying the common-law system, it is often the litigants who are responsible for serving judicial docu-

ternationalen Wirtschaftsrecht: Eine vergleichende Untersuchung unter besonderer Berücksichtigung des US-amerikanischen und deutschen Rechts 1990 52.

²⁶⁰ See, *inter alia*, Schack H *Internationales Zivilverfahrensrecht* 2010 226 n. 659 *et seq.*; Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 10 (date of use: 31 January 2013); Hess B *Europäisches Zivilprozessrecht* 2010 447 n. 2.

²⁶¹ The following comments focus on the relevant debate in Germany where the transmission of a request for a transfer of foreign evidence abroad has been widely discussed in recent years.

²⁶² Cf. Chapter 2 para. IV.B.2.b).

²⁶³ Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 29 n. 1 *et seq.*; Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 161, 164 *et seq.*; Geimer R *Internationales Zivilprozessrecht* 2009 204 n. 414; Staehelin A 'Art. 138' in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 892 n. 13; Bischof T *Die Zustellung im internationalen Rechtsverkehr in Zivil- oder Handelssachen* 1997 188; Geimer R *Neuordnung des internationalen Zustellungsrechts: Vorschläge für eine neue Zustellungskonvention* 1999 23 *et seq.*; Küttler A *Das Erlangen von Beweisen in den USA zur Verwertung im deutschen Zivilprozeß* 2007 136; Schack H *Internationales Zivilverfahrensrecht* 2010 227 n. 663; Strobel E-M 'Art. 140' in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 565 n. 2; Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 6, 10 (date of use: 31 January 2013). Cf. also BGE 124 V 50 consideration 3.a; BGE 105 Ia 310 consideration 3.b; BGE 103 III 4 consideration 2. See also Article 136 of the Swiss Civil Procedure Code which stipulates that the court serves on the persons concerned, amongst others, summonses, orders, decisions, and submissions made by the opposing party. For the (unofficial) English translation of this provision, see Berti SV (ed) *ZPO, CPC, CCP* 2009 560.

ments on their opponents and third parties, including experts. In these countries, the service of process is thus generally considered as a purely private act, provided no compulsion is applied.²⁶⁴

The qualification of service of process as a judicial act by the foreign state means that the trial court is not allowed to send judicial documents directly to witnesses located abroad; but instead, has to transmit them through channels of international judicial assistance.²⁶⁵ The latter is, as has been explained earlier, often a cumbersome and time-consuming process. This holds true not only for international judicial assistance in evidence-taking, but also for the service of judicial documents abroad, in particular where no relevant convention or treaty applies.²⁶⁶ In recent years, the cooperation on the service of judicial documents abroad in civil and commercial matters has been intensified. Many states either became a member of a relevant convention, such as the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters²⁶⁷ or, with respect to the member states of the European Union, the Regulation of 13 November 2007 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters,²⁶⁸ or entered

²⁶⁴ Bischof T *Die Zustellung im internationalen Rechtsverkehr in Zivil- oder Handelssachen* 1997 182 *et seq.*; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 103; Mössle KP *Extraterritoriale Beweisbeschaffung im internationalen Wirtschaftsrecht: Eine vergleichende Untersuchung unter besonderer Berücksichtigung des US-amerikanischen und deutschen Rechts* 1990 103; Geimer R *Neuordnung des internationalen Zustellungsrechts: Vorschläge für eine neue Zustellungskonvention* 1999 132 *et seq.*; Küttler A *Das Erlangen von Beweisen in den USA zur Verwertung im deutschen Zivilprozeß* 2007 136; Hollander C *Documentary Evidence* 2006 447. In this context, see also South African Law Reform Commission *Project 121: Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters – Discussion Paper 106* (closing date for comments: 30 September 2004) 13 *et seq.* (date of use: 31 January 2013) where it is stated that “*the service of a subpoena (...) is a clear manifestation of state power*”.

²⁶⁵ In the latter case, the trial court sends the judicial document to the competent authority of the foreign state which examines it and, in case of its approval, forwards the document to the witness located in its jurisdiction.

²⁶⁶ In this regard see Federal Office of Justice *Länderindex* <http://www.rhf.admin.ch/rhf/de/home/rhf/index/laenderindex.html> (date of use: 31 January 2013) which for many countries, lists the time period for a transmission of a request for international judicial assistance in civil and commercial matters from Swiss authorities to the competent authorities of the requested state. Such time periods are based on the experience of the relevant Swiss authorities with the states listed in the *Länderindex* in the past and vary considerably (*e.g.* Saudi Arabia: 3-12 months; Germany: 1-4 months; South Africa: 6-12 months. With regard to Botswana, Namibia, Nigeria, and Uganda, no details are given due to the lack of experience with these countries.)

²⁶⁷ Initiated by the Hague Conference on Private International Law. For the list of countries that are members of the Convention, see http://www.hcch.net/index_en.php?act=conventions.status&cid=17 (date of use: 31 January 2013). Unlike Switzerland and Botswana, South Africa, Namibia, Nigeria, and Uganda are not party to this Convention. With regard to the text of the Convention, *cf.* <http://www.hcch.net/upload/conventions/txt14en.pdf> (date of use: 31 January 2013).

²⁶⁸ Since Switzerland is not a member of the European Union, it is also not a party to this Regulation. For the text of the Regulation, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007R1393:EN:NOT> (date of use: 31 January 2013).

into bilateral treaties with other states.²⁶⁹ Although such cooperation facilitates the cross-border service of judicial documents, it cannot entirely remove the delays that necessarily occur where authorities of two different states are involved in such transmission. Trial courts are thus tempted to avoid forwarding documents, in particular a request for a transfer of foreign evidence, *via* international judicial assistance, but try instead to send them directly to the foreign witness without the assistance of the foreign state.

From the perspective of the trial court, the service of judicial documents *via* international judicial assistance to a foreign litigant may become obsolete, once the latter designated a person domiciled in the jurisdiction of the trial court who is authorised to accept service on his behalf.²⁷⁰ As a result, there is, with regard to the service of process, no longer an international element involved, and the judicial documents may be transmitted as if the foreign litigant was domiciled in the jurisdiction of the trial court. Where provided for by the relevant domestic rules, the trial court should, at the outset of a lawsuit, request a foreign litigant to designate an agent to receive process in its jurisdiction.²⁷¹

b) Service of a Request for a Transfer of Foreign Evidence by International Judicial Assistance?

The prevailing view²⁷² maintains that a request for a transfer of foreign evidence cannot be directly forwarded from the trial court to the foreign witness by postal channels, but has instead

²⁶⁹ See, for instance, the Exchange of Notes between Switzerland and Pakistan of 12 May/7 July 1960 regarding Judicial Assistance in Civil Matters, SR 0.274.183.671.

²⁷⁰ *Cf.*, for instance, Article 140 of the Swiss Civil Procedure Code. According to this provision, the court can order foreign parties to elect a domicile for service in Switzerland. For the (unofficial) English translation of this provision, *cf.* Berti SV (ed) *ZPO, CPC, CCP* 2009 560. The same applies where a foreign litigant is represented by a counsel domiciled in Switzerland, as in this case, the service is made on his counsel. For the relevant (unofficial) English translation, see Berti SV (ed) *ZPO, CPC, CCP* 2009 560. Once the judicial document is duly served on the agent or the counsel in Switzerland, it is, from the perspective of the Swiss court, irrelevant whether the agent or counsel forwards the document to the foreign litigant. See in this regard Strobel E-M 'Art. 137' in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 552 n. 3; Strobel E-M 'Art. 140' in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 566 n. 6; Bornatico R 'Art. 140' in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 688 n. 1.

²⁷¹ Bischof T *Die Zustellung im internationalen Rechtsverkehr in Zivil- oder Handelssachen* 1997 179, 196; Strobel E-M 'Art. 140' in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 566 n. 6; Bornatico R 'Art. 140' in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 688 n. 1. Whether a request to designate an agent to receive process has to be served through international judicial assistance or not, is controversial. In this context see, amongst others, Lobsiger A and Markus AR 'Überblick zu den vier neuen Konventionen über die internationale Rechtshilfe' 1996 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 187; Bischof T *Die Zustellung im internationalen Rechtsverkehr in Zivil- oder Handelssachen* 1997 181.

²⁷² *Cf.* in this regard fn. 261 above.

to be transmitted through channels of international judicial assistance.²⁷³ This is based on the qualification of service of process as an act of state and thus applies notwithstanding the content of the request, in particular, irrespective of whether or not the latter includes any measures of compulsion merely taking effect in the trial court's jurisdiction.²⁷⁴ Mössle maintains that where the trial court sends the request directly to the foreign witness, the transmission of the request is only completed once it has been handed over to the foreign witness. She thus argues that the transmission of the request by the trial court to the domestic post office ultimately takes effect in the foreign state.²⁷⁵

Bertele maintains that the activities of the foreign postal officer dealing with the document are to be imputed to the trial court, and that the direct transmission without the assistance of any authority of the foreign state therefore violates the latter's sovereignty.²⁷⁶

Stürner argues with the protective function of the sovereignty of states. He considers the sovereignty as "*Schutzschild*", literally "protective shield", which protects residents of a particular state against interference from any other state. According to Stürner, this particularly includes protection from transmissions of judicial documents by other ways than international judicial assistance. Stürner considers such protection as necessary, as often the foreign witness may not be familiar with the laws of the trial court, and may face language difficulties and poor translation of the respective documents. This may, according to Stürner, result in misunderstandings, confusion and legal uncertainty on the side of the foreign witness that prevent him from effective legal protection in the civil proceedings before the trial court.²⁷⁷

²⁷³ See, amongst others, Nagel H and Gottwald P *Internationales Zivilprozessrecht* 2007 349 n. 2; Schack H *Internationales Zivilverfahrensrecht* 2010 227 n. 663; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 101.

²⁷⁴ Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 101 *et seq.*; Stadler A *Der Schutz des Unternehmensgeheimnisses im deutschen und US-amerikanischen Zivilprozess und im Rechtshilfverfahren* 1989 287; Mössle KP *Extraterritoriale Beweisbeschaffung im internationalen Wirtschaftsrecht: Eine vergleichende Untersuchung unter besonderer Berücksichtigung des US-amerikanischen und deutschen Rechts* 1990 51 *et seq.* See also Siegrist D *Hoheitsakte auf fremdem Staatsgebiet* 1987 172, 184. For more on the use of compulsion by a trial court, see para. IV.C above.

²⁷⁵ Mössle KI *Internationale Förderungspfändung, unter besonderer Berücksichtigung der Schweiz, der Bundesrepublik Deutschland und Frankreich* 1991 84 *et seq.* See also Siegrist D *Hoheitsakte auf fremdem Staatsgebiet* 1987 168, 170.

²⁷⁶ Bertele J *Souveränität und Verfahrensrecht: Eine Untersuchung der aus dem Völkerrecht ableitbaren Grenzen staatlicher extraterritorialer Jurisdiktion im Verfahrensrecht* 1998 98.

²⁷⁷ Stürner R 'Europäische Urteilsvollstreckung nach Zustellungsmängeln' in Habscheid WJ and Schwab KH (eds) *Beiträge zum internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit: Festschrift für Heinrich Nagel* 1987 454 *et seq.* For criticism of Stürner's approach, see Schack H *Internationales Zivilverfahrensrecht* 2010 228 n. 664 *et seq.* Cf. also Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 173.

By contrast, another school of thought opines that the forwarding of a request for a transfer of foreign evidence without the involvement of the foreign state is permitted under public international law, provided the trial court does not use any compulsion, be it indirect or direct. Accordingly, Mann maintains that the direct transmission by the trial court is compatible with public international law, if the trial court merely requests the foreign witness to voluntarily cooperate.²⁷⁸

Schabenberger argues that whenever the addressee of a judicial document has to be protected, that is, where indirect or direct compulsion taking effect in the jurisdiction of the trial court are used,²⁷⁹ the document has to be served by international judicial assistance. According to Schabenberger, such protection can only be provided, if the addressee is able to fully understand the content of the relevant document, which requires that the latter is properly translated and such translation can be verified by the state where the addressee is located.²⁸⁰

Schack emphasises that the public international law principle, according to which a state is not allowed to perform acts of state on foreign territory, is limited. He brings forth the argument that an absolute ban of judicial acts on foreign soil only applies with regard to acts that involve measures of compulsion taking effect in foreign states. Accordingly, Schack regards the service of judicial documents without the assistance of the foreign state not as a violation of foreign sovereignty, provided no compulsion is applied abroad.²⁸¹

Mössle regards a direct transmission as compatible with public international law, if the sovereign interests of the foreign state are safeguarded. According to Mössle, this is the case if the foreign state obtains knowledge of the judicial document and is in a position to advise the addressee on the document's significance. Mössle therefore suggests that judicial documents can be directly served, provided the document is accompanied by an official translation and the foreign state is notified about the transmission.²⁸²

²⁷⁸ Mann FA 'Prozeßhandlungen gegenüber ausländischen Staaten und Staatsorganen' 1990 *Neue Juristische Wochenschrift* 619. See also Verdross A and Simma B *Universelles Völkerrecht, Theorie und Praxis* 1984 277.

²⁷⁹ As has been explained earlier, a trial court is not allowed to use compulsion which takes effect on foreign territory. Cf. para. IV.C.3 above.

²⁸⁰ Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 172 *et seqq.*

²⁸¹ Schack H *Internationales Zivilverfahrensrecht* 2010 227 n. 663 *et seqq.* Cf. also Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozeß: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 103 *et seq.*, 105.

²⁸² Mössle KP *Extraterritoriale Beweisbeschaffung im internationalen Wirtschaftsrecht: Eine vergleichende Untersuchung unter besonderer Berücksichtigung des US-amerikanischen und deutschen Rechts* 1990 256.

Geimer opines that summons, pleadings, or court decisions do not have to be transmitted through channels of international judicial assistance, as foreign sovereignty is not infringed. He argues that the trial court does not perform any act of state on foreign territory, but merely in its own jurisdiction where the respective decisions are taken. According to Geimer, the transmission abroad thus only serves as notification of a judicial act that has already been taken in the state of the trial court.²⁸³

Finally, Wiehe argues that a transmission without the involvement of the foreign state does not constitute a judicial act merely because the trial court requires the cooperation of the foreign postal authorities. He maintains that the said court does not perform an act of state on foreign territory, as the actions of the foreign postal authorities cannot be imputed to the trial court, but the latter merely uses an international means of communication.²⁸⁴

It is submitted that a trial court may directly transmit a request for a transfer of foreign evidence, which includes direct or indirect compulsion taking effect in its jurisdiction, to a foreign witness, provided such request is accompanied by an official translation and the foreign state is informed about the request. A request for voluntary cooperation of a foreign witness, however, can be transmitted without a translation and notification of the foreign state. It is, however, in the interest of the trial court to provide, where necessary, the witness with a translation, as the latter increases the chances that the witness may voluntarily cooperate.

Where a request for a transfer of foreign evidence is not forwarded by means of international judicial assistance, foreign sovereignty is, if at all, only marginally impaired. In this context, one has to keep in mind that neither a member of the trial court nor any other public official of the state of the said court becomes active on foreign territory. Civil-law countries should therefore renounce their excessive adherence to their current course of policy regarding cross-border service of process and should promote a more liberal approach. This should particularly be seen in the light of the fact that in practice, trial courts may resort to substituted service, notably service by publication, where a judicial document cannot be personally served upon witnesses.²⁸⁵ In the context of international litigation, this may, for instance, mean that a foreign

²⁸³ Geimer R *Internationales Zivilprozessrecht* 2009 206 n. 416 *et seq.* For criticism on Geimer's argument, see Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 170.

²⁸⁴ Wiehe H *Zustellungen, Zustellungsmängel und Urteilsanerkennung am Beispiel fiktiver Inlandszustellungen in Deutschland, Frankreich und den USA* 1993 102.

²⁸⁵ See, for instance, Article 141(1) of the Swiss Civil Procedure Code. According to this provision, service is made by publication in the official gazette where the whereabouts of the addressee is unknown and cannot be discovered despite reasonable efforts, where service is impossible or would involve unreasonable effort, or where a party with domicile abroad has failed to comply with the court's order to elect a domicile for service

defendant does not become aware of a lawsuit that is pending before the trial court and is thus not able to exercise his procedural rights, in particular the right to be heard. The same holds true where in civil proceedings before a trial court, the service of a judicial document relating to a foreign third party is made by public notice. One has furthermore to keep in mind that where a litigant is in default, the trial court may give a default judgment.²⁸⁶ Although a foreign litigant may resist the enforcement of such judgment in his state of residence, the decision will most likely be enforceable in the jurisdiction of the trial court, provided the litigant has assets in the relevant state.²⁸⁷ Having said this, cross-border service of process should not be unnecessarily complicated, as otherwise a trial court may be tempted to serve the document by public notification. The above shows that excessive requirements stipulated by a foreign state for the service of judicial documents are not always necessarily in the interest of its residents.

On the other hand, one has to keep in mind that in the majority of cases, a foreign witness is confronted with a legal system he is not familiar with and a foreign language of the proceedings when facing a request for a transfer of foreign evidence. In comparison with litigants and third parties domiciled in the state of the trial court, a foreign witness thus needs more protection when being involved in civil proceedings before a trial court. Such protection is particularly essential where he faces detrimental legal consequences when failing to comply with orders issued by the trial court. Adverse effects not only occur where direct compulsion is applied towards a foreign witness, but also in case of consequences of a merely procedural nature. No particular protection, however, is necessary where the foreign witness does not face any detrimental consequences, that is, where he is asked by the trial court for his voluntary cooperation.

In order to be able to fully assess the legal consequences that non-compliance with a request for a transfer of foreign evidence may have, the foreign witness must be in a position to understand the content of the relevant request which requires, in case the latter is in a foreign language, a proper translation. Unlike in the case of a direct transmission of the request by the trial court to the foreign witness, the service of process *via* international judicial assistance enables

in Switzerland. For the (unofficial) English translation of the said provision, see Berti SV (ed) *ZPO, CPC, CCP* 2009 560 *et seq.* Cf. also Schack H *Internationales Zivilverfahrensrecht* 2010 230 n. 669.

²⁸⁶ Cf., for instance, Article 223(2) of the Swiss Civil Procedure Code, which provides that if the respondent fails to file his statement of defence, the court gives judgment, provided the matter is ripe for decision. With regard to the (unofficial) English translation of the said provision, see Berti SV (ed) *ZPO, CPC, CCP* 2009 580.

²⁸⁷ Schack H *Internationales Zivilverfahrensrecht* 2010 228 n. 665; Schablenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 173. With regard to the relation between substituted service and public international law, see Gottwald P 'Grenzen zivilgerichtlicher Massnahmen mit Auslandswirkung' in Lindacher WF *et al* (eds) *Festschrift für Walther J. Habscheid* 1989 123 *et seq.*

the competent foreign authority to ensure that the relevant document is duly translated.²⁸⁸ The involvement of the foreign authority, however, is not limited to securing a proper translation of the order of the trial court, but also allows the relevant authority to scrutinise the content of the judicial document and advise the foreign witness on its significance.²⁸⁹ The service of process by means of international judicial assistance has furthermore a warning function. The formalities associated with a request for international judicial assistance are better suited to inform a foreign witness about the significance of a court order than if the latter is directly transmitted by the trial court which is a rather informal process.²⁹⁰ Again, such warning function is only needed with regard to court orders that use direct or indirect compulsion towards foreign witnesses.

The transmission of a request for a transfer of foreign evidence through channels of international judicial assistance, however, is not the only means to enable the foreign state to scrutinise the said request and give relevant advice to the foreign witness. Rather, such examination is also possible where the trial court directly forwards the request to the foreign witness and at the same time, notifies the foreign state about the transmission and the content of the request. Such procedure allows the foreign state to intervene if necessary, but also facilitates and expedites the transmission of requests for a transfer of foreign evidence and ultimately the cross-border taking of evidence in civil and commercial matters. Where, from the perspective of the foreign state, the proceedings before the trial court are conducted in a foreign language, the request for a transfer of foreign evidence should be accompanied by an official translation.

c) Service of a Request for a Transfer of Foreign Evidence and Article 271 of the Swiss Criminal Code

Like other civil-law countries, Switzerland regards the service of judicial documents as an act of state that is entrusted to the competent Swiss authorities. Judicial documents issued by a court abroad and addressed to witnesses residing in Switzerland have thus to be transmitted by

²⁸⁸ See also Schabenberger A *Der Zeuge im Ausland im deutschen Zivilprozess* 1996 174; Bischof T *Die Zustellung im internationalen Rechtsverkehr in Zivil- oder Handelssachen* 1997 189; Mössle KI *Internationale Förderungspfändung, unter besonderer Berücksichtigung der Schweiz, der Bundesrepublik Deutschland und Frankreich* 1991 86; Daoudi J *Extraterritoriale Beweisbeschaffung im deutschen Zivilprozess: Möglichkeiten und Grenzen der Beweisbeschaffung ausserhalb des internationalen Rechtshilfeweges* 2000 100. For more on the translation of judicial documents, cf. Geimer R *Neuordnung des internationalen Zustellungsrechts: Vorschläge für eine neue Zustellungsconvention* 1999 245 et seq.

²⁸⁹ Cf. Mössle KP *Extraterritoriale Beweisbeschaffung im internationalen Wirtschaftsrecht: Eine vergleichende Untersuchung unter besonderer Berücksichtigung des US-amerikanischen und deutschen Rechts* 1990 53.

²⁹⁰ See also Bischof T *Die Zustellung im internationalen Rechtsverkehr in Zivil- oder Handelssachen* 1997 189.

way of international judicial assistance.²⁹¹ An exception, however, applies where the said documents have no legal effect, or are not liable to have any such effect on the addressee. Under Swiss law, a request for a transfer of foreign evidence issued by a court abroad and applying direct or indirect compulsion has therefore to be forwarded through channels of international judicial assistance. The above contradicts the position the author has taken earlier with regard to the transmission of a request for a transfer of foreign evidence.²⁹² This conflict results from the more conservative approach Swiss law takes in relation to cross-border service of process. A request wherein the trial court asks a witness in Switzerland for his voluntary collaboration, however, can be directly transmitted without the assistance of Swiss authorities.²⁹³

Under Swiss law, the transmission of a request for a transfer of foreign evidence using direct or indirect compulsion to an individual residing in Switzerland without the assistance of the competent Swiss authorities does not only violate public international law, but also constitutes a criminal offence. The service of such request without the involvement of Swiss authorities is considered as “*activity on behalf of a foreign state*” in the sense of Article 271(1) of the Swiss Criminal Code.²⁹⁴

²⁹¹ Volken *Rechtshilfe* 29 n. 1 *et seq.*; Bischof T *Die Zustellung im internationalen Rechtsverkehr in Zivil- oder Handelssachen* 1997 176; Siegrist D *Hoheitsakte auf fremdem Staatsgebiet* 1987 170; Lobsiger A and Markus AR ‘Überblick zu den vier neuen Konventionen über die internationale Rechtshilfe’ 1996 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 184; Staehelin A ‘Art. 138’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 892 n. 13; Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 6, 9 (date of use: 31 January 2013); BGE 124 V 50 consideration 3.a; BGE 105 Ia 311 consideration 3.b; BGE 103 III 4; VPB 65 (2001) no. 71 2; VPB 66 (2002) no. 36 consideration 2.a.; VPB 66 (2002) no. 94 consideration 2.b.; VPB 69 (2005) no. 121 consideration 2.c.aa.

²⁹² See para. V.K.2.b).

²⁹³ Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 11, 23 (date of use: 31 January 2013); Lobsiger A and Markus AR ‘Überblick zu den vier neuen Konventionen über die internationale Rechtshilfe’ 1996 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 187; Bischof T *Die Zustellung im internationalen Rechtsverkehr in Zivil- oder Handelssachen* 1997 190. See, however, Siegrist D *Hoheitsakte auf fremdem Staatsgebiet* 1987 172 who regards the service of a judicial document without any legal effect as an act of state.

²⁹⁴ Hopf T ‘Art. 271’ in Niggli MA and Wiprächtiger H (eds) *Basler Kommentar Strafrecht II Art. 111-392 StGB* 2007 1923 n. 15; Lobsiger A and Markus AR ‘Überblick zu den vier neuen Konventionen über die internationale Rechtshilfe’ 1996 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 184; Honegger PC *Amerikanische Offenlegungspflichten in Konflikt mit schweizerischen Geheimhaltungspflichten unter besonderer Berücksichtigung der Rechtshilfe bei Steuerhinterziehungen und Insidergeschäften* 1986 136; Volken P *Rechtshilfe* 31 fn. 8; Jametti Greiner M ‘Neuerungen im internationalen Rechtshilfeverkehr der Schweiz’ 1996 *Zeitschrift für Zivilprozeß International* 197 *et seq.* For more on Article 271(1) of the Swiss Criminal Code, see Chapter 2 para. IV.B.4.a).

VI. Conclusion

From the perspective of a trial court, the collection of foreign evidence through channels of international judicial assistance is often a burdensome and time-consuming process. A trial court is thus often anxious to obtain such evidence by means other than through judicial assistance, namely *via* a so-called “transfer of foreign evidence”. Here, the evidence originally located in a foreign state is transferred to the jurisdiction of the trial court where it is heard by the latter. As a consequence, the evidence is no longer taken on foreign territory, but in the jurisdiction of the trial court. From the perspective of the said court, the evidence-taking thus constitutes a purely domestic matter which is under its sole control. Having said this, there is no need for the trial court to involve the foreign state where the evidence was located prior to its transfer.

A transfer of foreign evidence not only avoids the delays usually associated with a request for international judicial assistance, but it also means that the relevant evidence is heard by the trial court in accordance with its own laws. This not only minimises the risk that foreign evidence is of merely limited probative value, or even inadmissible in the proceedings before the trial court due to differences in the rules on evidence-taking in the states involved; it also avoids the evidence being “filtered” by a foreign authority, a commissioner, a diplomatic officer or a consular agent prior to its transmission to the trial court.

Irrespective of the fact that the trial court does not act physically on foreign territory when evidence is transferred to its jurisdiction, a request of the said court for a respective transfer has an effect beyond the state where the court is located. From a civil-law perspective, which qualifies the evidence-taking as a judicial act, the question therefore arises as to whether a request for a transfer of foreign evidence impairs the sovereignty of the state where the means of proof were originally situated. It is well established that under public international law, not every court order taking effect abroad interferes with foreign sovereignty. This holds true particularly for a request for a transfer of foreign evidence whose admissibility under public international law hinges on two factors, namely the addressee of such a request and whether the latter includes any compulsion towards its addressees.

A request for a transfer of foreign evidence either aims at foreign litigants or third parties. It is generally recognised that under public international law, foreign litigants have the same obligations as domestic parties and are thus under an obligation to cooperate with the trial court. In contrast, it is controversial whether and, if so, to what extent foreign non-party witnesses have to collaborate. While one approach rejects any obligation to cooperate under public interna-

tional law, another favours such obligation, albeit the reasoning given by the relevant scholars differs. It is submitted that foreign third parties having the same nationality as the trial court are under an obligation to collaborate with the latter. Here, the personal sovereignty of the state of the trial court prevails over the territorial sovereignty of the state where the third party is located. No such obligation, however, exists with regard to foreign third parties who have a different nationality than the trial court. In this context, the latter cannot invoke the personal sovereignty; rather, it is the territorial sovereignty of the state, where the foreign non-party witness is domiciled, that comes out on top.

Where foreign witnesses are under an obligation to collaborate, the question arises whether and, if so, to what extent the trial court can enforce such obligation. The said obligation of litigants and third parties is only as good as the trial court is able to compel recalcitrant witnesses to cooperate. It is well established that under public international law, a trial court is not allowed to apply direct compulsion, that is, coercive measures that either aim at the foreign witness himself or his assets, that takes effect in a foreign state. The use of such measures is considered as a violation of foreign sovereignty. By contrast, it is contentious whether the use of direct compulsion limited to the jurisdiction of the trial court, is compatible with public international law. The author regards such compulsion not as a violation of foreign sovereignty, as both the threat and the execution of the coercive measures take place in the jurisdiction of the trial court. The same holds true for indirect compulsion, that is, consequences of a merely procedural nature. Such measures are based on the procedural relation between the foreign litigant and the trial court, and their effects are confined to the latter's jurisdiction.

Given the aforesaid obligation of foreign litigants to comply with a request for a transfer of foreign evidence, a trial court may apply direct compulsion limited to its jurisdiction as well as indirect compulsion towards foreign litigants. With regard to foreign third parties, the use of compulsion is more restricted. Firstly, only non-party witnesses having the same nationality as the trial court are under an obligation to collaborate. Secondly, the use of indirect compulsion towards third parties is not feasible, as they are not party to the proceedings and thus no procedural relationship with the trial court exists. Consequently, the use of coercive measures towards foreign non-party witnesses is only allowed where the latter have the same nationality as the trial court, and the compulsion is direct as well as limited to the trial court's jurisdiction. By contrast, both requests for a transfer of foreign evidence that use direct compulsion having impact on foreign territory as well as requests aimed at foreign third parties whose nationalities are different to the trial court interfere with foreign sovereignty. Where a trial court cannot

compel foreign witnesses to collaborate, it may ask them for their voluntary cooperation. Such request is deemed compatible with public international law and does not require the judicial assistance of the foreign state.

Where a trial court wishes to obtain means of proof through a transfer of foreign evidence, it has several options. It may order a foreign witness to appear in court, to testify by videolink or telephone, to give evidence based on a questionnaire, or to submit documents or movable property. Moreover, the court may appoint a domestic expert to make investigations abroad which are necessary for the preparation of the expert opinion.

A request, wherein a trial court summons a foreign witness to attend court, constitutes a transfer of foreign evidence. Such a request not only avoids the burdensome and time-consuming process of international judicial assistance, but it also has the advantage that the witness examination is conducted in the presence of the trial court based on the latter's rules. Compared to the evidence-taking by international judicial assistance, the trial court, however, is restricted in using compulsion towards foreign witnesses who refuse to appear in court. A witness who resides in Switzerland and travels abroad to give testimony in foreign civil proceedings does not violate Article 271(1) of the Swiss Criminal Code, as the evidence-taking does not occur on Swiss soil.

Whether an examination by videolink interferes with foreign sovereignty when conducted without the involvement of the foreign state is controversial. The author regards such interrogation as a transfer of foreign evidence, as the trial court hears the evidence in its jurisdiction, and the evidence-taking is only concluded once the trial court has taken note of the witness' testimony. Under Swiss law, however, in the absence of any respective reported case law and based on the narrow interpretation of Article 271(1) of the Swiss Criminal Code by the Swiss Federal Court and other relevant Swiss authorities, it can be assumed that the questioning of a witness residing in Switzerland by a court abroad *via* videoconference is regarded as violation of the said provision. The advantages and disadvantages mentioned in the context of the aforesaid summons of a foreign witness to appear in court also apply with regard to an examination by videolink. In addition, it must be noted that the foreign witness does not have to travel to the state of the trial court when testifying by videoconference. One has furthermore to bear in mind that the examination does not occur in a courtroom which may have detrimental consequences for the accuracy of the witness' testimony.

The foregoing comments apply *mutatis mutandis* to an interrogation of a foreign witness by telephone. Here, however, it has to be kept in mind that the trial court's perception of the witness is reduced to what it hears over the phone. This not only hampers the verification of the witness' identity, but it also prevents the said court from observing the witness' demeanour with its own eyes.

Whether the examination of a foreign witness by the trial court based on a questionnaire constitutes a transfer of foreign evidence or not is contentious. It is submitted that such interrogation does not require the assistance of the foreign state where the witness to be questioned is located. As in the case of an interrogation *via* videolink, the evidence-taking ultimately occurs in the jurisdiction of the trial court, as the examination is only concluded once the latter has reviewed the questionnaire. Compared to the evidence-taking through the means of international judicial assistance, the procedure at hand is not only more swift, but it allows the witness to complete the questionnaire without time constraint, which may minimise the risks of incomplete and inconsistent answers. It has, however, to be kept in mind that an examination by questionnaire may not be suitable for all cases. This particularly applies where the subject of the hearing of evidence is complex and/or highly contested, or the witness to be questioned lacks the intellectual abilities and/or capacity of expressing himself in writing. Here, an examination before the trial court, be it by summoning the witness to attend court or interrogating him *via* videolink may prove more successful. Mention must also be made of the fact that an examination by means of questionnaire lacks the traditional judicial surroundings thought to convey the seriousness of court testimony. Moreover, it has to be borne in mind that the trial court has limited powers to use compulsion towards recalcitrant witnesses. Again, it can be assumed that an interrogation of a witness residing in Switzerland based on a questionnaire for the benefit of proceedings abroad is regarded as an infringement of Article 271(1) of the Swiss Criminal Code when conducted without the permission of the competent Swiss authorities.

Where documents or movable property are under the control of a foreign witness, the trial court may order the latter to submit such evidence to the court. The author regards such evidence-taking as a transfer of foreign evidence which does not require the assistance of the foreign state. The collection of the documents or movable property by the foreign witness constitutes merely a preparatory measure, while the review of such evidence takes place in the jurisdiction of the trial court. The comments made earlier on the advantages and disadvantages of the summons of a foreign witness to appear in court apply *mutatis mutandis*. In a decision in 1988, the Swiss Federal Court insinuated that the submission of documents by a witness residing in

Switzerland to a court abroad is not an “*activity on behalf of a foreign state*” in the sense of Article 271(1) of the Swiss Criminal Code. In the light of the absence of a published decision expressly dealing with the procedure at hand, however, witnesses domiciled in Switzerland should abstain from forwarding any documents or movable property to courts abroad without the permission of the competent Swiss authority.

In cases where a trial court located in a civil-law country lacks the expertise to determine the material facts of a lawsuit, it appoints a suitable expert. Where information, which is necessary for the preparation of the opinion of an expert, is situated in a foreign state, the trial court usually appoints an expert who is domiciled in its jurisdiction and requests him to make the necessary investigations abroad. Having said this, the question arises as to whether investigations conducted on foreign territory by an expert appointed by a trial court interfere with foreign sovereignty. This question is controversial; while one school of thought opines that the expert merely acts as a private individual who has no judicial power, another brings forth the argument that the expert’s activities cannot be seen as a purely private act and thus requires the permission of the competent foreign authorities. The former view is shared by the author. The gathering of information abroad by a court-appointed expert merely constitutes a preparatory measure. The evidence-taking therefore does not occur on foreign territory, but in the jurisdiction of the trial court. Moreover, no governmental authority is vested in the expert, as he cannot apply any compulsion towards recalcitrant witnesses. It goes without saying that a trial court could also request the competent authority of the foreign state, where the investigations are to be made, to appoint an expert. Such procedure, however, would not only be more time-consuming, but the appointment as well as the activities of the expert would usually be governed by the rules of the foreign state. In contrast to the trial court and the expert, the foreign authority could, however, apply coercive measures taking effect on its territory. The Swiss Federal Court has not yet dealt with the question whether an expert appointed by a court abroad violates Article 271(1) of the Swiss Criminal Code when making investigations in Switzerland. Given the aforesaid narrow interpretation of such provision, it is, however, highly probable that such activities are to be considered as violations of Article 271(1) of the Swiss Criminal Code.

In the foregoing cases, the trial court directly contacts the foreign witness from whom it wishes to obtain the relevant evidence. In relation to the testimony of a foreign third party or documents and movable property controlled by the latter, the said court may, however, try to obtain such evidence *via* a litigant. In other words, the court may request a litigant to procure a written statement from a particular foreign third party or other evidence administered by the latter.

Again, it is controversial whether such a request interferes with the sovereignty of the state where the third party is domiciled. It is submitted that neither the trial court nor the litigant, let alone the non-party witness, infringes foreign sovereignty. The litigant asks the foreign third party merely for his voluntary cooperation. The latter forwards the evidence to the litigant who then submits it to the trial court. The evidence-taking thus ultimately takes place in the trial court's jurisdiction. In practice, trial courts usually prefer to deal directly with foreign third parties. The fact that a judicial authority is involved in relation to the foreign third party may encourage the latter to testify more carefully and moreover minimises the risk of the non-party witness being influenced by the litigant who called him as witness. It has also to be borne in mind that neither the trial court nor the litigant can apply any measures of compulsion towards the third party who refuses to cooperate with the litigant. With regard to Article 271(1) of the Swiss Criminal Code, the relevant comments made in relation to a request wherein a trial court orders a foreign witness to procure documents or movable property also apply here. In order to avoid any criminal prosecution, litigants domiciled in Switzerland are thus advised not to comply with an order of a court abroad to obtain evidence from a third party. Third parties, however, located in Switzerland, who voluntarily provide a litigant with evidence which the latter then submits to a court abroad, do not contravene Article 271(1).

In the previously mentioned cases, the transfer of foreign evidence to the trial court's jurisdiction is initiated by the trial court. A foreign witness, in practice mostly a litigant, may, however, present evidence without having been asked to do so by the trial court. Such presentation is a purely private act which does not interfere with foreign sovereignty. The same holds true in relation to Article 271(1) of the Swiss Criminal Code. Witnesses residing in Switzerland do not infringe the said provision when voluntarily furnishing evidence to a court abroad.

The question of whether a transfer of foreign evidence is compatible with public international law must be strictly separated from the question of how a request issued by a trial court has to be served upon foreign witnesses. In countries following the civil-law tradition, the service of process is considered as a judicial act which is entrusted to the authorities of the state where the addressee of the judicial document is domiciled. As a general rule, therefore, a trial court is, from a civil-law perspective, not allowed to send judicial documents directly to foreign witnesses, but has to forward them through channels of international judicial assistance. Given the delays usually associated with the latter, trial courts often prefer to avoid judicial assistance and instead try to transmit judicial documents directly to foreign witnesses.

Having said this, the question arises as to whether the direct transmission of a request for a transfer of foreign evidence from the trial court to the foreign witness is allowed under public international law. Again, this issue is controversial. While the traditional approach maintains that such a request has to be forwarded through international judicial assistance, a more recent view takes into consideration the content of the request, and advocates a direct transmission where no compulsion, be it direct or indirect, is used by the trial court. The author suggests that a request for a transfer of foreign evidence using any compulsion compatible with public international law, can be directly forwarded to a foreign witness, provided it is accompanied by a translation and the foreign state is informed about the transmission and the content of the request. Compared to witnesses domiciled in the state of the trial court, foreign witnesses need special protection, as they are confronted with a legal system and a language of the proceedings with which they are not familiar. This holds particularly true where they face indirect and direct compulsion when failing to comply with the trial court's request. The aforesaid notification of the foreign state ensures such protection, as it enables the foreign authority to scrutinise the request and advise the witness on its significance. No such protection, however, is necessary where the foreign witness is asked for his voluntary cooperation. Accordingly, such a request can be directly transmitted without informing the foreign state. Switzerland regards the transmission of a request for a transfer of foreign evidence without the assistance of the competent Swiss authorities not only as violation of public international law, but also as a criminal offence under Article 271(1) of the Swiss Criminal Code. An exception, however, applies where the judicial document has no legal effect on the addressee residing in Switzerland. Consequently, a request for the voluntary cooperation of a witness domiciled in Switzerland can be transmitted without the assistance of Swiss authorities.

CHAPTER 4

CROSS-BORDER TAKING OF EVIDENCE IN CIVIL AND COMMERCIAL MATTERS IN SWITZERLAND, SOUTH AFRICA, BOTSWANA, NAMIBIA, NIGERIA, AND UGANDA

I. Introduction

The foregoing chapters analysed the conditions under which the taking of foreign evidence in civil and commercial matters is allowed under public international law. The present Chapter deals with the rules in Switzerland, South Africa, Botswana, Namibia, Nigeria, and Uganda that govern the cross-border taking of evidence in civil and commercial matters through channels of international judicial assistance.¹ In this context, a distinction is made according to whether a particular country seeks evidence abroad, or whether it is asked to take evidence for the benefit of another state; in other words, whether it acts as a requesting or a requested state.² Where a particular state is a member of a convention on cross-border taking of evidence in civil and commercial matters, the main principles of evidence-taking based on such an international agreement are outlined. The Chapter furthermore analyses the rules of the aforesaid countries that govern transborder evidence-taking in the absence of a relevant international treaty. Once the relevant set of rules for each jurisdiction covered by this thesis is established, the Chapter assesses the *status quo* of each of the said countries with regard to cooperation in the cross-border taking of evidence in civil and commercial matters and, where necessary, recommendations are made for the improvement of the existing situation.

II. Cross-border Taking of Evidence in Civil and Commercial Matters in Switzerland

A. General Remarks

International judicial assistance in evidence-taking in civil and commercial matters between Switzerland and other states is mainly governed by two conventions, namely the Hague Evidence Convention and the Hague Procedure Convention.³ In this context, it has to be remem-

¹ And not by means of a so-called “transfer of foreign evidence”. See in this regard Chapter 3.

² For the terms “requesting state” and “requested state”, *cf.* Chapter 2 para. V.A.

³ *Cf.* also in this regard Chapter 2 fns. 163 and 164. With numerous, mostly European states, Switzerland has entered into bilateral agreements regarding the transmission of requests for judicial assistance in civil and commercial matters (for instance, allowing direct communication between courts) and the language in which such requests have to be drafted. There are no relevant bilateral treaties between Switzerland, on the one hand, and South Africa, Botswana, Namibia, Nigeria, and, Uganda, on the other, on cross-border evidence-taking in

bered that conventions on judicial cooperation mainly stipulate the conditions under which the requested state is obliged to render assistance, as well as the forms of such assistance. The methods and procedure to be followed when executing a request for judicial assistance, however, are usually governed by the law of the requested state,⁴ which in the case of Switzerland is by the Swiss Civil Procedure Code. The same holds true for the decision of the trial court, whether or not the internal conditions for issuing a request for judicial assistance to obtain evidence located abroad are fulfilled.

The following subchapters first highlight the evidence-taking in Switzerland in accordance with the Hague Evidence Convention and the Hague Procedure Convention and, second, outline the principles of judicial cooperation involving Swiss authorities based on *courtoisie internationale*.⁵

B. Taking of Evidence based on the Hague Evidence Convention

1. Relation between the Hague Evidence Convention and the Hague Procedure Convention

The Hague Procedure Convention was concluded in 1954. It not only contains provisions on the taking of evidence in civil and commercial matters,⁶ but, amongst other things, also includes regulations on the communication of judicial documents,⁷ security for costs,⁸ or free legal aid.⁹ The Convention came into force in Switzerland in 1957 and has to date been ratified

civil and commercial matters or the transmission of respective requests. See, however, the Exchange of Notes between Switzerland and Uganda of 24 March/26 May 1965 regarding the Maintenance of the Swiss-British Agreement of 3 December 1937 on Civil Procedure, SR 0.274.186.181; <http://www.admin.ch/ch/d/sr/i2/0.274.186.181.de.pdf> (date of use: 31 January 2013). The said Swiss-British agreement (SR 0.274.183.671, <http://www.admin.ch/ch/d/sr/i2/0.274.183.671.de.pdf> (date of use: 31 January 2013)) includes provisions on access to justice, the requirement of a *cautio judicatum solvi*, legal aid, and on imprisonment pending the payment of a debt. For more on international treaties of Switzerland, cf. Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 8 (date of use: 31 January 2013); Volken P 'Vor Art. 11' in Girsberger A *et al* (eds) *Zürcher Kommentar zum IPRG* 2004 146 n. 41, 145 n. 31; Switzerland *Response of Switzerland to the Questionnaire of 2008 Relating to the Hague Convention of 18 March 1970 on the Taking of Evidence in Civil or Commercial Matters* (undated) <http://www.hcch.net/upload/wop/2008switzerland20.pdf> 17 (date of use: 31 January 2013). For a list of international bilateral and multilateral treaties of Switzerland, see <http://www.eda.admin.ch/eda/de/home/topics/intla/intrea/dbstv.html> (date of use: 31 January 2013).

⁴ Cf. Chapter 2 para. V.C. See also Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 82 n. 62.

⁵ For more on *courtoisie internationale*, see Chapter 2 para. V.B.1 above.

⁶ Articles 8-16 of the Hague Procedure Convention.

⁷ Articles 1-7 of the Hague Procedure Convention.

⁸ Articles 17-19 of the Hague Procedure Convention.

⁹ Articles 20-24 of the Hague Procedure Convention.

by 46 other countries.¹⁰ England, the United States, as well as other common-law countries, however, have not acceded to the Convention, as it did not take account of the particularities of the common-law system.¹¹

The Hague Evidence Convention was concluded in 1970. It was intended to renew Articles 8-16 of the Hague Procedure Convention on evidence-taking by facilitating the transmission and execution of letters of request,¹² and to “create a link between the system of taking of evidence of the civil law and that of the common law” by accommodating common-law methods for the taking of evidence.¹³ The latter was achieved by including rules on the taking of evidence by a commissioner. As a result, England, the United States, and other common-law countries, such as Australia, ratified the Convention. Today, 57 states, including Russia, China, and India, are parties to the Hague Evidence Convention. In Switzerland, the Convention came into force in 1995.¹⁴ Switzerland considers the provisions of the Convention to be of a self-executing character. Hence, they are directly applicable in Switzerland and no implementing law is required.¹⁵

With respect to contracting states to the Hague Evidence Convention that are also members of the Hague Procedure Convention, the Hague Evidence Convention replaces Articles 8-16 of the Hague Procedure Convention.¹⁶ In relation to Switzerland, Articles 8-16 of the Hague Pro-

¹⁰ For a list of the countries that have ratified the Hague Procedure Convention, cf. http://www.hcch.net/index_en.php?act=conventions.status&cid=33 (date of use: 31 January 2013). South Africa, Botswana, Namibia, Nigeria, and Uganda are not members of the Hague Procedure Convention.

¹¹ See, amongst others, Meier AL *Die Anwendung des Haager Beweisübereinkommens in der Schweiz unter besonderer Berücksichtigung der Beweisaufnahme für U.S.-amerikanische Zivilprozesse* 1999 15.

¹² Cf. the preamble to the Hague Evidence Convention.

¹³ Permanent Bureau of the Hague Conference on Private International Law *Report on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (April 1989) http://www.hcch.net/upload/scrpt89e_20.pdf 8 (date of use: 31 January 2013). See also Amram PW *Explanatory Report on the 1970 Hague Evidence Convention* (1970) <http://www.hcch.net/upload/expl20e.pdf> 1 (date of use: 31 January 2013); Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 91 n. 90 *et seq.*; Meier AL *Die Anwendung des Haager Beweisübereinkommens in der Schweiz unter besonderer Berücksichtigung der Beweisaufnahme für U.S.-amerikanische Zivilprozesse* 1999 16; Swiss Federal Council *Botschaft betreffend Genehmigung von vier Übereinkommen im Bereich der internationalen Rechtshilfe in Zivil- und Handelssachen vom 8. September 1993* BBl 1993 1271.

¹⁴ For a list of the countries that have ratified the Hague Evidence Convention, see http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (date of use: 31 January 2013). Botswana, Namibia, Nigeria, and Uganda are not members of the Hague Evidence Convention. With regard to the status of South Africa, see para. III.B.1 below.

¹⁵ Meier AL *Die Anwendung des Haager Beweisübereinkommens in der Schweiz unter besonderer Berücksichtigung der Beweisaufnahme für U.S.-amerikanische Zivilprozesse* 1999 17.

¹⁶ Article 29 of the Hague Evidence Convention.

cedure Convention are still in force with regard to eleven states,¹⁷ while the Hague Evidence Convention applies to 56 states.

With regard to the 193 states recognised by the United Nations,¹⁸ 68 countries, or, put differently, 30% of the recognised states are covered by the Hague Evidence Convention and the Hague Procedure Convention. In this context, it is notable that the vast majority of the aforesaid 68 countries are located in Europe, and that, for instance, only four states in South America and four African countries acceded to the Hague Evidence Convention or the Hague Procedure Convention.¹⁹

Given the fact that the Hague Evidence Convention includes a more detailed regulation on cross-border taking of evidence in civil and commercial matters than the Hague Procedure Convention, the following deals first with the Hague Evidence Convention and then addresses the evidence-taking under the Hague Procedure Convention, thereby focusing on the main differences between the two conventions. A comprehensive treatise on the taking of evidence under the said conventions would by far exceed the scope of this thesis. The following two sub-chapters thus outline the main principles of evidence-taking based on the two conventions. These comments not only shed light on the conditions under which Switzerland renders judicial assistance based on the said conventions, but also serve as reference points for the development of basic principles for a convention on cross-border taking of evidence in civil and commercial matters between South Africa, Botswana, Namibia, Nigeria, and Uganda outlined in Chapter 6.

2. Scope of the Hague Evidence Convention

The scope of the Hague Evidence Convention is limited to the taking of evidence in “*civil or commercial matters*”.²⁰ The Convention does not, however, define this term.²¹ In order to enhance judicial assistance in evidence-taking in civil and commercial matters between the contracting states as much as possible, the notion should be interpreted extensively. In Switzerland, it is well established that it is the nature of the substantive claim that is crucial and not the

¹⁷ As per 6 February 2013: Austria, Belgium, Egypt, Japan, Suriname, Armenia, the Holy See, Kyrgyzstan, Lebanon, the Republic of Moldova, and Uzbekistan.

¹⁸ For the list of member states, cf. <http://www.un.org/en/members/index.shtml> (date of use: 31 January 2013).

¹⁹ Egypt, Morocco, Seychelles, and South Africa.

²⁰ Article 1(1) of the Hague Evidence Convention.

²¹ Swiss Federal Council *Botschaft betreffend Genehmigung von vier Übereinkommen im Bereich der internationalen Rechtshilfe in Zivil- und Handelssachen vom 8. September 1993* BBl 1993 1265.

type of proceedings or the name of the authority before which the proceedings are pending.²² Accordingly, proceedings for the collection of debts as well as bankruptcy proceedings are, amongst others, covered by the Convention, provided they include private law claims.²³ By contrast, tax or expropriation proceedings, for instance, do not fall within the scope of the Hague Evidence Convention, even if the relevant matters were, according to the laws of the requesting state, to be decided by a civil court.²⁴

Whether the term “*civil or commercial matters*” is to be interpreted according to the law of the requesting state, or the law of the requested state, or the laws of both states cumulatively, is controversial. To date, the Swiss Federal Court has left this question open.²⁵ It appears that, in practice, the qualification based on the law of the requested state prevails.²⁶ As a consequence, the interpretation of “*civil or commercial matters*” in the requested state may differ from that in the requesting state, which may result in the refusal by the requested state to execute a request for judicial assistance. To avoid such dismissal, and to achieve a more uniform application of the Convention amongst the contracting states, the term of “*civil or commercial mat-*

²² See, amongst others, Swiss Federal Council *Botschaft betreffend Genehmigung von vier Übereinkommen im Bereich der internationalen Rechtshilfe in Zivil- und Handelssachen vom 8. September 1993* BBl 1993 1266; Nobel P ‘Die Rechtshilfe in Zivilsachen im Lichte der Ratifikation der Haager Konvention von 1970 über die Beweisaufnahme im Ausland in Zivil- und Handelssachen’ 1995 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 75; Volken P ‘Vor Art. 11’ in Girsberger A *et al* (eds) *Zürcher Kommentar zum IPRG* 2004 147 n. 50; Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 94 n. 98; Markus AR ‘Neue Entwicklungen bei der internationalen Rechtshilfe in Zivil- und Handelssachen’ 2002 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 69; ZR 88 (1989) no. 23 consideration 8.

²³ BGE 96 III 65 consideration 1; BGE 94 III 37 consideration 2; Swiss Federal Council *Botschaft betreffend Genehmigung von vier Übereinkommen im Bereich der internationalen Rechtshilfe in Zivil- und Handelssachen vom 8. September 1993* BBl 1993 1266; Markus AR ‘Neue Entwicklungen bei der internationalen Rechtshilfe in Zivil- und Handelssachen’ 2002 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 69; Breitenmoser S ‘§ 23 Internationale Amts- und Rechtshilfe’ in Uebersax P *et al* (eds) *Ausländerrecht: Eine umfassende Darstellung der Rechtsstellung von Ausländerinnen und Ausländern in der Schweiz – von A(syl) bis Z(ivilrecht)* 2009 1222 n. 23.69.

²⁴ Volken P ‘Vor Art. 11’ in Girsberger A *et al* (eds) *Zürcher Kommentar zum IPRG* 2004 147 n. 49; Nobel P ‘Die Rechtshilfe in Zivilsachen im Lichte der Ratifikation der Haager Konvention von 1970 über die Beweisaufnahme im Ausland in Zivil- und Handelssachen’ 1995 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 75; VPB 49 (1985) no.16 79 *et seq.* See also Geiger R ‘Legal Assistance between States in Civil Matters’ in Bernhardt R (ed) *Encyclopedia of Public International Law Volume III* 194.

²⁵ Swiss Federal Council *Botschaft betreffend Genehmigung von vier Übereinkommen im Bereich der internationalen Rechtshilfe in Zivil- und Handelssachen vom 8. September 1993* BBl 1993 1266; Markus AR ‘Neue Entwicklungen bei der internationalen Rechtshilfe in Zivil- und Handelssachen’ 2002 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 70; Nobel P ‘Die Rechtshilfe in Zivilsachen im Lichte der Ratifikation der Haager Konvention von 1970 über die Beweisaufnahme im Ausland in Zivil- und Handelssachen’ 1995 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 75.

²⁶ Markus AR ‘Neue Entwicklungen bei der internationalen Rechtshilfe in Zivil- und Handelssachen’ 2002 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 70 with further references; Breitenmoser S ‘§ 23 Internationale Amts- und Rechtshilfe’ in Uebersax P *et al* (eds) *Ausländerrecht: Eine umfassende Darstellung der Rechtsstellung von Ausländerinnen und Ausländern in der Schweiz – von A(syl) bis Z(ivilrecht)* 2009 1221 n. 23.67.

ters” should be interpreted autonomously.²⁷ In this context, the Permanent Bureau of the Hague Conference on Private International Law stated the following:²⁸

- a The Commission considered it desirable that the words ‘civil or commercial matters’ should be interpreted in an autonomous manner, without reference exclusively either to the law of the requesting State or to the law of the requested State, or to both laws cumulatively.*
- b In the ‘grey area’ between private and public law, the historical evolution would suggest the possibility of a more liberal interpretation of these words. In particular, it was accepted that matters such as bankruptcy, insurance and employment might fall within the scope of this concept.*
- c In contrast, other matters considered by most of the States to fall within public law, for example tax matters, would not yet seem to be covered by the Conventions as a result of this evolution. (...).”*

Among the contracting states, it is disputed whether or not the Hague Evidence Convention has mandatory character. In this context, the Permanent Bureau of the Hague Conference on Private International Law formulated the following question: “*Must a State Party have recourse to the Convention on each occasion that it intends to take evidence that is located in another State Party?*”²⁹ The answer to this question is of importance with regard to a transfer of foreign evidence in cases where both the state of the trial court and the state, where the evidence is originally located, are members of the Hague Evidence Convention.³⁰ In the case of the exclusive character of the Convention, a contracting state that orders a witness residing in another contracting state to transfer evidence without the assistance of the latter state would violate the Hague Evidence Convention. As a result, the relevant evidence could only be obtained with the

²⁷ Cf. also Nobel P ‘Die Rechtshilfe in Zivilsachen im Lichte der Ratifikation der Haager Konvention von 1970 über die Beweisaufnahme im Ausland in Zivil- und Handelssachen’ 1995 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 75; Markus AR ‘Neue Entwicklungen bei der internationalen Rechtshilfe in Zivil- und Handelssachen’ 2002 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 70.

²⁸ Permanent Bureau of the Hague Conference on Private International Law *Report on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (April 1989) http://www.hcch.net/upload/scrip89e_20.pdf 7 (date of use: 31 January 2013).

²⁹ Permanent Bureau of the Hague Conference on Private International Law *The Mandatory/Non-mandatory Character of the Evidence Convention* (December 2008) <http://www.hcch.net/upload/wop/2008pd10e.pdf> 3 (date of use: 31 January 2013).

³⁰ Cf. Stadler A ‘Grenzüberschreitende Beweisaufnahmen in der Europäischen Union – die Zukunft der Rechtshilfe in Beweissachen’ in Schütze RA (ed) *Einheit und Vielfalt des Rechts: Festschrift für Reinhold Geimer zum 65. Geburtstag* 2002 1282. With regard to the transfer of foreign evidence, see Chapter 3.

permission of the state where the evidence is located and pursuant to the methods stipulated in the Convention.³¹

While contracting states following the civil-law tradition advocate the mandatory nature of the Hague Evidence Convention,³² most common-law countries reject the exclusive character of the Convention.³³ This difference in opinion has a lengthy history and culminated in the 1980s in the so-called “*Justizkonflikt*”, literally “justice conflict”, or, in this instance, jurisdiction conflict, between the United States and several European civil-law countries following the so-called *Aerospatiale*-case.³⁴ In this decision, the American court ruled that where a foreign litigant is involved in proceedings pending before a court in the United States, such court is allowed to apply the Federal Rules of Civil Procedure in enforcing a request for evidence and has not necessarily to abide by the judicial assistance route stipulated by the Hague Evidence Convention.³⁵ Like the vast majority of the civil-law countries, Switzerland considers the nature of

³¹ Permanent Bureau of the Hague Conference on Private International Law *The Mandatory/Non-mandatory Character of the Evidence Convention* (December 2008) <http://www.hcch.net/upload/wop/2008pd10e.pdf> 3 (date of use: 31 January 2013).

³² Amongst others, most of the member states of the European Community. In 2008, the Permanent Bureau of the Hague Conference on Private International Law invited states parties to express their view on whether the Hague Evidence Convention has mandatory or non-mandatory character. For the relevant questionnaire, see Permanent Bureau of the Hague Conference on Private International Law *Questionnaire of May 2008 Relating to the Hague Convention of 19 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Evidence Convention)* (May 2008) http://www.hcch.net/index_en.php?act=publications.details&pid=4298&dtid=33 (date of use: 31 January 2013). For the summary of responses to this questionnaire, see Permanent Bureau of the Hague Conference on Private International Law *Summary of Responses to the Questionnaire of May 2008 Relating to the Evidence Convention, with Analytical Comments (Summary and Analysis Document)* (January 2009) <http://www.hcch.net/upload/wop/2008pd13e.pdf> 24 *et seq.* (date of use: 31 January 2013). With regard to Switzerland, see Switzerland *Response of Switzerland to the Questionnaire of May 2008 Relating to the Hague Convention of 19 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (undated) <http://www.hcch.net/upload/wop/2008switzerland20.pdf> 19 (date of use: 31 January 2013).

³³ Amongst others, the United States and Australia. Cf. Permanent Bureau of the Hague Conference on Private International Law *Summary of Responses to the Questionnaire of May 2008 Relating to the Evidence Convention, with Analytical Comments (Summary and Analysis Document)* (January 2009) <http://www.hcch.net/upload/wop/2008pd13e.pdf> 24 *et seq.* (date of use: 31 January 2013). With regard to the position taken by South Africa, see para. III.B.1 below. Cf. also Permanent Bureau of the Hague Conference on Private International Law *The Mandatory/Non-mandatory Character of the Evidence Convention* (December 2008) <http://www.hcch.net/upload/wop/2008pd10e.pdf> 3 (date of use: 31 January 2013).

³⁴ *Société Nationale Industrielle Aerospatiale et al. v United District Court for the Southern District of Iowa*, 482 U.S. 522 (1987). Cf. ‘Supreme Court Decision in *Societe Nationale Industrielle Aerospatiale et al. v. United States District Court for the Southern District of Iowa* (Hague Evidence Convention; Extraterritorial Discovery in U.S. Courts)’ 1987 *International Legal Materials* 1021-1044.

³⁵ Albrecht CJC and Bühler CB ‘Switzerland’ in Campbell D and Cotter S (eds) *Serving process and obtaining evidence abroad* 1998 434. The view of the court of first instance was shared by the Court of Appeals. The Supreme Court also rejected the mandatory character of the Hague Evidence Convention. It stated, amongst other things, that the “*treaty may be viewed as an undertaking amongst sovereigns to facilitate discovery to which an American court should resort when it deems that course of action appropriate, after considering the situation of the parties before it as well as the interests of the concerned foreign states*”, ‘Supreme Court Decision in *Societe Nationale Industrielle Aerospatiale et al. v. United States District Court for the Southern District of Iowa* (Hague Evidence Convention; Extraterritorial Discovery in U.S. Courts)’ 1987 *International Legal Materials* 1027. For more on the “*Justizkonflikt*”, see, amongst others, Walther FMR ‘Erläuterungen zum

the Hague Evidence Convention as mandatory. As a consequence, when ratifying the Convention in 1995, Switzerland submitted a declaration to Article 1 of the Convention wherein it expressly stated the Convention's exclusivity.³⁶ In contrast, the Permanent Bureau of the Hague Conference on Private International Law has not taken a view on the question at hand, but merely encourages the contracting states to resolve the issue.³⁷

3. Forms of Evidence-taking under the Hague Evidence Convention

Under the Hague Evidence Convention, evidence can be obtained in three different ways, namely by means of a letter of request, through commissioners, or *via* diplomatic officers or consular agents. As has been mentioned earlier,³⁸ evidence-taking by letter of request constitutes, from the perspective of the requested state, active judicial assistance, while the gathering of evidence through commissioners, diplomatic officers and consular agents is to be qualified as passive judicial assistance.

Haager Übereinkommen über die Beweisaufnahme im Ausland in Zivil- und Handelssachen (HBÜ), no. 61 B E' in Walter G, Jametti Greiner M and Schwander I (eds) *Internationales Privat- und Verfahrensrecht: Texte und Erläuterungen Band 2* 1999 12 n. 23 et seqq.; Meier AL *Die Anwendung des Haager Beweisübereinkommens in der Schweiz unter besonderer Berücksichtigung der Beweisaufnahme für U.S.-amerikanische Zivilprozesse* 1999 46 et seqq.; Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 99 n. 112 et seqq.; Swiss Federal Council *Botschaft betreffend Genehmigung von vier Übereinkommen im Bereich der internationalen Rechtshilfe in Zivil- und Handelssachen vom 8. September 1993* BBl 1993 1281 et seqq.; Jagmetti Greiner M 'Neuerungen im internationalen Rechtshilfeverkehr der Schweiz' 1996 *Zeitschrift für Zivilprozeß International* 195 et seqq.; Schlosser P *EU-Zivilprozessrecht: EuGVVO, AVAG, VTVO MahnVO, BagatellVO, HZÜ, EuZVO, HBÜ, EuBVO* 2009 473 n. 1 et seqq. See also Rogers JM 'On the Exclusivity of the Hague Evidence Convention' in 1985-1986 *Texas International Law Journal* 441 et seqq.

³⁶ The wording of this declaration is as follows: "With regard to Article 1, Switzerland takes the view that the Convention applies exclusively to the Contracting States. Moreover, regarding the conclusions of the Special Commission which met in The Hague in April 1989, 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." For the text of this declaration, cf. http://www.hcch.net/index_en.php?act=status.comment&csid=561&disp=resdn (date of use: 31 January 2013). See also Swiss Federal Council *Botschaft betreffend Genehmigung von vier Übereinkommen im Bereich der internationalen Rechtshilfe in Zivil- und Handelssachen vom 8. September 1993* BBl 1993 1282, 1292 et seq., 1301 et seq.; Switzerland 'Brief of Government of Switzerland as Amicus Curiae in Support of Petitioners' 1986 *International Legal Materials* 1551 et seqq. See, however, Müller-Chen M 'Aus dem US-amerikanischen Discovery-Verfahren gewonnene Beweise im internationalen Zivilprozess- und Schiedsrecht in der Schweiz' in Gauch P, Werro F and Pichonnaz P (eds) *Mélanges en l'honneur de Pierre Tercier* 2008 941, who rejects the mandatory character of the Hague Evidence Convention and refers to Article 27(c) of the said Convention, which stipulates that its provisions shall not prevent a contracting state from permitting, by internal law or practice, methods of taking evidence other than those provided for in the Convention.

³⁷ Permanent Bureau of the Hague Conference on Private International Law *The Mandatory/Non-mandatory Character of the Evidence Convention* (December 2008) <http://www.hcch.net/upload/wop/2008pd10e.pdf> 7, 15 (date of use: 31 January 2013). See also Permanent Bureau of the Hague Conference on Private International Law *Conclusions and Recommendations of the Special Commission on the Practical Operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions* (February 2009) http://www.hcch.net/upload/wop/jac_concl_e.pdf 9 no. 53 (date of use: 31 January 2013).

³⁸ See above Chapter 2 para. V.D.1.

Given the foregoing differentiation, the following two subchapters distinguish between the taking of evidence based on a letter of request on the one hand, and that by means of commissioners, diplomatic officers and consular agents on the other. They elaborate on the content of a request for judicial assistance, the transmission of such request, its examination and execution, and the applicable law governing the execution of the request. Finally, the relation between a letter of request and pre-trial discovery procedure is addressed.

a) Letter of Request under Chapter 1 of the Hague Evidence Convention

Article 3 of the Hague Evidence Convention specifies the minimum content of a letter of request. Accordingly, such request must, amongst other things, specify the evidence to be obtained, as well as the witness to be questioned. With regard to the latter, it also has to include the relevant questions or a statement of the subject matter about which the person is to be examined. Where the production of documents is sought, the request must identify them.³⁹ These requirements shall ensure that the request is sufficiently specified and is not used for the purpose of so-called “fishing expeditions”.⁴⁰ It is crucial to provide the foreign authority, which examines the witness, with all the facts that are necessary for the questioning. From the perspective of the trial court, it is thus advisable not only to furnish the foreign authority, as stipulated in Article 3(1)(f) of the Hague Evidence Convention with either the questions or a statement of the subject matter, but with both cumulatively.

A special commission of the Hague Conference on International Private Law developed a model form for a letter of request, the use of which, however, is not mandatory.⁴¹ In Switzerland, the Federal Office of Justice published its own model form which is preferably used when dealing with Swiss authorities.⁴²

³⁹ Article 3(1)(d)-(g) of the Hague Evidence Convention.

⁴⁰ Walther FMR ‘Erläuterungen zum Haager Übereinkommen über die Beweisaufnahme im Ausland in Zivil- und Handelssachen (HBÜ), no. 61 b E’ in Walter G, Jametti Greiner M and Schwander I (eds) *Internationales Privat- und Verfahrensrecht: Texte und Erläuterungen Band 2* 1999 20 n. 40. For more on fishing expeditions, see the comments below regarding Article 23 of the Hague Evidence Convention.

⁴¹ Permanent Bureau of the Hague Conference on Private International Law *Conclusions and Recommendations of the Special Commission on the Practical Operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions* (February 2009) http://www.hcch.net/upload/wop/jac_concl_e.pdf 9 no. 54 (date of use: 31 January 2013). For the model form, see <http://www.hcch.net/upload/actform20e.pdf> (date of use: 31 January 2013). See also Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 25 (date of use: 31 January 2013).

⁴² For the model form, see *Muster eines internationalen Rechtshilfeersuches in Zivilsachen gemäss HBewUe 70* <http://www.rhf.admin.ch/rhf/de/home/rhf/muster.html> (date of use: 31 January 2013).

Letters of request have to be drafted “*in the language of the authority requested to execute or be accompanied by a translation into that language*”.⁴³ Requests addressed to Swiss authorities must be in German or French or Italian, or accompanied by a translation into one of these languages, depending on the part of Switzerland in which the requests are to be executed.⁴⁴ Consequently, letters of requests in English are not accepted in Switzerland.

Under Swiss law, letters of requests have to be issued by a judicial authority and not by a private individual.⁴⁵ This particularly applies in cases where evidence located in Switzerland has to be obtained for use in civil proceedings abroad where the evidence-taking is controlled by the parties. From the perspective of the litigant bearing the burden of proof, it is thus crucial that it is the trial court that issues the letter of request.

The requesting state has to transmit the letter of request *via* the so-called “*Central Authority*” of the requested state designated by the latter when ratifying the Convention.⁴⁶ Due to the fact that Switzerland is a federal republic consisting of 26 cantons,⁴⁷ Switzerland appointed 26 central authorities, that is, one central authority for each canton.⁴⁸ A letter of request has thus to be lodged with the central authority of the canton where the evidence to be obtained is located. Where the means of proof are situated in different cantons, a separate request for each canton has to be sent to the respective central authority. A letter of request, however, can also be lodged with the Federal Office of Justice⁴⁹ which forwards it to the competent central authority.

⁴³ Article 4(1) of the Hague Evidence Convention.

⁴⁴ Article 4(3)-(4) of the Hague Evidence Convention read in conjunction with the “*Declaration of Switzerland second and third paragraphs*”. For the wording of this declaration, see http://www.hcch.net/index_en.php?act=status.comment&csid=561&disp=resdn (date of use: 31 January 2013).

⁴⁵ Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 107 n. 138; Walther FMR ‘Erläuterungen zum Haager Übereinkommen über die Beweisaufnahme im Ausland in Zivil- und Handelssachen (HBÜ), no. 61 b E’ in Walter G, Jametti Greiner M and Schwander I (eds) *Internationales Privat- und Verfahrensrecht: Texte und Erläuterungen Band 2* 1999 16 n. 32; Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 24 (date of use: 31 January 2013). See also Article 2(1) of the Hague Evidence Convention which expressly mentions “*Letters of Request coming from a judicial authority of another Contracting State*”.

⁴⁶ Article 2 of the Hague Evidence Convention read in conjunction with Article 35(1) of the Hague Evidence Convention.

⁴⁷ 23 cantons and six half-cantons.

⁴⁸ See Article 24(2) of the Hague Evidence Convention read in conjunction with Switzerland *Declaration Re Articles 2 and 24* http://www.hcch.net/index_en.php?act=status.comment&csid=561&disp=resdn (date of use: 31 January 2013). For a list of central authorities in Switzerland under Article 2 of the Hague Evidence Convention, see http://www.hcch.net/index_en.php?act=authorities.details&aid=523 (date of use: 31 January 2013) as well as <http://www.rhf.admin.ch/rhf/de/home/zivil/behoerden/zentral.html> (date of use: 31 January 2013). In the vast majority of cantons, the court of second instance (“*Obergericht*”, “*Kantonsgericht*”, “*tribunal cantonal*”, “*tribunale di appello*”) acts as central authority.

⁴⁹ Article 24(1) of the Hague Evidence Convention read in conjunction with Switzerland *Declaration Re Articles 2 and 24* http://www.hcch.net/index_en.php?act=status.comment&csid=561&disp=resdn (date of use: 31 Jan-

ty.⁵⁰ From the perspective of the requesting state, such submission makes particular sense where evidence to be obtained in Switzerland is located in more than one canton.⁵¹ Where the letter of request is addressed to the wrong authority, the latter has to forward it to the competent authority.⁵² Requests of Swiss courts to obtain evidence in another contracting state do not have to be transmitted *via* the cantonal central authority, but can be sent directly to the central authority of the requested foreign state.⁵³

On receipt of the letter of request, the competent central authority examines the formal and substantive requirements of the request.⁵⁴ Where the central authority regards the request as non-compliant with the rules stipulated in the Hague Evidence Convention, it will notify the requesting state specifying the objections to the letter of request.⁵⁵ A letter of request may be refused where the lawsuit underlying the request is not civil or commercial in nature,⁵⁶ where it does not fulfil formal requirements,⁵⁷ if it is not drafted in the proper language, or if it does not include the required translation.⁵⁸ In addition, a request may be rejected in cases where its authenticity is unclear, where the execution of the request is not within the jurisdiction of the judiciary,⁵⁹ where the requested state considers that its sovereignty or security would be prejudiced,⁶⁰ or where the requested method of execution of the request is contrary to the law of the

uary 2013). See also Jagmetti Greiner M ‘Neuerungen im internationalen Rechtshilfeverkehr der Schweiz’ 1996 *Zeitschrift für Zivilprozeß International* 192 *et seq.*

⁵⁰ Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 24 (date of use: 31 January 2013); BGE 129 III 110 consideration 1.2.2.

⁵¹ Jagmetti Greiner M ‘Neuerungen im internationalen Rechtshilfeverkehr der Schweiz’ 1996 *Zeitschrift für Zivilprozeß International* 193.

⁵² Article 6 of the Hague Evidence Convention.

⁵³ Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 24 (date of use: 31 January 2013); Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 107 n. 137.

⁵⁴ See in this regard Walther FMR ‘Erläuterungen zum Haager Übereinkommen über die Beweisaufnahme im Ausland in Zivil- und Handelssachen (HBÜ), no. 61 b E’ in Walter G, Jagmetti Greiner M and Schwander I (eds) *Internationales Privat- und Verfahrensrecht: Texte und Erläuterungen Band 2* 1999 20 n. 40 *et seq.*

⁵⁵ Cf. Article 5 of the Hague Evidence Convention. See also Walther FMR ‘Erläuterungen zum Haager Übereinkommen über die Beweisaufnahme im Ausland in Zivil- und Handelssachen (HBÜ), no. 61 b E’ in Walter G, Jagmetti Greiner M and Schwander I (eds) *Internationales Privat- und Verfahrensrecht: Texte und Erläuterungen Band 2* 1999 22 n. 47.

⁵⁶ See para. II.B.2 above.

⁵⁷ Cf. Article 3 of the Hague Evidence Convention.

⁵⁸ See Article 4 of the Hague Evidence Convention.

⁵⁹ Cf. Article 12(1)(a) of the Hague Evidence Convention. This may, for instance, be the case where an amount of money has to be collected in Switzerland, and the litigant has to act by way of forcible execution, Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 28 (date of use: 31 January 2013).

⁶⁰ See Article 12(1)(b) of the Hague Evidence Convention. Swiss sovereignty may, for example, be violated where the court abroad ordered the use of compulsion in Switzerland, Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005)

requested state.⁶¹ Where a letter of request does not comply with formal or language requirements, the central authority should, before refusing the request, ask the requesting authority to rectify the request. The same holds true where the requested form of execution contravenes the law of the requested state. Here, the central authority should enquire whether the requesting state accepts the execution of the request carried out according to the rules of the requested state.⁶²

The examination of the letter of request by the central authority under Article 5 of the Hague Evidence Convention is of merely summary nature. In other words, the authority to which the central authority forwards the request for execution may again examine the request and refuse to execute the latter, if it considers the request as non-compliant with the Convention.⁶³ In Switzerland, the execution of a letter of request is carried out by the competent court of the canton in which the evidence is located. It is for each canton to designate the competent court, usually the single judge of the court of first instance.⁶⁴

At the request of the requesting state, the requested state lets the former know of the time and the venue where the proceedings for the taking of evidence will take place.⁶⁵ Given the prior authorisation of the competent central authority, members of the trial court may be present at

<http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 28 (date of use: 31 January 2013). The security of Switzerland may, amongst others, be affected where the evidence to be obtained includes secret information on military installations in Switzerland.

⁶¹ See Article 9(2) of the Hague Evidence Convention. Cf. also Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 28 (date of use: 31 January 2013); Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 108 n. 140 *et seq.*, 110 n. 148 *et seq.*; Amram PW *Explanatory Report on the 1970 Hague Evidence Convention* (1970) <http://www.hcch.net/upload/expl20e.pdf> 9 (date of use: 31 January 2013).

⁶² Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 28 (date of use: 31 January 2013). See also Article 9(1) of the Hague Evidence Convention.

⁶³ Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 109 n. 142; Meier AL *Die Anwendung des Haager Beweisübereinkommens in der Schweiz unter besonderer Berücksichtigung der Beweisaufnahme für U.S.-amerikanische Zivilprozesse* 1999 157 *et seq.*; BGE 129 III 111 consideration 1.2.3. See, however, Walther FMR 'Erläuterungen zum Haager Übereinkommen über die Beweisaufnahme im Ausland in Zivil- und Handelssachen (HBÜ), no. 61 b E' in Walter G, Jametti Greiner M and Schwander I (eds) *Internationales Privat- und Verfahrensrecht: Texte und Erläuterungen Band 2* 1999 22 n. 46, who maintains that the decision of the central authority that the request fulfills the formal and substantive requirements is binding for the judicial authority competent to execute the request.

⁶⁴ In the Canton of Zurich, for example, the so-called "Einzelrichter" (literally "single judge"), § 31 of the Law on Organisation of Courts and Authorities in Civil and Penal Proceedings of 10 May 2010 (LS 211.1) ("*Gesetz über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess (GOG)*"), [http://www2.zhlex.zh.ch/appl/zhlex_r.nsf/0/C9C6078FD1A80A6EC12577E1004794E5/\\$file/211.1_10.5.10_7_1.pdf](http://www2.zhlex.zh.ch/appl/zhlex_r.nsf/0/C9C6078FD1A80A6EC12577E1004794E5/$file/211.1_10.5.10_7_1.pdf) (date of use: 31 January 2013).

⁶⁵ Article 7 of the Hague Evidence Convention.

the execution of the letter of request.⁶⁶ Once the request is executed by the competent authority of the requested state, such authority transmits the documents establishing the request's execution to the requesting authority by the same channel that was used by the latter.⁶⁷

With regard to evidence-taking by videolink, a special commission of the Permanent Bureau of the Hague Conference on International Private Law concluded that such method is consistent with the framework of the Hague Evidence Convention.⁶⁸ Consequently, a letter of request can be executed by videoconference, provided the law of the requested state allows videolink evidence. According to the Federal Office of Justice in Switzerland, courts abroad, as well as foreign litigants and their counsel may participate by videoconference at a hearing of a witness located in Switzerland, provided the Swiss judge conducts the examination and is the only person who applies coercive measures.⁶⁹ Again, such participation requires the prior authorisation of the relevant cantonal central authority.⁷⁰

The execution of a letter of request is usually governed by the *lex fori*,⁷¹ that is, in Switzerland

⁶⁶ Article 8 of the Hague Evidence Convention. Cf. also Switzerland *Declaration Re Article 8* http://www.hcch.net/index_en.php?act=status.comment&csid=561&disp=resdn (date of use: 31 January 2013). For a list of the competent Swiss authorities under Article 8 of the Hague Evidence Convention, cf. http://www.hcch.net/index_en.php?act=authorities.details&aid=782 (date of use: 31 January 2013).

⁶⁷ Article 13(1) of the Hague Evidence Convention. See also Article 13(2) of the Hague Evidence Convention for cases where a request was not executed. According to the Federal Office of Justice in *Response of Switzerland to the Questionnaire Relating to the Hague Convention of 18 March 1970 on the Taking of Evidence in Civil or Commercial Matters* (8 October 2003) http://www.hcch.net/upload/wop/lse_20ch.pdf 2 no. 8 (date of use: 31 January 2013), letters of request in Switzerland are usually executed within one to three months.

⁶⁸ Permanent Bureau of the Hague Conference on Private International Law *The Taking of Evidence by Videolink Under the Hague Evidence Convention* (December 2008) <http://www.hcch.net/upload/wop/2008pd06e.pdf> 11 no. 1 (date of use: 31 January 2013). According to the special commission, the taking of evidence by videolink raises a few new questions regarding the interaction of the law of the requested state and the law of the location of the participants to the videoconference. In the opinion of the commission, such issues are to be solved based on the law of the requested state.

⁶⁹ Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 36 (date of use: 31 January 2013). See also Federal Office of Justice *Response of Switzerland to the Questionnaire Relating to the Hague Convention of 18 March 1970 on the Taking of Evidence in Civil or Commercial Matters* (8 October 2003) http://www.hcch.net/upload/wop/lse_20ch.pdf 3 no. 11 (date of use: 31 January 2013). For the relevant questionnaire, see Permanent Bureau of the Hague Conference on Private International Law *Questionnaire Relating to the Hague Convention of 19 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (August 2003) http://www.hcch.net/upload/wop/lse_pd04e.pdf (date of use: 31 January 2013). Cf. also Chapter 2 paras. IV.B.2.a) and IV.B.2.c).

⁷⁰ Federal Office of Justice *International Judicial Assistance in Civil Matters* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 28 (date of use: 31 January 2013). Cf. also Switzerland *Response of Switzerland to the Questionnaire of May 2008 Relating to the Hague Convention of 19 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (undated) <http://www.hcch.net/upload/wop/2008switzerland20.pdf> 25 (date of use: 31 January 2013). Here, it was stated that a hearing by videolink always constitutes a "special method" under Article 9 of the Hague Evidence Convention. For more on the taking of evidence by videolink, see Chapter 3 para. V.C.1.

⁷¹ Article 9(1) of the Hague Evidence Convention.

by the Swiss Civil Procedure Code.⁷² This particularly holds true for measures of compulsion to be applied on Swiss soil.⁷³ Where, however, the requesting state asks for the application of its own law, the requested state applies such law, unless it is incompatible with its own rules, or where the application of that law is impossible due to practical difficulties.⁷⁴ With regard to “incompatible”, Amram stated the following:⁷⁵

“To be ‘incompatible’ with the internal law of the State of execution does not mean ‘different’ from the internal law. It means that there must be some constitutional inhibition or some absolute statutory prohibition. No Civil Law delegation suggested that his country had constitutional or statutory provisions which would prevent the examination of witnesses and the preparation of the transcript of the testimony ‘Common Law style’.”

The same applies with regard to “impossible”. According to Amram:

“It is not sufficient for the foreign practice to be ‘difficult’ to administer or ‘inconvenient’; compliance must be truly ‘impossible’.”

Under Swiss law, the cross-examination of a witness residing in Switzerland is, for instance, admissible, provided the Swiss judge remains in control of the interrogation.⁷⁶ In this context, it has to be kept in mind that the application of the law of the requesting state instead of the *lex fori* shall prevent the evidence obtained through international judicial assistance from being of merely limited probative value, or even being inadmissible in the proceedings before the trial court.⁷⁷

In the sense of a most-favoured-nation clause, the witness requested to give evidence may not only invoke the privileges under the law of the requested state, but also those of the requesting

⁷² Since 1 January 2011, Switzerland has uniform rules on civil procedure which apply to all 26 cantons including half-cantons. Before 2011, each canton had its own civil procedure law. See also Article 11(1) of the Swiss Private International Law Act of 18 December 1987, SR 291; “*Bundesgesetz über das Internationale Privatrecht (IPRG)*”). According to this provision, Swiss authorities apply Swiss law when rendering international judicial assistance.

⁷³ Article 10(1) of the Hague Evidence Convention.

⁷⁴ Article 9(2) of the Hague Evidence Convention. See also Article 3(1)(i) of the Hague Evidence Convention which provides that a letter of request shall specify any special method or procedure to be followed under Article 9 of the said Convention.

⁷⁵ Amram PW *Explanatory Report on the 1970 Hague Evidence Convention* (1970) <http://www.hcch.net/upload/expl20e.pdf> 11 (date of use: 31 January 2013).

⁷⁶ Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 27 (date of use: 31 January 2013); Walther FMR ‘Erläuterungen zum Haager Übereinkommen über die Beweisaufnahme im Ausland in Zivil- und Handelssachen (HBÜ), no. 61 b E’ in Walter G, Jametti Greiner M and Schwander I (eds) *Internationales Privat- und Verfahrensrecht: Texte und Erläuterungen Band 2* 1999 27 n. 56.

⁷⁷ See in this regard, Chapter 2 para. V.D.4.

state.⁷⁸ In the second case, the privileges have to be specified in the letter of request, or they must be otherwise confirmed by the requesting state.⁷⁹ The privileges, however, may be claimed not only by the requesting state, but also by the relevant witness.⁸⁰

As a general rule, the requested state cannot charge any costs for the execution of a letter of request. In cases, however, where fees for experts and/or interpreters incur, the requested state may claim compensation for such expenses. The same applies to costs occasioned by the use of a special procedure requested by the requesting state under Article 9(2) of the Hague Evidence Convention.⁸¹

According to Article 23 of the Hague Evidence Convention, a contracting state may declare “that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries”. *Ratio legis* of this provision is to prevent so-called “fishing expeditions”, that is, unspecified requests for the production of documents as known in the process of collecting evidence in the United States. To put it differently, the said provision protects the requested states and foreign witnesses against the unlimited search for or discovery of documents.⁸² Having said this, discovery proceedings, which require specified requests for the production of documents, do not fall under the said provision.

In contrast to American law, not only the laws of countries sharing the civil-law tradition, including Switzerland, but also common-law countries, such as England, South Africa, Botswana, Namibia,⁸³ Nigeria, and Uganda, stipulate stricter requirements for the specification of facts

⁷⁸ Article 11(1) of the Hague Evidence Convention. A declaration as stipulated by Article 11(2) of the Hague Evidence Convention has not been given by Switzerland. For more on the right of witnesses to refuse to give evidence in Switzerland, South Africa, Botswana, Namibia, Nigeria, and Uganda, see Chapter 5 paras. II.B.3, II.C.2, III.A.2, IV.A.2, V.A.2, VI.A.2, and VII.A.2.

⁷⁹ Cf. Articles 3(2) and 11(1)(b) of the Hague Evidence Convention.

⁸⁰ Amram PW *Explanatory Report on the 1970 Hague Evidence Convention* (1970) <http://www.hcch.net/upload/expl20e.pdf> 14 (date of use: 31 January 2013).

⁸¹ For instance where a civil-law judge had to appoint a commissioner who chairs the cross-examination of a witness. Cf. Article 14(1)-(2) of the Hague Evidence Convention.

⁸² Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 134 n. 213 *et seqq.*; Meier AL *Die Anwendung des Haager Beweisübereinkommens in der Schweiz unter besonderer Berücksichtigung der Beweisaufnahme für U.S.-amerikanische Zivilprozesse* 1999 134 *et seqq.*; Beckmann R ‘Das Haager Beweisübereinkommen und seine Bedeutung für die Pre-Trial Discovery’ 1990 *Praxis des Internationalen Privat- und Verfahrensrechts* 203; Swiss Federal Council *Botschaft betreffend Genehmigung von vier Übereinkommen im Bereich der internationalen Rechtshilfe in Zivil- und Handelssachen vom 8. September 1993* BBl 1993 1297; BGE 132 III 296; ZR 104 (2005) no. 49 consideration 4; ZR 101 (2002) no. 84 consideration 3. See also Nobel P ‘Die Rechtshilfe in Zivilsachen im Lichte der Ratifikation der Haager Konvention von 1970 über die Beweisaufnahme im Ausland in Zivil- und Handelssachen’ 1995 *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 78; decision of the Swiss Federal Court 4A_399/2007 of 4.12.2007 consideration 5.1; decision of the High Court of the Canton of Zurich NV040009 of 16 November 2004 consideration 4, 4.1.

⁸³ With regard to the hybrid system adopted by South Africa, Botswana, and Namibia, see Chapter 2 para. IV.B.2 above.

and evidence in civil litigation and do not allow “fishing expeditions”.⁸⁴ Under Swiss law, litigants have, *inter alia*, to specify the documents proffered in their pleadings as evidence by indicating the type and content of the documents. Whether the date of the document, its actual content, or the individual who drafted the document has to be indicated depends on the facts of the particular case. In any event, the person from whom the document is requested must be in a position to determine which document is required.⁸⁵

In the light of the above, Switzerland has made a declaration relating to Article 23 of the Hague Evidence Convention.⁸⁶ This declaration requires a letter of request to specify clearly the documents to be obtained from the witness in Switzerland, and the purpose for which the documents are requested. Letters of request, which have no direct and necessary link with the proceedings pending before the trial court and/or that require the witness to produce documents other than those mentioned in the request, will not be executed by the Swiss authorities. This holds particularly true for requests wherein the witness is asked to indicate what documents relating to the case are or were under his control.⁸⁷ Having said this, Swiss authorities do not generally refuse the execution of letters of request relating to pre-trial discovery proceedings, but only requests that do not specify the documents to be produced and the purpose for such production.⁸⁸

⁸⁴ For more on discovery in South Africa, Botswana, Namibia, Nigeria, and Uganda, see Chapter 5 paras. III.B, IV.B, V.B, VI.B, and VII.B.

⁸⁵ See, amongst others, Leuenberger C ‘Art. 221’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1269 n. 53. Cf. also Articles 221(1)(e) and 222(2) of the Swiss Civil Procedure Code.

⁸⁶ Switzerland *Declaration Re Article* 23
http://www.hcch.net/index_en.php?act=status.comment&csid=561&disp=resdn (date of use: 31 January 2013).

⁸⁷ The extent of the reservation made by Switzerland is in line with the recommendations of the Permanent Bureau of the Hague Conference on International Private Law towards contracting states that made a general declaration under Article 23 of the Hague Evidence Convention. Such non-particularised declarations refuse all requests relating to pre-trial discovery proceedings, irrespective of whether the requests include fishing expeditions or not. The Permanent Bureau recommended such states to revisit their declarations by limiting the latter’s scope accordingly. See in this regard, Permanent Bureau of the Hague Conference on Private International Law *Conclusions and Recommendations Adopted by the Special Commission the [sic] Practical Operation of the Hague Apostille, Evidence and Service Conventions* (October/November 2003) http://www.hcch.net/upload/wop/lse_concl_e.pdf 8 (date of use: 31 January 2013).

⁸⁸ Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 30 (date of use: 31 January 2013); Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 138 n. 224; Meier AL *Die Anwendung des Haager Beweisübereinkommens in der Schweiz unter besonderer Berücksichtigung der Beweisaufnahme für U.S.-amerikanische Zivilprozesse* 1999 140 *et seq.*; Jagmetti Greiner M ‘Neuerungen im internationalen Rechtshilfeverkehr der Schweiz’ 1996 *Zeitschrift für Zivilprozeß International* 205 *et seq.*; Swiss Federal Council *Botschaft betreffend Genehmigung von vier Übereinkommen im Bereich der internationalen Rechtshilfe in Zivil- und Handelssachen vom 8. September 1993* BBl 1993 1299 *et seq.*; decision of the Swiss Federal Court 4A_399/2007 of 4.12.2007 consideration 5.1; BGE 132 III 297; decision of the High Court of Zurich NV040009 of 16 November 2004 consideration 4.2, 4.4. Cf. also Permanent Bureau of the

b) Application under Chapter 2 of the Hague Evidence Convention

Unlike in the case of a letter of request,⁸⁹ the Hague Evidence Convention does not include a provision that deals particularly with the content of an application under its Chapter 2 to obtain evidence through a diplomatic officer, consular agent, or commissioner. Only Article 21(b)-(c) of the Convention contains some requirements as to the application's content.⁹⁰ In Switzerland, the Federal Office of Justice published a list regarding the requirements for content of an application under Chapter 2 of the Convention. Such list, includes, amongst other things, a brief description of the nature and subject matter of the proceedings, the name and addresses of the persons involved, the form of the intended procedural formalities, as well as a date for the requested taking of evidence.⁹¹ Where the evidence is to be taken through a commissioner,⁹² the decision of the trial court appointing the commissioner has to be attached to the application.⁹³

Neither the Hague Conference on Private International Law nor the competent Swiss authority developed a model form for an application under Chapter 2 of the Hague Evidence Convention. Unless the witness domiciled in Switzerland is a national of the requesting state, the application must be drafted in German, French, or Italian, depending on the part of Switzerland in which the application is to be executed, or it has to be accompanied by a translation into one of these languages.⁹⁴

An application for the taking of evidence under Chapter 2 has to be transmitted *via* the competent cantonal central authority. The Federal Office of Justice recommends that, before sending such an application, written confirmation is requested from the witness residing in Switzerland

Hague Conference on Private International Law *Report on the Work of the Special Commission of May 1985 on the Operation of the Convention* (September 1986) http://www.hcch.net/upload/srpt85e_20.pdf 6 *et seq.* (date of use: 31 January 2013).

⁸⁹ See Article 3 of the Hague Evidence Convention.

⁹⁰ Regarding the language of the application, the legal representation of the witness, as well as the fact that the latter is not compelled to appear before the foreign authority or to give evidence.

⁹¹ Federal Office of Justice *Conditions for a Commissioner or Diplomatic or Consular Officer to Obtain Evidence in Switzerland* (June 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0048.File.tmp/mb-a17-e.pdf> 1 *et seq.* (date of use: 31 January 2013); Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 32 *et seq.* (date of use: 31 January 2013). With regard to the date for the evidence-taking, the Federal Office of Justice recommends that the application should be submitted two months before the proposed date.

⁹² Article 17 of the Evidence Convention.

⁹³ Federal Office of Justice *Conditions for a Commissioner or Diplomatic or Consular Officer to Obtain Evidence in Switzerland* (June 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0048.File.tmp/mb-a17-e.pdf> 2 (date of use: 31 January 2013).

⁹⁴ Article 21(b) of the Hague Evidence Convention. See in this regard also Switzerland *Declaration Re Article 4 second and third paragraphs* http://www.hcch.net/index_en.php?act=status.comment&csid=561&disp=resdn (date of use: 31 January 2013).

asserting that “it is aware that it is cooperating of its own accord, that it knows it cannot be subjected to any coercive measures, that it cannot be forced to participate or to appear and that it has the right to invoke an exemption or a prohibition to give evidence provided for by the law of the State addressed or of the State of origin”.⁹⁵ This is in order to avoid unnecessary applications in cases where the witness is not willing to collaborate.⁹⁶ Switzerland has not made a declaration as stipulated in Article 18(1) of the said Convention. Consequently, a witness residing in Switzerland cannot be compelled to cooperate with diplomatic officers, consular agents, or commissioners.

Where evidence in Switzerland is to be taken under Chapter 2 of the Hague Evidence Convention, a prior authorisation by the Federal Office of Justice is required.⁹⁷ In order to expedite the process, it is advisable not only to transmit the application to the competent cantonal authority but, at the same time, to send a copy to the Federal Office of Justice.⁹⁸ Applications under Chapter 2 do not have to be filed by a judicial authority. Here, it is sufficient for the application to be submitted by a litigant or his counsel, provided a power of attorney from the litigant or an authorisation by the trial court is attached.⁹⁹

The foregoing comments on the examination of a letter of request apply *mutatis mutandis* to applications under Chapter 2 of the Hague Evidence Convention.¹⁰⁰ However, one has to bear in mind that, unlike in the case of a letter of request, the application at hand also requires the

⁹⁵ Federal Office of Justice *Conditions for a Commissioner or Diplomatic or Consular Officer to Obtain Evidence in Switzerland* (June 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0048.File.tmp/mb-a17-e.pdf> 2 (date of use: 31 January 2013). See also Article 21(c) of the Hague Evidence Convention.

⁹⁶ Federal Office of Justice *Conditions for a Commissioner or Diplomatic or Consular Officer to Obtain Evidence in Switzerland* (June 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0048.File.tmp/mb-a17-e.pdf> 2 (date of use: 31 January 2013).

⁹⁷ See Articles 15(2), 16(2), and 17(2) of the Hague Evidence Convention read in conjunction with Switzerland *Declaration Re Articles 15, 16 and 17* http://www.hcch.net/index_en.php?act=status.comment&csid=561&disp=resdn (date of use: 31 January 2013). For the competent Swiss authorities under Articles 15-17 of the Hague Evidence Convention, see also http://www.hcch.net/index_en.php?act=authorities.details&aid=776 (date of use: 31 January 2013).

⁹⁸ Federal Office of Justice *Conditions for a Commissioner or Diplomatic or Consular Officer to Obtain Evidence in Switzerland* (June 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0048.File.tmp/mb-a17-e.pdf> 2 (date of use: 31 January 2013); Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 32 (date of use: 31 January 2013). For the aspects the Federal Office of Justice takes into consideration when deciding whether to grant an application under Chapter 2 of the Hague Evidence Convention, see Jagmetti Greiner M ‘Neuerungen im internationalen Rechtshilfeverkehr der Schweiz’ 1996 *Zeitschrift für Zivilprozeß International* 202 *et seq.*

⁹⁹ Federal Office of Justice *Conditions for a Commissioner or Diplomatic or Consular Officer to Obtain Evidence in Switzerland* (June 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0048.File.tmp/mb-a17-e.pdf> 2 (date of use: 31 January 2013); Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 32 (date of use: 31 January 2013).

¹⁰⁰ See para. II.B.3.a).

authorisation of the Federal Office of Justice. Once the competent cantonal central authority has examined the application, it forwards it to the Federal Office of Justice, thereby indicating whether or not it supports the application and, if so, whether certain accompanying conditions have to be taken.¹⁰¹ Where the requirements of Article 21(b)-(c) of the Convention are met, the authorisation by the Federal Office of Justice is granted, provided an advance on procedural costs is paid by the litigant requesting the evidence-taking on Swiss soil.¹⁰² As the Federal Office of Justice has to give notice of its decision on the granting of the authorisation, and such decision has usually to be served abroad by means of international judicial assistance, the applicant is advised to nominate a domicile in Switzerland for the purpose of such notification.¹⁰³ Where an application under Chapter 2 of the Convention has not been granted by the relevant Swiss authorities, the requesting state may seek the taking of evidence in Switzerland through a letter of request.¹⁰⁴

Unlike in the case of a letter of request, it is not a Swiss court that takes the evidence in Switzerland, but a diplomatic officer, consular agent, or commissioner. In the absence of any conditions laid down in accordance with Article 19 of the Hague Evidence Convention, neither the competent cantonal central authority, nor the Federal Office of Justice is involved in the execution of the application. It is also the diplomatic officer, consular agent, or commissioner who, again without the assistance of any Swiss authority, transmits the results of the evidence-taking to the requesting state.

Chapter 2 of the Hague Evidence Convention includes two methods for the taking of evidence abroad, on the one hand, the evidence-taking by a diplomatic officer or consular agent, and, on

¹⁰¹ Federal Office of Justice *Conditions for a Commissioner or Diplomatic or Consular Officer to Obtain Evidence in Switzerland* (June 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0048.File.tmp/mb-a17-e.pdf> 1 (date of use: 31 January 2013). For the accompanying conditions, see Article 19 of the Hague Evidence Convention. Such conditions may, for instance, include the time or place of the evidence-taking, or the presence of a representative of the competent cantonal central authority or the Federal Office of Justice during the examination of the witness.

¹⁰² According to the Federal Office of Justice, such advance payment may range from CHF 100 to CHF 5,000 (now presumably CHF 7,000), depending on the amount in controversy and the complexity of the case. See in this regard Federal Office of Justice *Conditions for a Commissioner or Diplomatic or Consular Officer to Obtain Evidence in Switzerland* (June 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0048.File.tmp/mb-a17-e.pdf> 1 (date of use: 31 January 2013). Cf. also Article 5 read in conjunction with Article 13 of the Ordinance on Costs and Reimbursements in Administrative Proceedings of 10 September 1969, SR 172.041.0 (“*Verordnung über Kosten und Entschädigungen im Verwaltungsverfahren*”). Cf. in this regard <http://www.admin.ch/ch/d/sr/1/172.041.0.de.pdf> (date of use: 31 January 2013).

¹⁰³ Federal Office of Justice *Conditions for a Commissioner or Diplomatic or Consular Officer to Obtain Evidence in Switzerland* (June 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0048.File.tmp/mb-a17-e.pdf> 2 (date of use: 31 January 2013). For more on the service of process, see Chapter 3 para. V.K.

¹⁰⁴ Article 22 of the Hague Evidence Convention.

the other, that through a commissioner. A diplomatic officer or consular agent representing the requesting state in Switzerland may on Swiss soil, within the area where he exercises his diplomatic or consular functions, take the evidence of nationals of the requesting state, of Switzerland, or a third state in aid of proceedings pending in the requesting state, provided the Federal Office of Justice has given its prior authorisation.¹⁰⁵

By contrast Article 17 of the Hague Evidence Convention on evidence-taking through commissioners does not distinguish between witnesses having the nationality of the requesting state and those having another nationality. In practice, the individual acting as commissioner is usually nominated by the trial court. In the absence of such an appointment, however, it is possible that the commissioner is nominated by the relevant cantonal central authority.¹⁰⁶ In Switzerland, commissioners appointed under Article 17 of the Hague Evidence Convention are mostly common-law counsel who take evidence for the benefit of civil proceedings pending in a common-law country.¹⁰⁷ Trial courts in countries following the civil-law tradition prefer, as mentioned earlier,¹⁰⁸ to obtain foreign evidence by means of letters of request.

When executing an application under Chapter 2 of the Hague Evidence Convention, the diplomatic officer, consular agent, or commissioner applies the law of the requesting state, provided the manner stipulated by such law is not contradictory to the permission of the competent central authority or the Federal Office of Justice and is not forbidden by the law of the requested state. This particularly holds true for the kinds of evidence such person may take.¹⁰⁹ A diplomatic officer, consular agent, or commissioner, however, is not allowed to use any coercive

¹⁰⁵ Articles 15-16 of the Hague Evidence Convention read in conjunction with Switzerland *Declaration Re Articles 15, 16 and 17* http://www.hcch.net/index_en.php?act=status.comment&csid=561&disp=resdn (date of use: 31 January 2013). With regard to the evidence-taking by diplomatic officers or consular agents, the Hague Evidence Convention distinguishes between two different configurations, depending on whether or not the relevant witness has the same nationality as the requesting state. The difference between Article 15 (witness has nationality of requesting state) and Article 16 of the said Convention (witness has nationality of a third country) is, that in the first case, such evidence-taking only requires a special authorisation of the requested state, if the latter made a respective declaration when ratifying the Convention. By contrast, under Article 16, evidence may merely be taken by a diplomatic officer or consular agent, if the requested state has given its prior permission. Since Switzerland not only made a respective declaration in relation to Article 16 of the Hague Evidence Convention, but also with regard to Article 15, the requirements for the taking of evidence by diplomatic officers or consular agents on Swiss territory under the said provisions are the same.

¹⁰⁶ Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 123 n. 181. See also Amram PW *Explanatory Report on the 1970 Hague Evidence Convention* (1970) <http://www.hcch.net/upload/exp120e.pdf> 20 (date of use: 31 January 2013). According to Amram, a commissioner may not be appointed by a private authority or a non-judicial authority, for instance by a consular agent.

¹⁰⁷ Cf. also Walther FMR 'Erläuterungen zum Haager Übereinkommen über die Beweisaufnahme im Ausland in Zivil- und Handelssachen (HBÜ), no. 61 b E' in Walter G, Jametti Greiner M and Schwander I (eds) *Internationales Privat- und Verfahrensrecht: Texte und Erläuterungen Band 2* 1999 30 n. 68.

¹⁰⁸ See in this regard Chapter 2 para. V.E.

¹⁰⁹ Article 21(a), (d) of the Hague Evidence Convention.

measures in Switzerland, nor can he apply to any Swiss authority for assistance to obtain evidence by compulsion.¹¹⁰ As a consequence, evidence located in Switzerland can only be taken based on Articles 15-17 of the Hague Evidence Convention, if the witness voluntarily cooperates. In Switzerland, the cross-examination of a witness on Swiss soil by the counsel of the litigants for the benefit of foreign proceedings is regarded as compatible with Swiss law. In this context, the Federal Office of Justice suggests two approaches. On the one hand, the appointment of a sole commissioner who chairs the evidence-taking and ensures that the examination by the litigants' counsel is carried out in accordance with Swiss law (that is, no coercive measures, and reminder of exemptions or of any prohibition from giving evidence), and, on the other, the nomination of each party's counsel as commissioner. While in the first case, only one authorisation is granted by the Federal Office of Justice, permission is given to each counsel in the second case.¹¹¹

As in the case of a letter of request, a witness examined under Chapter 2 of the Hague Evidence Convention may invoke the privilege to refuse to give evidence under the law of the requested state, as well as that of the requesting state.¹¹²

C. Taking of Evidence based on the Hague Procedure Convention

1. Scope of the Hague Procedure Convention

Like the Hague Evidence Convention, the Hague Procedure Convention applies to “*civil or commercial matters*”.¹¹³ As has been mentioned earlier, the Hague Evidence Convention was intended to renew the provisions of the Hague Procedure Convention on evidence-taking in civil and commercial matters and was therefore based on the Hague Procedure Convention.¹¹⁴ With regard to both conventions, the notion of “*civil or commercial matters*” should therefore

¹¹⁰ See Articles 15(1), 16(1), 17(1), 18(1), and 21(a) of the Hague Evidence Convention. As mentioned earlier, Switzerland has not made a declaration under Article 18(1) of the Hague Evidence Convention.

¹¹¹ Federal Office of Justice *Conditions for a Commissioner or Diplomatic or Consular Officer to Obtain Evidence in Switzerland* (June 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0048.File.tmp/mb-a17-e.pdf> 2 (date of use: 31 January 2013); Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 32 (date of use: 31 January 2013).

¹¹² Article 21(e) read in conjunction with Article 11(1) of the Hague Evidence Convention. Regarding the advantages and disadvantages of the different methods under Chapter 1 and Chapter 2 of the Hague Evidence Convention, see Chapter 2 para. V.D above.

¹¹³ See Article 8 of the Hague Procedure Convention whose wording is almost identical with Article 1(1) of the Hague Evidence Convention.

¹¹⁴ Cf. para. II.B.1 above.

be interpreted in the same manner. The comments on “*civil or commercial matters*” made in the context of the Hague Evidence Convention thus apply here accordingly.¹¹⁵

Compared to the Hague Evidence Convention, the Hague Procedure Convention only provides for one method for the taking of evidence, namely by means of letter of request.

2. Taking of Evidence based on a Letter of Request

The Hague Procedure Convention does not contain any provisions specifying the (minimum) content of a letter of request. In Switzerland, the Federal Office of Justice published a model form of a letter of request under the Hague Procedure Convention which is preferably used for requests to be executed on Swiss soil. According to this model form, the request should, amongst other things, contain information on the requesting judicial authority, the litigants, the subject matter of the lawsuit, and on the evidence to be obtained in Switzerland. In addition, the name and address of the witness to be examined, and the questions to be put to him should be included in the request, as well as any special method or procedure to be followed by the relevant Swiss authorities.¹¹⁶ A letter of request has to be written in the language of the canton where the evidence is located, or it must be accompanied by a certified translation into that language.¹¹⁷

A letter of request must be issued by a judicial authority and not by a private individual.¹¹⁸ The requesting state sends the request to its consul in Switzerland, who then transmits it to the Federal Office of Justice which, in turn, forwards the request to the competent cantonal authority.¹¹⁹ This procedure also applies to a letter of request wherein a Swiss court asks for judicial

¹¹⁵ See para. II.B.2 above. Cf. also Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 9 (date of use: 31 January 2013).

¹¹⁶ For the model form, see <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0039.File.tmp/must-HUe54-d.pdf> (date of use: 31 January 2013).

¹¹⁷ Article 10 of the Hague Procedure Convention. Cf. also Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 26 (date of use: 31 January 2013); Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 90 n. 87.

¹¹⁸ Article 8 of the Hague Procedure Convention. See also Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 26 (date of use: 31 January 2013).

¹¹⁹ Article 9(1) of the Hague Procedure Convention. Cf. also Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 87 n. 75 *et seq.*; VPB 49 (1985) no.16 81; Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 13 (date of use: 31 January 2013).

assistance from another contracting state. Accordingly, the trial court forwards the request to the Federal Office of Justice, which sends it to the consul representing Switzerland in the requested state. The Swiss consul then transmits the request to the competent foreign authority.¹²⁰

The foregoing comments on the grounds for refusal of a request under Chapter 1 of the Hague Evidence Convention apply *mutatis mutandis* to a letter of request based on the Hague Procedure Convention.¹²¹ If the authority, to which the letter of request was sent, is not competent to execute it, the request has to be automatically forwarded to the competent authority of the requested state.¹²²

A letter of request may be executed either by the competent authority of the requested state, or by a diplomatic officer or consular agent of the requesting state.¹²³ The latter, however, requires the conclusion of a relevant agreement between the requesting and the requested state, or that the latter does not object to an execution through diplomatic officers or consular agents. To date, Switzerland has not entered into any such treaty and does not, as a general principle, accept the aforesaid individuals taking evidence on Swiss soil.¹²⁴ Nationals of the requesting state, however, may voluntarily make declarations in the diplomatic or consular representations of the requesting state in Switzerland.¹²⁵

Under Swiss law, a letter of request is executed by the competent cantonal authority in whose jurisdiction the evidence to be taken is located, usually by a single judge of the court of first instance.¹²⁶

The competent authority of the requested state generally applies its own law when executing a letter of request. This holds particularly true for the use of compulsion.¹²⁷ In Switzerland, the

¹²⁰ Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 87 n. 75 *et seq.*

¹²¹ Article 11(3) of the Hague Procedure Convention. See also para. II.B.3.a). Cf. also Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 91 n. 86; VPB 49 (1985) no.16 88.

¹²² Article 12 of the Hague Procedure Convention.

¹²³ See Articles 14-15 of the Hague Procedure Convention.

¹²⁴ Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 35 (date of use: 31 January 2013); VPB 49 (1985) no.16 91. See also in this regard Article 5(j) of the Vienna Convention on Consular Relations of 24 April 1963 (“Vienna Consular Convention”). According to this provision, a consular agent may execute letters rogatory or commissions to take evidence for the courts of the sending state in accordance with international agreements in force or, in the absence of such agreements, in any other manner compatible with the laws and regulations of the receiving state. For the text of this convention, see http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf (date of use: 31 January 2013).

¹²⁵ VPB 49 (1985) no.16 91.

¹²⁶ Article 14 of the Hague Procedure Convention. See also fn. 64 above.

¹²⁷ Articles 14(1) and 11 of the Hague Procedure Convention.

court executes a letter of request in accordance with the rules of the Swiss Civil Procedure Code. When, however, asked by the requesting authority, the Swiss court may apply a special method or procedure stipulated by the law of the requesting state, provided such method is not contrary to the law of Switzerland.¹²⁸ As a consequence, the cross-examination of a witness domiciled in Switzerland, or the evidence-taking by a commissioner appointed by the trial court of the requesting state is possible.¹²⁹

A witness residing in Switzerland can only invoke the privileges to refuse to give evidence as stipulated by Swiss law, unless a special method or procedure according to Article 14(2) of the Hague Procedure Convention applies.¹³⁰

As a general principle, the execution of a letter of request under the Hague Procedure Convention is free of charge. However, fees paid to witnesses or experts, and costs that are incurred because a witness did not appear voluntarily, have to be reimbursed by the requesting state. The same holds true for expenses arising from the application of a special method or procedure under Article 14(2) of the Hague Procedure Convention.¹³¹

Compared to the Hague Procedure Convention, the Hague Evidence Convention provides genuine improvements which considerably facilitate the taking of evidence by means of letters of request amongst the contracting states. These improvements include the transmission of letters of request *via* central authorities, the specification of the minimum content of a request, as well as the strengthening of the witness' right to refuse to give evidence.¹³² In addition, the Hague Evidence Convention introduced a new form for obtaining evidence abroad, namely evidence-taking by commissioners. This paved the way for countries following the common-law tradition to become members of the Hague Evidence Convention.¹³³

¹²⁸ Article 14(2) of the Hague Procedure Convention.

¹²⁹ Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 88 n. 80.

¹³⁰ For more on the rights to refuse to give evidence under the laws of Switzerland, South Africa, Botswana, Namibia, Nigeria, and Uganda, see Chapter 5 paras. II.B.3, II.C.2, III.A.2, IV.A.2, V.A.2, VI.A.2, and VII.A.2.

¹³¹ Article 16 of the Hague Procedure Convention. No reimbursement may occur where there are relevant bilateral treaties. See in this regard, Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 91 n. 89.

¹³² Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 92 n. 91.

¹³³ See also in this regard para. II.B.1 above.

D. Taking of Evidence based on *Courtoisie Internationale*

1. General Remarks

Where the Hague Procedure Convention or the Hague Evidence Convention applies, the taking of evidence between Switzerland and the respective contracting states is governed by the provisions of such conventions. Accordingly, the request of a Swiss court to obtain evidence in another contracting state, as well as the request of the latter to take evidence in Switzerland, are governed by the same convention.

The situation, however, is different where no convention applies and international judicial assistance is, if at all, rendered on the basis of *courtoisie internationale*.¹³⁴ Here, a distinct set of rules applies, depending on whether Switzerland acts as the requested or requesting state. In the first case, it is not only up to Switzerland to decide whether or not judicial assistance is granted, but it is also Switzerland that establishes the rules that govern the evidence-taking for proceedings pending abroad. By contrast, in the second configuration, where evidence is taken abroad for the benefit of a Swiss court, Switzerland, due to the concept of sovereignty, is not entitled to lay down the rules for evidence-taking on foreign territory. It is merely allowed to impose the rules which stipulate under which conditions a litigant in proceedings pending in Switzerland can make an application to the Swiss court to obtain evidence abroad.

In the light of the above, the following comments deal first with requests emanating from a foreign state to obtain evidence on Swiss soil. In a second step, the case where a party in civil proceedings pending in Switzerland seeks evidence abroad is addressed.

2. Obtaining Evidence in Switzerland for the Benefit of a Court Abroad

With regard to requests for taking evidence in Switzerland of states that are neither a party to the Hague Procedure Convention, nor the Hague Evidence Convention, Swiss authorities apply the provisions of the Hague Procedure Convention by analogy.¹³⁵ Switzerland thus merely grants active judicial assistance based on a letter of request. Accordingly, it is the single judge

¹³⁴ For more on *courtoisie internationale*, see Chapter 2 para. V.B.1.

¹³⁵ Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 35 (date of use: 31 January 2013); VPB 49 (1985) no.16 80.

of the court that has jurisdiction over the area where the evidence is situated, who executes the request usually by applying the rules of the Swiss Civil Procedure Code.¹³⁶

The Federal Office of Justice recommends the use of the same model form as in the case of a request under Articles 8-16 of the Hague Procedure Convention.¹³⁷ The request has to be drafted in the language of the requested authority and must be transmitted through consular channels.¹³⁸

Unlike in the case of Article 16 of the Hague Procedure Convention, all costs and expenses can be charged to the requesting state. In practice, however, Swiss authorities only claim compensation if the amounts are substantial and the requesting state does not execute requests for judicial assistance from Switzerland free of charge.¹³⁹

3. Obtaining Evidence Abroad for the Benefit of a Swiss Court

Neither the Swiss Civil Procedure Code, nor any other act in Switzerland contains provisions which deal with the procedure to be followed, in case a litigant in civil proceedings pending before a Swiss court proffers foreign evidence.¹⁴⁰ This holds particularly true for the conditions under which a Swiss court gives leave to a relevant request of a litigant.¹⁴¹

Under Swiss law, witnesses give evidence *viva voce* before the court in the presence of the litigants and their counsel.¹⁴² Depositions drafted by litigants or third parties are not suitable to prove the accuracy of the respective statements¹⁴³ and can thus not replace the oral testimony of a witness.¹⁴⁴ According to Article 152, read in conjunction with Article 150 of the Swiss Civil Procedure Code, each litigant has the right to expect that the court will admit any admis-

¹³⁶ For the principles governing a letter of request under the Hague Procedure Convention, see para. II.C.2 above.

¹³⁷ Regarding the model form, cf. <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0039.File.tmp/must-HUe54-d.pdf> (date of use: 31 January 2013).

¹³⁸ Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 15, 36 (date of use: 31 January 2013).

¹³⁹ Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 36 (date of use: 31 January 2013); VPB 49 (1985) no.16 92.

¹⁴⁰ Articles 194-196 of the Swiss Civil Procedure Code merely include provisions dealing with judicial assistance amongst courts located in different cantons.

¹⁴¹ This is in contrast to South Africa, Botswana, Namibia, Nigeria, and Uganda. See in this regard paras. III.C.2, IV.B.2, V.B.2, VI.B.2, and VII.B.2.

¹⁴² See Articles 170, 172-173, and 191(1) of the Swiss Civil Procedure Code.

¹⁴³ They merely prove that a certain statement was made.

¹⁴⁴ See Dolge A 'Art. 177' in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 827 n. 12; Frank R, Sträuli H, and Messmer G *Kommentar zur zürcherischen Zivilprozessordnung* 1997 528 n. 3.

sible evidence that he has offered in time and in proper form, provided such evidence is relevant to the court's decision.¹⁴⁵ The latter lies within the discretion of the court and has to be decided based on the facts of the particular case. It appears that in Switzerland, the question of whether or not a court should grant a request for obtaining foreign evidence is hardly controversial as no reported case law was found in this regard. The reason for the absence of such case law may be that Swiss courts take a fairly open approach in deciding whether or not to issue a request for judicial assistance.¹⁴⁶

The foregoing comments do not only apply where a litigant in civil proceedings pending in Switzerland requests the taking of evidence in a foreign state which is not a party to any relevant convention, but also where the Hague Procedure Convention or the Hague Evidence Convention apply. In the latter case, the provisions of the said conventions only come into play once the Swiss court decides to issue a request for judicial assistance.

With regard to requests for judicial assistance to foreign states which are not members of a convention on cross-border taking of evidence in civil and commercial matters, the Federal Office of Justice recommends the use of the same model form as in the case of a letter of request under the Hague Procedure Convention.¹⁴⁷ The request should be drafted in the language of the requested state, or it must be accompanied by a translation, and has to be transmitted through diplomatic channels.¹⁴⁸ Accordingly, the Swiss court has to address the request to the Federal Office of Justice, which then forwards it to the Swiss representative in the requested state. The latter transmits the request to the department of foreign affairs of the requested state which, in turn, sends it to the competent local authority.¹⁴⁹

E. Position of Switzerland with Regard to Cross-border Taking of Evidence in Civil and Commercial Matters

Cross-border taking of evidence in civil and commercial matters between Switzerland and its immediate neighbouring countries, the vast majority of European countries, as well as Switzer-

¹⁴⁵ For the translation of Article 152 of the Swiss Civil Procedure Code, cf. Berti SV (ed) *ZPO, CPC, CCP* 2009 563.

¹⁴⁶ In other words, requests of litigants to have evidence taken abroad are usually granted by the court so that there is no need for the litigants to appeal against a court decision rejecting their respective requests.

¹⁴⁷ For the model form, see <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0039.File.tmp/must-HUe54-d.pdf> (date of use: 31 January 2013).

¹⁴⁸ Federal Office of Justice *International Judicial Assistance in Civil Matters Guidelines* (3rd ed 2003; last updated in July 2005) <http://www.rhf.admin.ch/etc/medialib/data/rhf.Par.0064.File.tmp/wegl-ziv-e.pdf> 15 *et seq.* (date of use: 31 January 2013).

¹⁴⁹ Volken P *Die internationale Rechtshilfe in Zivilsachen* 1996 58 n. 88.

land's major trading partners, is governed by the Hague Evidence Convention and the Hague Procedure Convention. In relation to these states, the execution of requests for international judicial assistance is guaranteed,¹⁵⁰ and the procedural principles governing the transborder taking of evidence are defined.¹⁵¹

With respect to requests received from states that are party neither to the Hague Procedure Convention nor to the Hague Evidence Convention, Switzerland applies by analogy the rules of the Hague Procedure Convention. In practice, also in the absence of any international obligation to render judicial assistance in evidence-taking, foreign states can expect Swiss courts to execute their requests swiftly, provided the latter fulfil the necessary formal and substantive requirements, and there are no grounds for refusal. Swiss courts requesting assistance in evidence-taking from foreign countries which are not party to the Hague Procedure Convention or to the Hague Evidence Convention are at the mercy of the foreign states in which the evidence sought is located. This issue, however, exists not only with regard to Switzerland, but is a general problem. It ultimately results from the sovereignty of states and the latter's authority to decide whether and, if so, to what extent international judicial assistance is granted in the absence of a relevant international agreement.

In the light of the above, it seems fair to say that Switzerland is rather well-positioned with respect to cross-border taking of evidence in civil and commercial matters. From a Swiss perspective, however, there is need for action regarding requests from courts in Switzerland to obtain evidence from countries that have not acceded to the Hague Procedure Convention or Hague Evidence Convention. This particularly holds true for African countries. The most efficient method for improving this situation is the negotiation of bilateral treaties with such states. With regard to the judicial cooperation between Switzerland and the member states of the European Union, one may wonder whether Switzerland should make an attempt to adopt the rules of the European Evidence Regulation. By adopting these rules, Switzerland would contribute to the creation of a uniform legal area in evidence-taking in civil and commercial matters in Europe and would in this regard be treated like a member state of the European Union.

¹⁵⁰ The contracting states are under an international obligation to render judicial assistance in accordance with the rules laid down in the Hague Evidence Convention and Hague Procedure Convention.

¹⁵¹ Between 2003-2007, the number of received letters of request under Chapter 1 of the Hague Evidence Convention was estimated by Switzerland to range between 111-191 per year and that of outgoing requests between 140-191 *per annum*. With regard to applications under Chapter 2 of the Hague Evidence Convention, Switzerland received 18 requests in the said period. See Switzerland *Response of Switzerland to the Questionnaire of May 2008 Relating to the Hague Convention of 19 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (undated) <http://www.hcch.net/upload/wop/2008switzerland20.pdf> 7 *et seq.* (date of use: 31 January 2013).

III. Cross-border Taking of Evidence in Civil and Commercial Matters in South Africa

A. General Remarks

Since South Africa is a member of the Hague Evidence Convention, cross-border taking of evidence in civil and commercial matters between South Africa and other contracting states is governed by the rules of the said convention. With regard to other countries, South Africa renders judicial assistance based on *courtoisie internationale*. Here, a different set of rules applies, depending on whether it is a foreign state that wishes to obtain evidence in South Africa, or whether evidence located abroad is sought for the benefit of proceedings pending before a South African court.

The following remarks first deal with the evidence-taking based on the Hague Evidence Convention and then addresses the gathering of evidence based on *courtoisie internationale*. Finally, the *status quo* of South Africa with regard to the cross-border taking of evidence in civil and commercial matters is analysed.

In this context, it should be mentioned that South Africa is a member of the Vienna Consular Convention.¹⁵² As already mentioned, Article 5(j) of the Convention allows consular agents to take evidence in a foreign state for the courts of the sending state. Consequently, a witness residing outside South Africa may be examined by a consular agent representing South Africa in the foreign state, provided the latter permits such evidence-taking.¹⁵³

B. Taking of Evidence based on the Hague Evidence Convention

1. Applicability of the Hague Evidence Convention in South Africa

South Africa acceded to the Hague Evidence Convention in 1997.¹⁵⁴ However, to date, this Convention has not yet been incorporated into South African law. With regard to the application of international law in domestic law, one has to distinguish between the so-called “monist approach” and the “dualist approach”. While in the first case, the international law applies di-

¹⁵² Cf. also fn. 124. For a list of the contracting states to this Convention, see http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&mtmsg_no=III-6&chapter=3&lang=en#Participants (date of use: 31 January 2013).

¹⁵³ See also South African Law Reform Commission *Project 121: Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters - Report* (December 2006) http://salawreform.justice.gov.za/reports/r_prj121_2006dec.pdf 19 (date of use: 31 January 2013).

¹⁵⁴ Cf. http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (date of use: 31 January 2013).

rectly in the state,¹⁵⁵ a transformation of international law into domestic law is required in the second configuration which applies particularly to South Africa.¹⁵⁶ In this context, the South African Law Reform Commission referred to Article 231(4) of the Constitution of the Republic of South Africa, 1996, which provides that “*a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament*”. The South African Law Reform Commission noted that there is no indication that the Hague Evidence Convention falls within the said constitutional provision, and that therefore individuals residing in South Africa can claim no rights under the Hague Evidence Convention as long as the latter’s provisions are not incorporated into South African law.¹⁵⁷

Notwithstanding the foregoing, it appears that in the past, South Africa has applied the rules of the Hague Evidence Convention *both* to incoming and outgoing requests for judicial assistance in evidence-taking. In its response to a questionnaire issued by the Hague Conference on International Private Law in 2008, South Africa stated that in the years 2003-2007, it received 37 letters of request under Chapter 1 of the Convention and sent two requests to other contracting states. During the same period, South Africa executed 37 applications for the taking of evidence through commissioners and transmitted two applications abroad.¹⁵⁸

In the light of the above, it seems that the incorporation of the provisions of the Hague Evidence Convention into South African law is just a matter of time.¹⁵⁹ Having said this, it makes sense to deal again with the Hague Evidence Convention, thereby, however, focusing on the particularities that apply with regard to South Africa. Where there are no fundamental differences in the application of the Convention in Switzerland and South Africa, reference can be made to the relevant comments relating to Switzerland.¹⁶⁰

¹⁵⁵ This is the case, for instance, in Switzerland.

¹⁵⁶ Olivier ME ‘Exploring the doctrine of self-execution as enforcement mechanism of internal obligations’ 2002 *South African Yearbook of International Law* 99 *et seq.*

¹⁵⁷ South African Law Reform Commission *Project 121: Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters - Report* (December 2006) http://salawreform.justice.gov.za/reports/r_prj121_2006dec.pdf 20 (date of use: 31 January 2013).

¹⁵⁸ *South Africa Response of South Africa to the Questionnaire of 2008 Relating to the Hague Convention of 18 March 1970 on the Taking of Evidence in Civil or Commercial Matters* (undated) <http://www.hcch.net/upload/wop/2008southafrica20.pdf> 9 *et seqq.* (date of use: 31 January 2013).

¹⁵⁹ See in this regard also para. III.D below.

¹⁶⁰ *Cf.* para. II.B above.

2. Scope of the Hague Evidence Convention

Based on South Africa's response to the aforesaid questionnaire, the term "*civil or commercial matters*" is, compared to Switzerland, interpreted more broadly. It includes, *inter alia*, not only bankruptcy, insolvency, consumer protection, or employment matters, but also issues regarding the regulation and oversight of financial markets and stock exchanges, as well as the proceeds of crime and taxation.¹⁶¹

Unlike Switzerland,¹⁶² South Africa considers the character of the Hague Evidence Convention as non-mandatory.¹⁶³

3. Forms of Evidence-taking under the Hague Evidence Convention

When acceding to the Hague Evidence Convention, South Africa excluded the application of Articles 15-16 of the Convention.¹⁶⁴ As a result, South Africa does not execute any applications for the taking of evidence by diplomatic officers or consular agents on South African soil. Due to South Africa's reservation, other contracting states may refuse to let diplomatic officers and consular agents representing South Africa take evidence on their territory.¹⁶⁵ Evidence located in South Africa, however, may be taken based on a letter of request under Chapter 1 of the Hague Evidence Convention, as well as through commissioners, pursuant to Article 17 of the Convention.

a) Letter of Request under Chapter 1 of the Hague Evidence Convention

When addressing a request under Chapter 1 of the Hague Evidence Convention to South Africa, the use of the relevant model form developed by the Permanent Bureau of the Hague Conference on Private International Law is recommended. The letter does not only have to include

¹⁶¹ South Africa *Response of South Africa to the Questionnaire of 2008 Relating to the Hague Convention of 18 March 1970 on the Taking of Evidence in Civil or Commercial Matters* (undated) <http://www.hcch.net/upload/wop/2008southafrica20.pdf> 16 *et seq.* (date of use: 31 January 2013).

¹⁶² See para. II.B.2 above.

¹⁶³ South Africa *Response of South Africa to the Questionnaire of 2008 Relating to the Hague Convention of 18 March 1970 on the Taking of Evidence in Civil or Commercial Matters* (undated) <http://www.hcch.net/upload/wop/2008southafrica20.pdf> 15 (date of use: 31 January 2013).

¹⁶⁴ Article 33(1) of the Hague Evidence Convention read in conjunction with South Africa *Reservation 1(b)* http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (date of use: 31 January 2013).

¹⁶⁵ Article 33(3) of the Hague Evidence Convention.

a list of matters to be addressed during the relevant witness examination, but, amongst other things, it must also provide the specific questions to be put to the witness.¹⁶⁶

Letters of request have to be drafted in one of the eleven official languages in South Africa, which are English, Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, isiNdebele, isiXhosa, or isiZulu.¹⁶⁷

Requests addressed to South Africa have to be transmitted *via* the central authority.¹⁶⁸ South Africa appointed the Director-General of the Department of Justice and Constitutional Development as the central authority.¹⁶⁹ The same holds true for a letter of request of a South African court for obtaining evidence abroad. Such a request has to be forwarded *via* the Director-General and cannot be sent directly to the foreign central authority.¹⁷⁰

Once the Director-General has approved an incoming letter of request,¹⁷¹ he forwards it to the Registrar of the High Court in whose jurisdiction the evidence to be obtained is located. The Registrar then submits the request to a judge in chambers, in order to give effect to the letter of request.¹⁷²

South Africa's reservation under Article 23 of the Hague Evidence Convention with respect to letters of request relating to pre-trial discovery is unlimited. It provides that all "*letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries, will not be executed*".¹⁷³ In this context, the South African Law Reform Commission emphasised that the declaration of South Africa is too broad, as the original purpose of Article 23 of the Convention was to exclude "fishing expeditions". The Law Reform

¹⁶⁶ South Africa Response of South Africa to the Questionnaire of 2008 Relating to the Hague Convention of 18 March 1970 on the Taking of Evidence in Civil or Commercial Matters (undated) <http://www.hcch.net/upload/wop/2008southafrica20.pdf> 25 (date of use: 31 January 2013). With regard to the model form, see para. II.B.3.a) above.

¹⁶⁷ Article 4(2) of the Hague Evidence Convention read in conjunction with South Africa Declaration 3(a) http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (date of use: 31 January 2013).

¹⁶⁸ Article 2 of the Hague Evidence Convention. See also para. II.B.3.a) above.

¹⁶⁹ See http://www.hcch.net/index_en.php?act=authorities.details&aid=518 (date of use: 31 January 2013).

¹⁷⁰ South Africa Response of South Africa to the Questionnaire of 2008 Relating to the Hague Convention of 18 March 1970 on the Taking of Evidence in Civil or Commercial Matters (undated) <http://www.hcch.net/upload/wop/2008southafrica20.pdf> 25 (date of use: 31 January 2013).

¹⁷¹ With regard to the refusal of a request for evidence-taking based on the South African Protection of Businesses, see para. III.C.1.d) below.

¹⁷² Section 33(1) of the Supreme Court Act No. 59 of 1959. See also South Africa Response of South Africa to the Questionnaire of 2008 Relating to the Hague Convention of 18 March 1970 on the Taking of Evidence in Civil or Commercial Matters (undated) <http://www.hcch.net/upload/wop/2008southafrica20.pdf> 27, 13 (date of use: 31 January 2013).

¹⁷³ South Africa Declaration 3(e) http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (date of use: 31 January 2013).

Commission thus recommended limiting the said declaration when incorporating the provisions of the Convention into domestic law, and adopting a wording that is similar to the United Kingdom's declaration under Article 23.¹⁷⁴

b) Application under Chapter 2 of the Hague Evidence Convention

As mentioned earlier, under Chapter 2 of the Hague Evidence Convention, evidence in South Africa can only be taken through commissioners. The prior authorisation under Article 17(1)(a) of the Convention is given by the High Court in whose jurisdiction the application is to be executed.¹⁷⁵

In contrast to Switzerland,¹⁷⁶ a commissioner authorised in the above sense may apply to the High Court to obtain the evidence by compulsion. The coercive measures have to be appropriate and prescribed by South African law for use in domestic proceedings.¹⁷⁷

C. Taking of Evidence based on *Courtoisie Internationale*

As mentioned earlier, in cases where the Hague Evidence Convention does not apply one has to distinguish between two different configurations: on the one hand, the situation where a court or litigant located abroad wishes to obtain evidence in South Africa, and, on the other, the case where a litigant in civil proceedings pending before a South African court seeks means of proof situated in a foreign state.

¹⁷⁴ South African Law Reform Commission *Project 121: Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters - Report* (December 2006) http://salawreform.justice.gov.za/reports/r_prj121_2006dec.pdf 22 *et seq.*, 27 (date of use: 31 January 2013). For the declaration the United Kingdom made under Article 23 of the Hague Evidence Convention, see United Kingdom *Declaration 3* http://www.hcch.net/index_en.php?act=status.comment&csid=564&disp=resdn (date of use: 31 January 2013). Switzerland's reservation under Article 23 is very similar to that of the United Kingdom. Hence, the legal situation with regard to the said provision in Switzerland and South Africa is the same, once South Africa has amended its original declaration.

¹⁷⁵ Cf. South Africa *Declaration 3(c)* http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (date of use: 31 January 2013). With regard to the competent authority, see http://www.hcch.net/index_en.php?act=authorities.details&aid=869 (date of use: 31 January 2013) where the High Court is the designated authority under Articles 17-18 of the Hague Evidence Convention. Based on South Africa *Response of South Africa to the Questionnaire of 2008 Relating to the Hague Convention of 18 March 1970 on the Taking of Evidence in Civil or Commercial Matters* (undated) <http://www.hcch.net/upload/wop/2008southafrica20.pdf> 7 (date of use: 31 January 2013), however, it is the Director-General who gives the relevant authorisation.

¹⁷⁶ See para. II.B.3.b) above.

¹⁷⁷ Cf. Article 18 of the Hague Evidence Convention read in conjunction with South Africa *Declaration 3(d)* http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (date of use: 31 January 2013). For the competent authority, see http://www.hcch.net/index_en.php?act=authorities.details&aid=869 (date of use: 31 January 2013). With regard to the competent authority to whom a commissioner has to apply for the use of compulsion, see fn. 175 above.

The following two subchapters deal first with requests emanating from foreign states and then with the opposite type of case where a litigant in civil proceedings in South Africa seeks evidence abroad.

1. Obtaining Evidence in South Africa for the Benefit of a Court Abroad

a) General Remarks

A trial court or foreign litigant may ask for evidence to be taken in South Africa based on two different laws, namely the Foreign Courts Evidence Act¹⁷⁸ and the Supreme Court Act. In its report on international judicial cooperation in civil and commercial matters,¹⁷⁹ the South African Law Reform Commission referred to another possibility to obtain evidence in South Africa, namely that based on Section 53 of the Magistrates' Courts Act.¹⁸⁰ According to this provision, a "*court may in any case which is pending before it, (...) appoint a person to be a commissioner to take evidence of any witness, whether within the Republic or elsewhere (...)*". This provision requires that the lawsuit, for which the evidence is sought in South Africa, is pending before a South African magistrate's court. However, in the case at hand, that is, where evidence located in South Africa is to be obtained for the benefit of foreign civil proceedings, the lawsuit is not pending in South Africa, but in a foreign state. It is thus submitted that Section 53(1) of the Magistrates' Courts Act does not refer to applications of courts or litigants abroad to obtain evidence in South Africa.

b) Taking of Evidence based on the Foreign Courts Evidence Act

Where a trial court or a foreign litigant wishes to obtain evidence in South Africa based on the Foreign Courts Evidence Act, an application has to be lodged with the High Court¹⁸¹ in whose jurisdiction the evidence is located.¹⁸² The request can either be submitted by the trial court, or

¹⁷⁸ No. 80 of 1962.

¹⁷⁹ South African Law Reform Commission *Project 121: Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters - Report* (December 2006) http://salawreform.justice.gov.za/reports/r_prj121_2006dec.pdf 19 (date of use: 31 January 2013).

¹⁸⁰ No. 32 of 1944.

¹⁸¹ Section 2(1) of the Foreign Courts Evidence Act refers to "*provincial or local division of the Supreme Court of South Africa*". The court structure in South Africa was rationalised in the Constitution of the Republic of South Africa, 1993 and 1996. The former provincial and local divisions of the Supreme Court were replaced by the High Courts. See in this regard, amongst others, Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 19-33; Paleker M 'Civil Procedure in South Africa: the Past, the Present and the Future' 2011 *Zeitschrift für Zivilprozess International* 359 *et seqq.*

¹⁸² Section 2(1) of the Foreign Courts Evidence Act. Where the evidence situated in South Africa is to be used by a magistrate's court in Lesotho, Botswana, Swaziland, Malawi, Namibia, or Zimbabwe, the request can, ac-

by the litigant who proffered the particular evidence. In both cases, proof has to be supplied that the trial court having jurisdiction to hear the civil proceedings is “*desirous of obtaining the evidence in relation to such proceedings*”.¹⁸³ Such proof may, for instance, be given where the litigant’s application is accompanied by the order wherein the trial court decided that evidence is to be obtained in South Africa.¹⁸⁴ Where these requirements are met, the application for taking evidence in South Africa is granted, unless the furnishing of the requested information contravenes Section 1 of the Protection of Businesses Act.¹⁸⁵

When granting the request for taking evidence in South Africa and ordering the examination of the particular witness, the High Court of South Africa also appoints the person before whom the witness has to testify.¹⁸⁶ Where the trial court or the foreign litigant suggests a particular individual to conduct the examination, the judge usually appoints said person. In cases where no such proposal is made, or if there are good grounds for the judge not to follow the recommendation, the latter will appoint a suitable individual, usually the magistrate at the domicile of the witness.¹⁸⁷

The witness, whose examination is requested in the application under Section 2(1) of the Foreign Courts Evidence Act, is summoned to appear before the person appointed by the High Court to testify *viva voce*, or to produce any book, document, or object. The witness is summoned in the same way as if he were a witness in proceedings before a magistrate’s court.¹⁸⁸ Where he fails, without sufficient cause, to attend the examination or to produce the relevant means of proof, or refuses to answer the questions put to him, he is guilty of an offence and liable to a fine or to imprisonment.¹⁸⁹

The foreign witness is examined in accordance with the rules of a magistrate’s court that apply in similar proceedings to those in connection with which the witness’ evidence is sought.¹⁹⁰

ording to Section 3 of the said Act, be directed to a magistrate in South Africa. In this context, it has to be recalled that with regard to Botswana and Namibia, the present thesis is limited to civil proceedings pending before the High Court of the said countries. See in this regard, Chapter 1.

¹⁸³ Section 2(1) of the Foreign Courts Evidence Act.

¹⁸⁴ Uys JF ‘The Continuation of Civil Proceedings in a Foreign Country’ 1969 *Comparative and International Law Journal of Southern Africa* 105 *et seq.*

¹⁸⁵ No. 99 of 1978. *Cf.* Article 2(2) of the Foreign Courts Evidence Act. For more on Section 1 of the Protection of Businesses Act, see para. III.C.1.d) below.

¹⁸⁶ Section 2(1) *in fine* of the Foreign Courts Evidence Act.

¹⁸⁷ Uys JF ‘The Continuation of Civil Proceedings in a Foreign Country’ 1969 *Comparative and International Law Journal of Southern Africa* 106.

¹⁸⁸ Section 4(1)-(2) of the Foreign Courts Evidence Act.

¹⁸⁹ Section 6(1) of the Foreign Courts Evidence Act.

¹⁹⁰ Section 4(1) of the Foreign Courts Evidence Act.

This holds particularly true for the right of the witness to refuse to give evidence.¹⁹¹ Where the application under Section 2(1) of the Foreign Courts Evidence Act is accompanied by a questionnaire, it can be expected that the examiner will not ask other questions except to elucidate the answers given by the witness.¹⁹² In the absence of any questionnaire, the examiner will interrogate the witness in full on specified topics.¹⁹³ From the perspective of the trial court, it is advisable to provide the South African court with a list of questions to be put to the witness in order to ensure that the latter is asked all the relevant questions. In this context, one has to bear in mind that the examiner is not familiar with the court case for whose benefit the witness is to be examined. It is therefore crucial to provide the High Court in any case with the relevant facts underlying the lawsuit. Only in this way can an application under Section 2(1) of the Foreign Courts Evidence Act succeed and provide the trial court with the necessary information. Once the examination of the witness is concluded, the examiner certifies the correctness of the evidence and transmits it to the Registrar of the High Court that granted the application.¹⁹⁴

There is little published case law with regard to the Foreign Courts Evidence Act. The reported decisions dealt mainly with Section 7 of the Act,¹⁹⁵ but did not further elaborate on the request under Section 2(1), or the procedure under Section 4 of the Act.

c) Taking of Evidence based on Section 33 of the Supreme Court Act

Section 33(1) of the Supreme Court Act provides for another method to obtain evidence located in South Africa for the benefit of proceedings pending abroad.¹⁹⁶ Here, a letter of request has to be addressed to the Director-General of the Department of Justice and Constitutional Development. The wording of the said provision suggests that the application has to be made

¹⁹¹ Section 5(2) of the Foreign Courts Evidence Act.

¹⁹² Uys JF 'The Continuation of Civil Proceedings in a Foreign Country' 1969 *Comparative and International Law Journal of Southern Africa* 103 with reference to *Boda v Akalwaya* 1928 WLD 9.

¹⁹³ Uys JF 'The Continuation of Civil Proceedings in a Foreign Country' 1969 *Comparative and International Law Journal of Southern Africa* 104.

¹⁹⁴ Section 4(4) of the Foreign Courts Evidence Act.

¹⁹⁵ Section 7 of the Foreign Courts Evidence Act provides special rules for the issue of *subpoenas* relating to witnesses domiciled in Lesotho, Botswana, Swaziland, Malawi, Namibia, and Zimbabwe. See in this regard, for instance, *S v Charalambous* 1970 (1) SA 599 (T); *S v Banda and Others* 1991 (2) SA 352 (BGD); *Minister of Water Affairs and Forestry and Others v Swissborough Diamond Mines (Pty) Ltd and Others* 1999 (2) SA 345 (T).

¹⁹⁶ In *Saunders and Another v Minister of Justice and Others* 1997 (2) SA 1090 (C) at 1096, the purpose of a letter of request was described as follows: "(...) the purpose of a letter of request envisaged in s 33(1) of the Supreme Court Act is, in a sense, to extend the hearing before a foreign court to a hearing before a commissioner in the Republic. The evidence taken before the commissioner in the Republic becomes part of the evidence before the foreign court."

by the competent authority of the requesting state and not by a private individual.¹⁹⁷ The letter of request has either to be drafted in English or Afrikaans, or has to be accompanied by a translation into either of the two languages.¹⁹⁸ In order to achieve an optimal result from the evidence-taking in South Africa, the request should, *inter alia*, include the questions to be put to the witness, as well as a summary of the relevant facts underlying the lawsuit. In this context, one has to bear in mind that when provided with a questionnaire, the examiner will not ask other questions than those listed except to clarify any ambiguous answers given by the witness.¹⁹⁹

When granting the request, the Director-General sends the letter of request to the Registrar of the High Court in whose jurisdiction the evidence to be obtained is located.²⁰⁰ If, however, the Minister of Justice considers it undesirable that the request for evidence-taking be granted, and that the litigants or their counsel should rather make an application directly to the competent High Court under Section 2(1) of the Foreign Courts Evidence Act,²⁰¹ the Director-General notifies the foreign authority accordingly and returns the letter of request.²⁰² Uys maintains that this may be the case, for instance, where the Minister of Justice regards the matter as so complex that the assistance of counsel or experts is necessary.²⁰³ In addition, the execution of a letter of request may be refused based on Section 1 of the Protection of Businesses Act.²⁰⁴

In cases where the application for evidence-taking in South Africa is granted, the Registrar of the competent High Court forwards the request to a judge in chambers, who, in turn, makes the necessary order for the appointment of an examiner to interrogate the witness.²⁰⁵ The judge usually appoints the magistrate at the domicile of the witness as examiner.²⁰⁶ He may, howev-

¹⁹⁷ See also Uys JF 'The Continuation of Civil Proceedings in a Foreign Country' 1969 *Comparative and International Law Journal of Southern Africa* 103.

¹⁹⁸ Section 33(1) of the Supreme Court Act.

¹⁹⁹ *Boda v Akalwaya* 1928 WLD 9 at 13 *et seq.*; Uys JF 'The Continuation of Civil Proceedings in a Foreign Country' 1969 *Comparative and International Law Journal of Southern Africa* 103.

²⁰⁰ For an example of a forwarding letter of the Director-General, see *Saunders and Another v Minister of Justice and Others* 1997 (2) SA 1090 (C) at 1093.

²⁰¹ Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 872 *in fine*.

²⁰² Section 33(1) of the Supreme Court Act.

²⁰³ Uys JF 'The Continuation of Civil Proceedings in a Foreign Country' 1969 *Comparative and International Law Journal of Southern Africa* 104.

²⁰⁴ For more on the Protection of Businesses Act, see para. III.C.1.d) below.

²⁰⁵ Section 33(1) of the Supreme Court Act.

²⁰⁶ For an example of such court order, see, for instance, *Cline and Another v Magistrate, Witbank, and Another* 1985 (4) SA 605 (T) at 607.

er, also appoint any other suitable individual, including a person suggested by the relevant foreign authority, or he may himself act as examiner.²⁰⁷

Having received the respective court order, the examiner summons the witness to appear before him. The witness examination is conducted in accordance with the South African rules of procedure and evidence.²⁰⁸ As already mentioned, the examiner is, bound by the scope of the letter of request and cannot change the questions to be put to the witness provided by the trial court.²⁰⁹ Once the examination is concluded, the examiner certifies the correctness of the answers given by the witness and forwards the evidence to the Registrar of the competent High Court. The latter verifies the relevant documents and sends them to the Director-General for transmission abroad.²¹⁰

Except where the Minister of Justice otherwise directs, no fees other than disbursements are recovered from the requesting state.²¹¹

Compared to a letter of request under Section 33(1) of the Supreme Court Act, the procedure for an application based on the Foreign Courts Evidence Act appears to be simpler. In the latter case, the application can be directly lodged with the High Court, and no involvement of the Director-General is required. In addition, no intimation of the Minister of Justice is necessary under the Foreign Courts Evidence Act. Having said this, it can be expected that the decision as to whether or not an application for taking evidence in South Africa is to be granted is made more swiftly under the Foreign Courts Evidence Act than requests made in terms of Section 33(1) of the Supreme Court Act.²¹²

d) Restrictions on the Obtaining of Evidence in South Africa based on the Protection of Businesses Act

According to Sections 1(1)(a) and 1(3) of the Protection of Businesses Act, no *commission rogatoire*, letter of request, or any other request that emanates from outside South Africa in

²⁰⁷ Uys JF 'The Continuation of Civil Proceedings in a Foreign Country' 1969 *Comparative and International Law Journal of Southern Africa* 104.

²⁰⁸ See *Cline and Another v Magistrate, Witbank, and Another* 1985(4) SA 605 (T) at 612; *Saunders and Another v Minister of Justice and Others* 1997 (2) SA 1090 (C) at 1096; Malan FR *et al* 'Transnational Litigation in South African Law' 1995 *Tydskrif vir die Suid Afrikaanse Reg* 469; Uys JF 'The Continuation of Civil Proceedings in a Foreign Country' 1969 *Comparative and International Law Journal of Southern Africa* 105.

²⁰⁹ *Boda v Akalwaya* 1928 WLD 9 at 13 *et seq.*

²¹⁰ Section 33(3) of the Supreme Court Act.

²¹¹ Section 33(4) of the Supreme Court Act.

²¹² For the recommendations of the South African Law Reform Commission regarding the harmonisation of the Foreign Courts Evidence Act and Section 33 of the Supreme Court Act, see para. III.D below.

connection with any civil proceedings, shall be enforced in South Africa without the permission of the Minister of Economic Affairs (now presumably the Minister of Trade and Industry), provided it arose from any act or transaction which took place at any time, whether before or after the commencement of the said Act, and is related to mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into, or from South Africa. Section 1(1)(b) read in conjunction with Section 1(3) of the Act furthermore provides that, save with the authorisation of the aforesaid Minister, no person shall in compliance with, or in response to, any *commission rogatoire*, letter of request, or any other request arising from outside South Africa in connection with any civil proceedings, furnish any information as to any business, whether carried on within or outside South Africa.²¹³

The main purpose of the Protection of Businesses Act was “*to protect South Africans from the draconian effects of certain foreign laws, in particular those allowing awards of penal or multiple damages*”.²¹⁴ According to Forsyth and Leon, the said Act is a classic example of legislative overkill.²¹⁵ The ambit of the aforesaid sections of the Protection of Businesses Act is so broad²¹⁶ that the Act embraces almost all ranges of human activity and practically prohibits any form of international judicial cooperation, including the taking of evidence in civil and commercial matters, unless the aforesaid Minister grants permission.²¹⁷

²¹³ According to Section 1G(2) of the Protection of Businesses Act, a person, who contravenes Section 1(1)(b) of the Act, commits a criminal offence.

²¹⁴ South African Law Reform Commission *Project 121: Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters - Report* (December 2006) http://salawreform.justice.gov.za/reports/r_prj121_2006dec.pdf 70, 73, 76 (date of use: 31 January 2013). See also Leon PSG ‘*Roma non Locuta est: The Recognition and Enforcement of Foreign Judgments in South Africa*’ 1983 *Comparative and International Law Journal of Southern Africa* 347, who emphasises that the Protection of Businesses Act aimed at combating “*the extra-territorial reach and jurisdictional assertiveness of the United States anti-trust law*”. Cf. also Dugard J *International Law: A South African Perspective* 2012 151; Oppong RF ‘*Private International Law in Africa: The Past, Present and Future*’ 2007 *American Journal of Comparative Law* 708; Cartoon BJ ‘*The Westinghouse Case: Collective response to the extraterritorial enforcement of United States antitrust laws*’ 1983 *South African Law Journal* 739 *et seq.*

²¹⁵ Leon PSG ‘*Roma non Locuta est: The Recognition and Enforcement of Foreign Judgments in South Africa*’ 1983 *Comparative and International Law Journal of Southern Africa* 347; Forsyth C *Private International Law: The modern Roman-Dutch Law including the jurisdictions of the High Courts* 2012 466.

²¹⁶ “[A]ny matter or material” in the case of Section 1(1)(a) and “any business whether carried on in or outside South Africa” in the case of Section 1(1)(b) of the Protection of Businesses Act.

²¹⁷ South African Law Reform Commission *Project 121: Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters - Report* (December 2006) http://salawreform.justice.gov.za/reports/r_prj121_2006dec.pdf 71 (date of use: 31 January 2013); Schulze C *On Jurisdiction and the Recognition and Enforcement of Foreign Money Judgments* 2005 31; Forsyth C *Private International Law: The modern Roman-Dutch Law including the jurisdictions of the High Courts* 2012 466, 467.

With regard to the application of Section 1(1)(a) of the Protection of Businesses Act, the South African courts take a restrictive approach by, for instance, interpreting the term of “*any matter or material*” in a narrow manner, and thus limit the scope of application of the Act. In *Tradex Ocean Transportation SA v MV Silvergate (or Astyanax) and Others*,²¹⁸ and *Chinatex Oriental Trading Co v Erskine*,²¹⁹ it was held that the notion that “*any matter or material*” includes only raw materials or substances, and that manufactured goods do not fall within Section 1(1)(a) of the Protection of Businesses Act. Kirk-Cohen J stated in *Jones v Krok*²²⁰ that the object of Section 1(1)(a) read in conjunction with Section 1(3) of the Protection of Businesses Act is “*limited to punitive damages awarded in cases which may loosely be termed product liability claims*”²²¹. In other court decisions, no mention was made that the plaintiff has received an authorisation of the relevant minister. The South African Law Reform Commission noted with regard to the enforcement of foreign judgments in South Africa, that in practice, the Protection of Businesses Act is not applied, unless a foreign judgment involves multiple or punitive damages.²²² Needless to say, the above comments should not only apply with regard to Section 1(1)(a) of the Protection of Businesses Act or the enforcement of foreign judgments, but also to Section 1(1)(b) of the said Act and the cross-border taking of evidence in civil and commercial matters.

With respect to the incorporation of the provisions of the Hague Evidence Convention into the domestic law, the South African Law Reform Commission pointed out that the Protection of Businesses Act violates South Africa’s international obligations under this Convention to execute requests for the taking of evidence. In this context, the Commission held that the said Act may protect interests in the sense of Article 12(1)(b) of the Hague Evidence Convention.²²³ It, however, emphasised that the unlimited discretion the said Act gives to the court and the competent minister is in contradiction with the aforesaid international obligations of South Africa.

²¹⁸ 1994 (4) SA 119 (C) at 120 *et seq.*

²¹⁹ 1998 (4) SA 1087 (C) at 1095 *et seq.*

²²⁰ 1996 (1) SA 504 (TPD) at 510.

²²¹ See also *Richman v Ben-Tovim* [2007] 2 All SA 234 (SCA) at 241. *Cf.* furthermore Forsyth C *Private International Law: The modern Roman-Dutch Law including the jurisdictions of the High Courts* 2012 467 who points out the inconsistency between the restrictions imposed by the foregoing court decisions and the relevant provisions of the Protection of Businesses Act.

²²² South African Law Reform Commission *Project 121: Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters - Report* (December 2006) http://salawreform.justice.gov.za/reports/r_prj121_2006dec.pdf 71 *et seq.* (date of use: 31 January 2013).

²²³ That is, South Africa’s sovereignty or security.

The Commission thus recommended the repeal of the Protection of Businesses Act when transforming the provisions of the Hague Evidence Convention into South African law.²²⁴

2. Obtaining Evidence Abroad for the Benefit of a South African Court

a) General Remarks

While the foregoing subchapter elaborated on the configuration where a trial court or foreign litigant seeks evidence in South Africa, the following remarks address the situation where a litigant in civil proceedings pending before the High Court of South Africa wishes to obtain evidence located abroad. The respective application of a litigant to the High Court is governed by Rule 38(3) of the High Court Rules.

Following some general remarks on the taking of evidence on commission based on Rule 38(3) of the High Court Rules, the subsequent subchapter deals with the conditions for the granting of a commission regarding witnesses outside South Africa, the application for commission, as well as its execution. Rule 38(3) of the said Rules does not only apply where a litigant in civil proceedings before the High Court of South Africa seeks means of proof located in a foreign state which is not party to any international treaty on evidence-taking, but also where the Hague Evidence Convention applies. The provisions of this Convention only come into play once the High Court decides to issue a request for taking evidence abroad.

b) Taking of Evidence based on Order 38(3) of the High Court Rules

In terms of Rule 38(3) of the High Court Rules, a court may, “*where it appears convenient or necessary for the purposes of justice, make an order for the taking of evidence of a witness (...) before a commissioner of the court*”. As a result, the witness, as would be the normal procedure in High Court,²²⁵ no longer appears personally in court to be examined *viva voce* before the judge who ultimately decides the case, but he gives evidence before a commissioner appointed by the court. Once the witness has been examined by the commissioner, the litigant applying for the taking of evidence on commission may tender the witness’ deposition as evi-

²²⁴ South African Law Reform Commission *Project 121: Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters - Report* (December 2006) http://salawreform.justice.gov.za/reports/r_prj121_2006dec.pdf 25 *et seq.*, 76 *et seq.* (date of use: 31 January 2013). See also Forsyth C *Private International Law: The modern Roman-Dutch Law including the jurisdictions of the High Courts* 2012 467, 468.

²²⁵ See Rule 38(2) of the High Court Rules. *Cf.* also *Samuel Kantor v James Bell & Co* (1906) 27 NLR 363 at 366. For more in this regard, see Chapter 5 para. III.A.3.a).

dence at the trial.²²⁶ As a consequence, the judge no longer has the opportunity to observe the demeanour of the witness, and to put any questions to the latter.²²⁷ Having said this, Rule 38(3) of the High Court Rules provides for an exception from the ordinary way of taking evidence, namely by dispensing with the need for a witness to appear in court.²²⁸ Such an exception only applies where a witness cannot attend the trial to be questioned in presence of the trial judge.

The evidence-taking based on the aforesaid provision is also referred to as so-called “commission *de bene esse*”. The term “*de bene esse*” literally means “as being well done for the present” but, in the context of the said provision, it stands for “conditionally”. The condition being, in the words of van Zyl:

*“that the evidence shall be used only if the witness should not be present at the trial; but if the witness appears, it is not to be used, and he is to give his evidence viva voce.”*²²⁹

Rule 38(3) of the High Court Rules applies in all cases where evidence is to be taken on commission, irrespective of whether the witness is located in or outside South Africa. With regard to foreign witnesses, however, it has to be kept in mind that Rule 38(3) merely stipulates the conditions under which the High Court gives leave to an application for the taking of evidence on commission. Whether the respective evidence can actually be obtained on foreign territory depends, in the absence of a relevant international agreement, on the foreign state.²³⁰ The same holds true for the procedure for the taking of the foreign evidence once the foreign state has decided to grant judicial assistance. As a result, Rule 38(4)-(7) of the High Court Rules does not apply in cases where foreign evidence is to be taken on commission. These provisions regulate the procedure for the taking of evidence on commission and are merely binding for commissioners within South Africa.

²²⁶ Rule 38(3) of the High Court Rules. See also Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 872. Cf. also Rule 38(8) of the High Court Rules.

²²⁷ Petè S *et al Civil Procedure: A Practical Guide* 2011 247. See also *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 676D-F.

²²⁸ Cf. *Hills v Hills (II)* 1933 NPD 293 at 294.

²²⁹ Van Zyl GB *The Theory of the Judicial Practice of South Africa* 1921 412. See also *Nelson v Nelson* (1881) 1 SC 139 at 139; *Cohen v Cohen* (1884) 4 EDC 40 at 41; *Janisch v Herold* 1914 CPD 258; *Shield Insurance Co Ltd v Deysel and Another* 1978 (2) SA 164 (SE) at 167C-E.

²³⁰ Cf. Van Loggerenberg DE *Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa Volume I: The Act* 2012 Act 358.

Apart from the mention that evidence may be taken before a commissioner where “*it appears convenient and necessary for the purposes of justice*”,²³¹ Rule 38(3) of the High Court Rules contains no indication of the conditions under which a commission *de bene esse* may be granted. Whether or not a court may issue an order for the taking of evidence on commission thus lies within its discretion and must be found in the case law based on the facts of the particular case.²³²

In *Nxasana v Minister of Justice and Another*,²³³ it was held that the aforesaid discretion is not of an absolute nature and may be exercised in accordance with recognised principles which have evolved over the years. The factors a court has to take into consideration when deciding on an application for commission *de bene esse* include, amongst others, the materiality²³⁴ and relevance²³⁵ of the evidence, the inability of the witness to appear before the court,²³⁶ and the prospects that the foreign evidence would indeed be forthcoming if the commission is granted.²³⁷ With regard to the latter, the court must consider whether the respective witness would be compellable, whether he will have valid ground on which he could refuse to testify before the commissioner even if he was compellable, and whether the witness has committed himself to giving such evidence in writing.²³⁸ In addition, the court has to take into account whether the litigant applying for the commission *de bene esse* acted diligently in pursuing alternatives to obtain the foreign evidence,²³⁹ whether there was unreasonable delay in making the relevant

²³¹ Cf. *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 675J where it is stated that the convenience referred to in Rule 38(3) of the High Court Rules “*is the convenience, not only of himself [the litigant applying for commission], but of respondent and of the Court*”.

²³² *Fleischer v Klassen* (1883) 3 EDC 207 at 208; *Becker v Beukes* (1885) 4 EDC 313 at 314; *Crowder v The Natal Bank* (1891) 12 NLR 191 at 191; *MJ Dhooma v AC Pillay* (1905) 26 NLR 147 at 148; *Samuel Kantor v James Bell & Co* (1906) 27 NLR 363 at 366; *Nxasana v Minister of Justice and Another* 1976 (3) SA 745 (D) at 760 *et seq.*; *Fernandes v Fittinghoff & Firher CC* 1993 (2) SA 704 (W) at 707H-I. See also Van Zyl GB *The Theory of the Judicial Practice of South Africa* 1921 413.

²³³ 1976 (3) SA 745 (D) at 760. See also *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 675H.

²³⁴ *Grant v Grant* 1949 (1) SA 22 (C) at 26; *Guggenheim v Rosenbaum (1)* 1961 (4) SA 15 (W) at 18B-19E; *Nxasana v Minister of Justice and Another* 1976 (3) SA 745 (D) at 760 *et seq.*; *Federated Insurance Ltd v Britz and Another* 1981 (4) SA 74 (T) at 75; *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 678A-B; *Fernandes v Fittinghoff & Firher CC* 1993 (2) SA 704 (W) at 708A. With regard to *Federated Insurance Ltd v Britz and Another* 1981 (4) SA 74, see also Skeen ASQ ‘The mercenary witness and the grant of a commission *de bene esse*’ 1982 *South African Law Journal* 338 *et seq.*

²³⁵ *Fernandes v Fittinghoff & Firher CC* 1993 (2) SA 704 (W) at 708D-E.

²³⁶ For instance due to ill-health. See in this regard *Robinson v Randfontein Estates Gold Mining Co Ltd* 1918 TPD 420 at 422; *Johnson v Guernsey & Foreign Investment Trust Ltd* 1935 CPD 448 at 450; *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C) at 264; *Federated Insurance Ltd v Britz and Another* 1981 (4) SA 74 (T) at 75 *et seq.*

²³⁷ *Fernandes v Fittinghoff & Firher CC* 1993 (2) SA 704 (W) at 708F-H.

²³⁸ *Fernandes v Fittinghoff & Firher CC* 1993 (2) SA 704 (W) at 708G-H.

²³⁹ *Fernandes v Fittinghoff & Firher CC* 1993 (2) SA 704 (W) at 708H-I.

application,²⁴⁰ and how convenient and expensive the evidence-taking before the commissioner will be.²⁴¹ Moreover, the court must also consider whether the foreign witness can be properly examined and cross-examined if his testimony is taken on commission.²⁴² The court has furthermore to take into account what will be the prejudice to the litigant seeking the commission if the latter is refused and the detriment to the opponent if the application is granted,²⁴³ as well as how important it would be for the court to see and hear the particular witness at trial.²⁴⁴ Finally, courts do not look favourably at an application for the examination of an expert domiciled abroad on commission, if the possibility of obtaining such evidence through an expert located in South Africa has not been sufficiently explored.²⁴⁵ Moreover, the mere fact that a foreign witness is more expert than those in South Africa, is generally not sufficient to take the relevant evidence on commission. It, however, goes without saying that a commission will be granted where there is no suitable expert available in South Africa.²⁴⁶

Depending on whether the application for the appointment of a commission refers to foreign litigants or third parties, the court exercises its discretion in a different way.²⁴⁷ With regard to non-party witnesses, South African courts generally grant a commission, unless the litigant not applying for commission is not likely to have a fair trial, if the evidence is taken by a commissioner.²⁴⁸

²⁴⁰ *Fleischer v Klassen* (1883) 3 EDC 207 at 208; *Botma v Norton* (1905) 22 SC 65 at 66; *Grant v Grant* 1949 (1) SA 22 (C) at 30; *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 678F.

²⁴¹ *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 676F-H, 677A-E; *Fernandes v Fittinghoff & Firher CC* 1993 (2) SA 704 (W) at 709A-B. See also *Caldwell v Chelcourt Ltd* 1965 (2) SA 270 (N) at 272F-H, 279A-B.

²⁴² See in this regard *Robinson v Randfontein Estates Gold Mining Co Ltd* 1918 TPD 420 at 422; *Pountas' Trustee v Coustas* 1924 WLD 170 at 172 *et seq.*; *Rhodesia Railways Ltd v Markham & Willoughby's Consolidated Co Ltd* 1924 SR 57; *Hespel v Hespel* 1948 (3) SA 257 (E) at 265; *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C) at 264; *S v Ffrench-Beytagh* (2) 1971 (4) SA 426 (T) at 430.

²⁴³ *Grant v Grant* 1949 (1) SA 22 (C) at 32; *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C) at 263; *Fernandes v Fittinghoff & Firher CC* 1993 (2) SA 704 (W) at 709B-C.

²⁴⁴ *Hespel v Hespel* 1948 (3) SA 257 (E) at 262; *S v Hoare and Others* 1982 (3) SA 306 (N) at 308; *Meyerson v Health Beverages (Pty) Ltd* 1989 4 SA 667 (C) at 676D-E; *Fernandes v Fittinghoff & Firher CC* 1993 (2) SA 704 (W) at 709C-E.

²⁴⁵ *Hind v Boswell Brothers Circus (Pty) Ltd* 1952 (2) SA 158 (N) at 161; *Hurwitz v Southern Insurance Association Ltd* 1970 (3) SA 80 (W) at 81; *Smitham v De Luca* 1977 (2) SA 582 (W) at 584 *et seqq.*

²⁴⁶ *Jokl and Others v Alexander* 1947 (3) SA 542 (W) at 546-549 with reference to *Carnes v Maeder* 1939 WLD 207. See also *SA Mutual Life Assurance Society v African Life Assurance Society Ltd* (1909) 19 CTR 38; *Gough v Woolley* 1912 EDL 39; *Kitchener and Another v South African Native Trust* 1962 (2) SA 311 (T) at 312C-314B.

²⁴⁷ Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 859, 861.

²⁴⁸ *Robinson v Randfontein Estates Gold Mining Co Ltd* 1918 TPD 420 at 424; *Federated Insurance Ltd v Britz and Another* 1981 (4) SA 74 (T) at 76.

In *Robinson v Randfontein Estates Gold Mining Co Ltd*,²⁴⁹ Wessels J held the following:

“I take it as a general rule that, if a witness in a cause cannot, by subpoena, be brought before this Court, rather than do without or lose his evidence the Court will issue a commission de bene esse to examine him in his own domicile. The Court cannot compel an unwilling person to come from a foreign country to give evidence here, and in these circumstances the next best thing that the Court can do is to take his testimony upon paper.”

He furthermore pointed out that:

*“(…) the exclusion of the testimony of witnesses whose attendance cannot be enforced by this Court is more likely to lead to a miscarriage of justice than to have their testimony on paper.”*²⁵⁰

Where foreign third parties cannot be compelled by the trial court and are not willing to voluntarily attend the trial, the courts in South Africa prefer to obtain the evidence of such witnesses on commission, rather than not having their testimony at all.²⁵¹

In this context, one has to bear in mind that the litigant, whose application for taking evidence on commission is granted, is at a disadvantage in respect of the efficacy of such evidence.²⁵² In *Robinson v Randfontein Estates Gold Mining Co Ltd*, the court held in this regard that:²⁵³

“the person who produced on paper the evidence of a witness is as a rule at a disadvantage, because the Court will pay more attention to the evidence of witnesses who appear before it, who are examined and cross-examined before it, than to those witnesses whom it has not had an opportunity of seeing, and, if a question arises as to the credibility of such a witness, or whether the Court ought to accept his testimony, it would prefer to base its judgment on what it has seen and heard than on testimony about which some doubt may exist.”

In the light of the above, before applying for a commission under Rule 38(3) of the High Court Rules, the litigant should try to persuade the foreign witness to come to South Africa and testify before the trial court.

By contrast, South African courts are generally reluctant to allow a plaintiff domiciled abroad

²⁴⁹ 1918 TPD 420 at 421. See also *Hespel v Hespel* 1948 (3) SA 257 (E) at 264; *S v Hoare and Others* 1982 (3) SA 306 (N) at 307; *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 677F.

²⁵⁰ *Randfontein Estates Gold Mining Co Ltd* 1918 TPD 420 at 423. See also *Grant v Grant* 1949 (1) SA 22 (C) at 30.

²⁵¹ For cases in which commissions were granted regarding witnesses located outside South Africa, see *National Bank of SA Ltd v Peel* (1909) 19 CTR 101; *Pountas' Trustee v Coustas* 1924 WLD 170; *Howaldt & Vollmer v Land & Agricultural Bank of SWA* 1924 SWA 91; *Hespel v Hespel* 1948 (3) SA 257 (E); *Grant v Grant* 1949 (1) SA 22 (C).

²⁵² *S v Hoare and Others* 1982 (3) SA 306 (N) at 308.

²⁵³ 1918 TPD 420 (2) at 422. See also *Scott v Scott* 1955 (4) SA 153 (W) at 154H, 155A; *S v Ffrench-Beytagh* (2) 1971 (4) SA 426 (T) at 428E.

to give evidence on commission, as it was the plaintiff who has chosen the *forum*. In this context, Wessels J stated the following:²⁵⁴

“(...) the Court will often insist on the plaintiff appearing in person, because it is the plaintiff who invokes the aid of the Court and it is not too much to expect of him that he will submit himself to the jurisdiction of the Court and appear in person (...).

In *Princess Eugenie of Greece v Prince Dominique Radziwill*, the court refused to take the evidence of a plaintiff domiciled in France on commission. Here, the court held that:

“where the evidence sought to be given elsewhere is of great importance and the amount in dispute substantial, the Court is naturally slow to grant a party the indulgence of a commission de bene esse, and the Court is particularly disinclined to accede to such a request when the party asking for such relief is the plaintiff and, in addition a peregrinus. Furthermore, where the issues involved are of a serious character and where (...) a determination of these issues must largely depend upon the credence to be placed upon the evidence of the respective parties, it is difficult to see how justice can be done if the order is granted.”²⁵⁵

In contrast to a foreign plaintiff, courts are more willing to grant an order for taking the evidence of a defendant domiciled abroad on commission, provided the latter can show good grounds for it.²⁵⁶ Courts, however, are reluctant to grant a commission of a foreign defendant where difficult issues of fact are involved.²⁵⁷

In cases where both the plaintiff and defendant are domiciled outside South Africa, a commission *de bene esse* is usually not granted. The *ratio* for such refusal is presumably that such cases should rather be heard by a court in a country where either one or both of the litigants are located.²⁵⁸

²⁵⁴ *Robinson v Randfontein Estates Gold Mining Co Ltd* 1918 TPD 420 at 422. See also *Samuel Kantor v James Bell & Co* 1906 NLR 363 at 364 *et seq.*; *Hespel v Hespel* 1948 (3) SA 257 (E) at 262 *et seq.*; *Princess Eugenie of Greece v Prince Dominique Radziwill* 1949 (2) SA 259 (C) at 261; *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 678D.

²⁵⁵ 1949 (2) SA 259 at 261. See also *Caldwell v Chelcourt Ltd* 1965 (2) SA 270 (N) at 272D-E where the amount in dispute was relatively small, but the court refused the plaintiff's application for commission, as it expected the plaintiff's evidence to be of great importance. See also *Scott v Scott* 1955 (4) SA 153 (W) at 155A. *Cf.*, however, *Escombe v Folkes* (1890) 11 NLR 68 at 68, where the evidence of a foreign plaintiff was taken on commission.

²⁵⁶ *Rygor v Rygor* 1908 TS 1098 at 1099; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1918 TPD 420 at 422; *Freedman v Bauer & Black*; *Bauer & Black v Freedman* 1941 WLD 161 at 176; *Hespel v Hespel* 1948 (3) SA 257 (E) at 262 *et seq.*; *Grant v Grant* 1949 (1) SA 22 (C) at 31; *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 678D-E.

²⁵⁷ *Morgan v Hiddingh* (1898) 8 CTR 318 at 318; *MJ Dhooma v AC Pillay* (1905) 26 NLR 147 at 148; *Watson's Trustee v Daines & Seymour* (1908) 18 CTR 28 at 28.

²⁵⁸ Van Loggerenberg DE *Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa Volume I: The Act* 2012 Act 355.

A commission *de bene esse* cannot be granted only with respect to formal evidence,²⁵⁹ but also in relation to contentious evidence issues.²⁶⁰ In practice, however, courts will more readily grant a commission, if evidence of a formal nature is involved.²⁶¹ Where the foreign evidence relates to fraud, courts give even closer consideration to the question of whether there is fear of miscarriage of justice in case a commission *de bene esse* is issued.²⁶² Here, evidence is only to be given abroad if a “*cogent and compelling case*” has been established as to why the testimony should be taken on commission.²⁶³

The application for a commission *de bene esse* is made on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.²⁶⁴ The application has, *inter alia*, to elaborate on the nature of the proposed evidence and its relevance,²⁶⁵ and it has to include the names of the witnesses to be questioned.²⁶⁶ Moreover, it has to set out why it is convenient or necessary for the purposes of justice to take the evidence on commission. The application has to state the reasons why the witness cannot appear in person before the trial court.²⁶⁷ Finally, the request may also suggest the person who may act as commissioner.²⁶⁸

In addition to the aforesaid notice of motion, the litigant requesting a commission *de bene esse* has to apply for the issue of a letter of request to the competent authority of the state where the

²⁵⁹ Formal evidence may, for instance, include the evidence of a bank official who testifies regarding the exchange rate on a particular day, Petè S *et al Civil Procedure: A Practical Guide* 2011 250. See also *S v Ffrench-Beytagh* (2) 1971 (4) SA 426 at 429.

²⁶⁰ *S v Ffrench-Beytagh* (2) 1971 (4) SA 426 at 428; *Smitham v De Luca* 1977 (2) SA 582 (W) at 586 *et seq.*

²⁶¹ Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 863; Malan FR *et al* ‘Transnational Litigation in South African Law’ 1995 *Tydskrif vir die Suid Afrikaanse Reg* 466.

²⁶² *Robinson v Randfontein Estates Gold Mining Co Ltd* 1918 TPD 420 at 424; *Federated Insurance Ltd v Britz and Another* 1981 (4) SA 74 (T) at 422.

²⁶³ *Johnson v Guernsey & Foreign Investment Trust Ltd* 1935 CPD 448 at 450. For more on this subject, see, amongst others, Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 862 *et seq.*

²⁶⁴ Rule 38(3) read in conjunction with Rule 6(1) of the High Court Rules.

²⁶⁵ *Ehrmann v Ehrmann* [1896] 2 Ch Div 611 at 616; *Samuel Kantor v James Bell & Co* 1906 NLR 363 at 364; *Davis v Davis* 1945 WLD 87 at 91; *Hespel v Hespel* 1948 (3) SA 257 (E) at 260; *Grant v Grant* 1949 (1) SA 22 (C) at 26. See also *Rafbros (Tvl) (Pty) Ltd v Nortier* 1968 (1) SA 160 (W) at 161 *et seq.*; *Nxasana v Minister of Justice and Another* 1976 (3) SA 745 (D) at 760 *et seq.*; *Smitham v De Luca* 1977 (2) SA 582 (W) at 585.

²⁶⁶ *Curator of Marais’s Estate v Woodbine Cloete* (1880) Kotze 187; *Ross T Smith & Co v A Findlay & Co* (1899) 20 NLR 148 at 148; *De Kock v De Kock* (1924) 3 PH F22 (C); *Freedman v Bauer & Black*; *Bauer & Black v Freedman* 1941 WLD 161 at 175; *Hurwitz v Southern Insurance Association Ltd* 1970 (3) SA 80 (W) at 81.

²⁶⁷ *Ehrmann v Ehrmann* [1896] 2 Ch Div 611 at 614; *Samuel Kantor v James Bell & Co* 1906 NLR 363 at 364; *Rollnick v Rollnick* (1923) 2 PH F16 (W); *Hespel v Hespel* 1948 (3) SA 257 (E) at 261.

²⁶⁸ *Segal v Segal* 1949 (4) SA 86 (C) at 92.

evidence to be obtained is located.²⁶⁹ Once such application is granted by the South African court, the letter of request is forwarded to the foreign state.²⁷⁰

As a general principle, an application under Rule 38(3) of the High Court Rules is only granted once the litigants have concluded their pleadings. Only at this stage have the issues underlying the lawsuit been defined, and it is clear what evidence is required.²⁷¹ In exceptional cases, however, the court may order a commission *de bene esse* before the pleadings have been closed. This may, for instance, be the case where there is a danger that the evidence gets lost before the litigants submitted their pleadings.²⁷²

When granting the application for the taking of foreign evidence on commission, the court may suggest a suitable person who shall act as commissioner. Such an individual is preferably domiciled in the state where the letter of request is to be executed. The competent foreign authority, however, is not bound by such a proposal. In practice, however, it will not overrule such suggestion without good cause.²⁷³

As mentioned earlier, it is the foreign state, where the witness is located, that decides whether or not, and if so, to what extent judicial assistance is granted. Where the foreign state does not allow the taking of evidence *via* commissioners, the request for judicial assistance will be rejected.²⁷⁴ This holds particularly true for Switzerland, which does not permit evidence-taking through commissioners when rendering judicial assistance based on *courtoisie internationale*. It is, however, submitted that the taking of evidence on commission should be allowed in Switzerland, if the Swiss judge, in whose jurisdiction the evidence is located, is acting as commis-

²⁶⁹ Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 872; Van Loggerenberg DE *Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa Volume I: The Act* 2012 Act 358 *et seq.*

²⁷⁰ According to Rule 4(5) of the High Court Rules, the letter of request has to be accompanied by a sworn translation into an official language of the state in which the request is to be executed.

²⁷¹ *Maynard v The Wynberg Railway Co* (1865) 1 Roscoe 302; *Re E Matilde Schnitzler v Trustees of the Insolvent Estate of Schnitzler & Peyke* (1891) 6 EDC 190 at 191 *et seq.*; *Natal Land & Colonization Co Ltd v J W Rycroft* (1906) 27 NLR 180 at 181.

²⁷² *Nelson v Nelson* (1881) 1 SC 139 at 139; *Cohen v Cohen* (1884) 4 EDC 40 at 40; *Natal Land & Colonization Co Ltd v J W Rycroft* (1906) 27 NLR 180 at 181; *Delany v Medefindt* (1908) EDC 48 at 49. For more on this issue, see, amongst others, Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 868.

²⁷³ *Cf. Paarl Roller Flour Mills v Union Government* 1925 (1) PH F39 (C), where the Supreme Court has issued a commission to a foreign state and left it to the latter's competent authority to fill in the name of the individual acting as commissioner.

²⁷⁴ In order to enhance the cross-border taking of evidence, the foreign state should, before refusing a request for the taking of evidence on commission, enquire whether the trial court wishes the evidence to be taken through the competent authority of the foreign state.

sioner. The situation is different in countries adopting the common-law model, as they generally allow the taking of evidence through commissioners on their territory.

D. Position of South Africa with Regard to Cross-border Taking of Evidence in Civil and Commercial Matters

South Africa is a party to the Hague Evidence Convention, but has not yet incorporated the Convention's provisions into its domestic law. Despite the lack of transformation into national law, South Africa has applied the Convention in the past. It has not only executed requests for judicial assistance received from other contracting states, but it has also sent requests abroad. Regardless of such application, one has to keep in mind, however, that litigants in civil proceedings pending in South Africa cannot claim direct rights under the Hague Evidence Convention due to the aforesaid lack of transformation.

With regard to countries for which the Hague Evidence Convention is not applicable, litigants in South Africa are at the mercy of the foreign states when seeking evidence located in the latter's territory, provided there is no bilateral treaty on cross-border taking of evidence in civil and commercial matters. To date, South Africa has not entered into any such international treaty. The above holds particularly true for South Africa's immediate neighbouring countries, and all other African states.²⁷⁵

Where a trial court or a litigant in civil proceedings pending abroad wishes to obtain evidence in South Africa based on *courtoisie internationale*, South African law provides two methods, namely the procedure as stipulated in the Foreign Courts Evidence Act, and that in Section 33(1) of the Supreme Court Act. The fact that there are two options when seeking evidence in South Africa is confusing for the said courts and litigants.

In the light of the above, the need for South Africa to change the legal situation relating to international cooperation in evidence-taking in civil and commercial matters is evident. In 2000, the South African Law Reform Commission was asked by Parliament to look into the issue of "Consolidated Legislation Pertaining to International Co-operation in Civil Matters" which, amongst others, also included the taking of evidence for use in civil proceedings. In its report released in 2008, the South African Law Reform Commission emphasised the aforesaid problems regarding the cross-border taking of evidence under South African law and made various

²⁷⁵ Apart from the Seychelles and Morocco, which are party to the Hague Evidence Convention. For a list of the contracting states, see http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (date of use: 31 January 2013).

recommendations. The latter included the incorporation of the Hague Evidence Convention into domestic law and, at the same time, the repeal of the Protection of Businesses Act.²⁷⁶ The report also suggested the harmonisation of domestic rules governing requests of trial courts and litigants in foreign civil proceedings to obtain evidence in South Africa by consolidating the relevant provisions in the Supreme Court Act into the Foreign Courts Evidence Act in order to provide the said courts and litigants with a uniform method for gathering evidence in South Africa. Furthermore, the negotiation of bilateral treaties with neighbouring states was recommended.²⁷⁷ So far, neither the recommendations of the South African Law Reform Commission, nor any other changes pertaining to the cross-border taking of evidence in civil and commercial matters have been implemented in South African law.

With regard to South Africa and other African countries, there is, in addition to the suggestions of the South African Law Reform Commission, another approach to achieve cooperation in evidence-taking between the said countries, namely through an autonomous convention on cross-border taking of evidence in civil and commercial matters prepared by and for the said countries.²⁷⁸ Compared to the Hague Evidence Convention, the preparation of a new convention has the major advantage that it can be tailored to the particular needs of the aforesaid countries. This is all the more important given that the Hague Evidence Convention was drafted not only with common-law countries in mind, but also with regard to civil-law jurisdictions. To overcome some of the differences in evidence-taking between these two systems mentioned earlier,²⁷⁹ compromises were made when the Hague Evidence Convention was drafted. It goes without saying that compared to the negotiation of bilateral treaties, the drafting of a new convention is a more lengthy and cumbersome process, as more than just two states are involved. However, amongst the member states of the convention, a uniform legal area in evidence-taking in civil and commercial matters would be created where all the states involved would be under the same obligation to render judicial assistance and their requests for cross-border taking of evidence would be governed by the same rules.

²⁷⁶ For a draft of the act enacting the provisions of the Hague Evidence Convention into South African law, see South African Law Reform Commission *Project 121: Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters - Report* (December 2006) http://salawreform.justice.gov.za/reports/r_prj121_2006dec.pdf 76, 125 *et seq.* (date of use: 31 January 2013). See also para. III.C.1.d) above.

²⁷⁷ South African Law Reform Commission *Project 121: Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters - Report* (December 2006) http://salawreform.justice.gov.za/reports/r_prj121_2006dec.pdf 26 *et seq.* (date of use: 31 January 2013).

²⁷⁸ See in this regard Chapter 6, where an attempt is made to generate basic principles for such convention between South Africa, Botswana, Namibia, Nigeria, and Uganda.

²⁷⁹ *Cf.* Chapter 2 para. IV.B.2.d).

IV. Cross-border Taking of Evidence in Civil and Commercial Matters in Botswana

A. General Remarks

Botswana is not a contracting state to the Hague Procedure Convention²⁸⁰ and the Hague Evidence Convention,²⁸¹ and it has not entered into any other international treaty on the cross-border taking of evidence in civil and commercial matters.²⁸² Botswana is, however, a party to the Vienna Consular Convention.²⁸³ As a result, judicial assistance in evidence-taking in civil and commercial matters between Botswana and other states is, if rendered at all, based on *courtoisie internationale*.²⁸⁴

With regard to the latter, two scenarios can be distinguished: on the one hand, the case where a trial court or litigant in foreign civil proceedings wishes to obtain evidence situated in Botswana, and, on the other, the situation where foreign evidence is sought by a party in civil proceedings pending in Botswana. While in the first case, the relevant requests are governed by the Foreign Tribunals Evidence Act,²⁸⁵ applications from litigants in Botswana are regulated by Order 44 of the Rules of the High Court. In this context, mention has also to be made of the Compulsion of Witnesses Act.²⁸⁶ This Act deals, *inter alia*, with the procedure for compelling persons domiciled in Botswana to appear in court in Lesotho, Namibia, South Africa, Swaziland, and Zimbabwe.²⁸⁷

²⁸⁰ For a list of the contracting states, see http://www.hcch.net/index_en.php?act=conventions.status&cid=33 (date of use: 31 January 2013).

²⁸¹ For a list of the member states, cf. http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (date of use: 31 January 2013).

²⁸² Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 157.

²⁸³ For a list of the contracting states to this Convention, see http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=III-6&chapter=3&lang=en#Participants (date of use: 31 January 2013). See also in this regard para. III.A and fn. 124 above.

²⁸⁴ For more on *courtoisie internationale*, see Chapter 2 para. V.B.1.

²⁸⁵ Chapter 11:03.

²⁸⁶ Chapter 14:02.

²⁸⁷ Sections 3-6 of the Compulsion of Witnesses Act. Section 7(1) of the said Act provides that witnesses in Botswana may be examined by means of interrogatories, if the lawsuit, for which the testimony is obtained, is pending in Lesotho, or in Namibia, South Africa, Swaziland, or in Zimbabwe. The evidence-taking by means of interrogatories, however, only applies in matters pending in a magistrates' court in the aforesaid countries. For more on the Compulsion of Witnesses Act, see Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 157.

B. Taking of Evidence based on *Courtoisie Internationale*

1. Obtaining Evidence in Botswana for the Benefit of a Court Abroad

The application for obtaining evidence in Botswana has to be lodged with the High Court in whose jurisdiction the witness to be questioned is located.²⁸⁸ The request has to be accompanied by a certificate under the hand of an accredited ambassador, minister, other diplomatic officer, or consular agent. Such a certificate has to confirm that any matter, in relation to which an application is made, is a civil or commercial matter pending before a court in the requesting state, and that such court is desirous of obtaining the testimony of the witness referred to in the application.²⁸⁹ Where no such certificate is produced, other evidence to that effect is admissible.²⁹⁰ Having said this, it can be assumed, for instance, that the order wherein the relevant court ruled that the testimony of a particular witness is to be taken in Botswana is sufficient under the Foreign Tribunals Evidence Act, provided such order is duly certified in accordance with the laws of the requesting state. It is submitted that an application under the said Act cannot only be made by the court before which the civil proceedings are pending, but also by the litigant who called the foreign witness, provided he can produce the aforesaid certificate or other suitable evidence.

If it appears to the High Court that the trial court is desirous to obtain evidence in Botswana, it orders the examination of the relevant witness by oath, interrogatories, or otherwise before the person named in such order.²⁹¹ The High Court not only appoints the commissioner, but it also gives directions as to the time, place, and manner of the examination, and instructs the witness to appear in court and/or to produce any documents specified in the request for judicial assistance.²⁹² Such directions may be enforced in the same manner as an order made in a lawsuit pending in the High Court.²⁹³

The examination of the witness in Botswana is conducted in accordance with the rules of procedure and evidence that apply in civil proceedings before the High Court. This particularly holds true for the witness' right to refuse to testify. According to Section 6 of the Foreign Tri-

²⁸⁸ Section 2(1) of the Foreign Tribunals Evidence Act.

²⁸⁹ Section 3 of the Foreign Tribunals Evidence Act.

²⁹⁰ Section 3 *in fine* of the Foreign Tribunals Evidence Act.

²⁹¹ Section 2(1) of the Foreign Tribunals Evidence Act.

²⁹² Section 2(2) of the Foreign Tribunals Evidence Act.

²⁹³ Section 2(3) of the Foreign Tribunals Evidence Act.

bunals Evidence Act, a witness may decline to give evidence which may incriminate himself, and to answer questions which he may refuse as witness in any claim before the High Court.²⁹⁴

The Foreign Tribunals Evidence Act does not include a reservation similar to that in Section 2(2) of the South African Foreign Courts Evidence Act, which prohibits the furnishing of information that contravenes the Protection of Businesses Act.²⁹⁵

2. Obtaining Evidence Abroad for the Benefit of a Court in Botswana

a) General Remarks

In the past, there were statutory provisions dealing with the procedure for requests emanating from Botswana to obtain evidence in civil and commercial matters in a foreign country. The relevant acts seem to have ceased to apply though, and it appears that there are no longer statutory provisions in this regard. A litigant in Botswana seeking evidence abroad can thus merely invoke Order 44(3) of the Rules of the High Court.²⁹⁶

b) Taking of Evidence based on Order 44(3) of the Rules of the High Court

The wording of the aforesaid provision is virtually identical with that of Rule 38(3) of the South African High Court Rules. According to Order 44(3) of the Rules of the High Court, a judge may “*in any matter where it appears convenient, or necessary for the purpose of justice, make an order for taking the evidence of a witness (...) by a commissioner of the judge*”. As in the case of Rule 38(3) of the South African High Court Rules, Order 44(3) stipulates an exception from the normal procedure for the examination of a witness, namely an examination *viva voce* in presence of the trial court.²⁹⁷ By granting a commission under Order 44(3), the court dispenses with the need for a witness to appear in court.²⁹⁸

Like the corresponding rule in South African law, Order 44(3) of the Rules of the High Court does not differentiate between a commission regarding evidence within Botswana and a commission relating to evidence located abroad. Again, it is the competent authority of the requested state that decides whether a request for taking of evidence issued by a court in Botswana is

²⁹⁴ For more in this regard, *cf.* Chapter 5 para. IV.A.2.

²⁹⁵ See in this regard para. III.C.1.d) above.

²⁹⁶ The Foreign Tribunals (Evidence) Act 1856 and the Evidence by Commissions Acts 1859 and 1885. For further details in this regard, see Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 157.

²⁹⁷ Order 44(2)(1) of the Rules of the High Court.

²⁹⁸ Regarding the nature of the taking of evidence on commission, see para. III.C.2.b) above.

executed on its territory, and if so, how the examination will be conducted. Order 44(4)-(8) of the said Rules regulating the procedure for a commission are thus only binding for commissioners taking evidence in Botswana.²⁹⁹

Whether or not the taking of evidence on commission is allowed under Order 44(3) of the Rules of the High Court lies within the discretion of the High Court of Botswana. The respective principles have thus to be developed by case law.³⁰⁰ To date, there has only been one reported case, *First National Bank of Botswana Ltd v Eastgate Enterprises (Pty) Ltd and Others*,³⁰¹ that dealt with foreign evidence taken on commission under the said provision. In this decision, Lord Coulsfield JA held the following:³⁰²

“Order 44 rule 3 of the Rules of the High Court is in substantially the same terms as the corresponding rule in South Africa and guidance as to its application can be found in decided cases there.”

In his reasoning, Lord Coulsfield JA thus applied the principles that were formulated by South African case law in relation to Rule 38(3) of the South African High Court Rules.³⁰³ Since such principles have already been outlined earlier, it is not necessary to elaborate further on the principles for a commission under Order 44(3) of the Rules of the High Court.³⁰⁴

The application for the appointment of a commission is brought on notice of motion supported by an affidavit outlining the facts upon which the applicant bases his request.³⁰⁵ In addition, the litigant has to apply to the High Court for the authorisation of a letter of request wherein the competent authority of the foreign state is asked for judicial assistance.³⁰⁶ According to Kakuli, such a letter of request should particularly outline the matters upon which the witness' evidence is requested.³⁰⁷ It is furthermore advisable to include a list of the questions to be put to the foreign witness. Once the application for commission including the letter of request is

²⁹⁹ For more in this regard, cf. the relevant comments made under South African law in para. III.C.2.b) above.

³⁰⁰ *First National Bank of Botswana Ltd v Eastgate Enterprises (Pty) Ltd and Others* [2008] 1 BLR 279 (CA) at 282A. See also Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 155.

³⁰¹ [2008] 1 BLR 279 (CA).

³⁰² At 282C.

³⁰³ See *First National Bank of Botswana Ltd v Eastgate Enterprises (Pty) Ltd and Others* [2008] 1 BLR 279 (CA) at 282C *et seqq.*

³⁰⁴ See in this regard para. III.C.2.b) above.

³⁰⁵ Order 44(3) read in conjunction with Order 12(1) of the Rules of the High Court. See also Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 155. For more on the content of the application, see para. III.C.2.b) above. For an example of a court order regarding a commission, see *First National Bank of Botswana Ltd v Eastgate Enterprises (Pty) Ltd and Others* [2008] 1 BLR 279 (CA) at 286C-E.

³⁰⁶ See *First National Bank of Botswana Ltd v Eastgate Enterprises (Pty) Ltd and Others* [2008] 1 BLR 279 (CA) at 286D. See also Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 154.

³⁰⁷ Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 157.

granted, the latter is forwarded to the competent foreign authority through the diplomatic routes of the Foreign Office of Botswana.³⁰⁸

As a general rule, leave for an application to take evidence on commission is only granted once the litigants have concluded their pleadings.³⁰⁹

With regard to the execution of a letter of request regarding the taking of evidence on commission outside Botswana, the relevant remarks made in relation to South Africa apply *mutatis mutandis* to Order 44(3) of the Rules of the High Court.³¹⁰ Accordingly, the competent foreign authority conducts the examination of the witness in accordance with its own law when executing the letter of request of the High Court of Botswana.

C. Position of Botswana with Regard to Cross-border Taking of Evidence in Civil and Commercial Matters

Since Botswana is not a party to any international agreement on cross-border taking of evidence in civil and commercial matters, litigants in civil proceedings pending in Botswana, who wish to obtain evidence abroad, are at the mercy of the foreign state on whose territory the evidence is located.

The position of such litigants can only be improved by adopting internationally legally binding instruments on evidence-taking. This holds particularly true for the accession of Botswana to the Hague Evidence Convention.³¹¹ Such an approach, however, would only enhance the legal situation with regard to evidence located in contracting states to the Hague Evidence Convention, but not in relation to other states. This particularly applies to the vast majority of the African countries, including Botswana's immediate neighbours.³¹² To overcome this problem, Botswana should, in the short-term, negotiate bilateral treaties with its neighbouring countries, as well as its leading trading partners. In the longer term, Botswana should pursue the creation of regional cooperation in the taking of evidence in civil and commercial matters.³¹³

³⁰⁸ Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 157.

³⁰⁹ Order 44(3) of the Rules of the High Court. See in this regard also the relevant remarks relating to South African law in para. III.C.2.b).

³¹⁰ See para. III.C.2.b) above.

³¹¹ Including the latter's implementation in the domestic law.

³¹² With the exception of South Africa, Morocco, and the Seychelles, which are members of the Hague Evidence Convention. For a list of contracting states to this Convention, see http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (date of use: 31 January 2013).

³¹³ See in this regard above para. III.D and Chapter 6.

V. Cross-border Taking of Evidence in Civil and Commercial Matters in Namibia

A. General Remarks

Namibia is neither a member of the Hague Procedure Convention or the Hague Evidence Convention, nor has it entered into any bilateral treaty on the taking of evidence in civil and commercial matters. Namibia, however, is a party to the Vienna Consular Convention.³¹⁴ As a result, judicial assistance in cross-border taking of evidence in civil and commercial matters between Namibia and other states is, if at all, granted based on *courtoisie internationale*.³¹⁵

Again, one has to differentiate between requests emanating from foreign states to obtain evidence in Namibia and applications of litigants in proceedings before the Namibian High Court for the collection of evidence abroad. In the first case, Namibian law provides two methods: requests can either be based on the Foreign Courts Evidence Act,³¹⁶ or on Section 29 of the High Court Act.³¹⁷ In the second configuration, a litigant has to apply for a commission *de bene esse* based on Section 28 of the High Court Act.

B. Taking of Evidence based on Courtoisie Internationale

1. Obtaining Evidence in Namibia for the Benefit of a Court Abroad

a) Taking of Evidence based on the Foreign Courts Evidence Act

Namibia enacted the Foreign Courts Evidence Act in 1995. This Act repealed the South African Foreign Courts Evidence Act No. 80 of 1962, which was applicable in Namibia before 1995.³¹⁸ It therefore comes as no surprise that the Namibian Foreign Courts Evidence Act is

³¹⁴ For a list of the contracting states to this Convention, see http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=III-6&chapter=3&lang=en#Participants (date of use: 31 January 2013). See also in this regard para. III.A and fn. 124 above.

³¹⁵ For more on *courtoisie internationale*, see Chapter 2 para. V.B.1.

³¹⁶ Act No. 2 of 1995.

³¹⁷ Act No. 16 of 1990.

³¹⁸ See Section 13 of the Namibian Foreign Courts Evidence Act. For the South African Foreign Courts Evidence Act, see para. III.C.1.b) above. Between 1915 and 1990, Namibia (then called “South West Africa”) was under the administration of South Africa. As a result, South African legislation, including the South African Foreign Courts Evidence Act, applied in Namibia. At the independence of Namibia in 1990, some South African statutes were inherited by Namibia. This holds particularly true for the South African Foreign Courts Evidence Act. See in this regard Legal Assistance Centre *Namlex: Index to the Laws of Namibia* (2010 update) <http://www.lac.org.na/namlex/Intro.pdf> Introduction-2, Introduction-5, History-1 *et seqq.* (date of use: 31 January 2013); Legal Assistance Centre *Namlex: Index to the Laws of Namibia - Evidence* (2010 update) <http://www.lac.org.na/namlex/Evidence.pdf> Evidence-2 (date of use: 31 January 2013). In order to avoid any confusion between the Act applicable in South Africa and that in Namibia, reference will be made either to the “South African Foreign Courts Evidence Act” or the “Namibian Foreign Courts Evidence Act”.

inspired by the aforesaid South African Act. As a result, the wording of both acts is virtually identical.

In the light of the above and in order to avoid repetition, reference can thus be made to the comments on the South African Foreign Courts Evidence Act.³¹⁹ It appears that to date, there has not been any reported case law on the Namibian Foreign Courts Evidence Act.³²⁰

An application under Section 2(1) of the Namibian Foreign Courts Evidence Act has to be lodged with the High Court in whose jurisdiction the evidence to be obtained is located.

b) Taking of Evidence based on Section 29 of the High Court Act

The wording of Section 29 of the High Court Act is practically identical with that of Section 33 of the South African Supreme Court Act.³²¹ Accordingly, Section 29(1) of the High Court Act stipulates the intimation that the Minister of Justice considers it desirable that effect should be given to a request of a foreign court to obtain evidence in Namibia without requiring the litigants to apply directly to the High Court. By virtue of Section 29(1), the letter of request has to be lodged with the Permanent Secretary for Justice. The request has either to be drafted in English, or has to be accompanied by a translation.³²² Since the identical South African legislation has already been discussed, there is no need to elaborate further on Section 29 of the High Court Act.³²³

c) Restrictions on the Obtaining of Evidence in Namibia based on the Second General Law Amendment Act

Under Section 2(1) of the Second General Law Amendment Act,³²⁴ no person shall, except with the permission of the Minister of Economic Affairs (now presumably the Minister of Trade and Industry), in compliance with any order, direction or letter of request issued or emanating from outside Namibia, furnish any information as to any business, whether operating in

³¹⁹ Cf. para. III.C.1.b) above.

³²⁰ See, however, *S v Loft-Eaton & Others (2)* 1993 NR 405 (HC) concerning the applicability of the South African Foreign Courts Evidence in Namibia.

³²¹ Cf. para. III.C.1.c) above.

³²² Section 29(1) of the High Court Act. See also *S v Koch* 2006 (2) NR 513 at 535E.

³²³ See para. III.C.1.c) above. With regard to the main differences between the taking of evidence under the Namibian Foreign Courts Evidence Act and Section 29 of the High Court Act, the comments made in para. III.C.1.c) apply *mutatis mutandis*.

³²⁴ No. 94 of 1974. At the independence of Namibia, this Act was inherited by Namibia. See Legal Assistance Centre *Namlex: Index to the Laws of Namibia - Evidence* (2010 update) <http://www.lac.org.na/namlex/Evidence.pdf> Evidence-2 (date of use: 31 January 2013).

or outside Namibia.³²⁵ As in the case of Section 1 of the South African Protection of Businesses Act,³²⁶ the ambit of Section 2(1) of the Second General Law Amendment Act is so broad that it prevents any international judicial cooperation of Namibia, including the cross-border taking of evidence in civil and commercial matters, unless the aforesaid Minister grants permission. To this day, there has not been any reported case law on Section 2 of the Second General Law Amendment.

Based on Section 2(2) of the Namibian Foreign Courts Evidence Act, a request for taking evidence in Namibia is, amongst others, not granted, if it appears to the High Court that such evidence is the furnishing of information in contravention of Section 2 of the Second General Law Amendment Act. Needless to say, the latter provision also applies to requests emanating from foreign states based on Section 29 of the High Court Act.

2. Obtaining Evidence Abroad for the Benefit of a Namibian Court

a) General Remarks

Namibian legislation includes a provision, Section 28 of the High Court Act, which particularly deals with the request of a litigant in civil proceedings before the High Court who seeks evidence located abroad. Rule 38(3)-(8) of the High Court Rules of Namibia contains virtually identical provisions regarding the taking of evidence on commission like Rule 38(3)-(8) of the South African High Court Rules. Rule 38(3)-(8) of the High Court Rules of Namibia, however, only applies to evidence taken on commission in Namibia, while Section 28 of the High Court Act deals with requests to obtain evidence abroad. There is no reported case law with regard to Section 28 of the said Act.

b) Taking of Evidence based on Section 28 of the High Court Act

A litigant in civil proceedings before the High Court of Namibia who is unable to secure the attendance of a witness at the hearing due to the fact that such witness is resident outside Namibia, may apply to the High Court for the issue of a letter of request to the competent foreign court asking the said court to appoint a particular person to act as commissioner to take evidence of such a witness.³²⁷

³²⁵ According to Section 2(3) of the Second General Law Amendment Act, any person, who contravenes Section 2(1), shall be guilty of an offence and on conviction liable to a fine or imprisonment.

³²⁶ Cf. para. III.C.1.d) above.

³²⁷ Section 28(1) of the High Court Act.

Compared to the rules on taking evidence on commission in South Africa and Botswana,³²⁸ Section 28(1) of the High Court Act is a very straightforward provision. It merely requires that the witness to be examined is resident abroad, and that his attendance at the hearing before the High Court cannot be secured by the litigant wishing to call such witness. In this context, one has to keep in mind that neither the litigant nor the High Court can compel a foreign third party to come to Namibia to be examined *viva voce*, but it requires the assistance of the relevant foreign state to obtain such evidence.³²⁹ With regard to foreign litigants, the High Court should allow them to give evidence abroad only in exceptional cases. This holds particularly true for plaintiffs having chosen the *forum*.³³⁰

The application for the issue of a letter of request is made on notice of motion supported by an affidavit as to the facts upon which the application relies for relief.³³¹ The affidavit should, *inter alia*, set out the name of the witness to be examined, as well as the nature and relevancy of the proposed evidence. Moreover, the application should include proof that the witness is residing abroad and not willing to appear before the High Court. Finally, it is advisable to attach a list with the questions to be put to the witness.³³² Although the commissioner is appointed by the foreign court,³³³ it is reasonable for the litigant to make a suggestion for the individual to be nominated as commissioner. The foreign court, however, is not bound by such proposal, but will not overrule the latter without good cause.

Section 28 of the High Court Act is silent on the time when an application for the issue of a letter of request can be made. It is submitted that such an application is, as a general rule, only granted once the litigants have closed their pleadings.³³⁴

Where an application under Section 28(1) of the said Act is granted, the Registrar of the High Court forwards the relevant certificate together with the letter of request through diplomatic

³²⁸ See paras. III.C.1.b) and IV.B.2.b) above.

³²⁹ Cf. *Bidoli v Ellistron t/a Ellistron Truck & Plant* 2002 NR 451 (HC) at 458. See also *Robinson v Randfontein Estates Gold Mining Co Ltd* 1918 TPD 420 at 421. See also *Hespel v Hespel* 1948 (3) SA 257 (E) at 264; *S v Hoare and Others* 1982 (3) SA 306 (N) at 307; *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 677F.

³³⁰ See in this regard the comments made in para. III.C.2.b) above.

³³¹ Section 28(1) of the High Court Act read in conjunction with Rule 6(1) of the Rules of the High Court of Namibia.

³³² See also Section 28(4) of the High Court Act.

³³³ Sections 28(1) *in fine* and 28(5) of the High Court Act.

³³⁴ Cf. Rule 38(3) *in fine* of the High Court Rules of Namibia. According to this provision, an application for the taking of evidence on commission located in Namibia can be made after the close of pleadings.

channels to the competent authority of the foreign state where the witness to be examined is domiciled.³³⁵

Section 28(1) *in fine* of the High Court Act stipulates that the commissioner may take evidence “*by means of interrogatories or otherwise*”.³³⁶ In this context, one has to keep in mind that it is the foreign state that decides in what form requests for judicial assistance are executed.³³⁷ Where a foreign witness refuses to give evidence before the commissioner, Section 28(6) of the said Act instructs the Registrar of the High Court to provide the foreign authority with the necessary documents to enable the latter to compel the witness’ attendance.

By virtue of Section 28(5) of the High Court Act, evidence recorded and duly certified by the relevant commissioner abroad is received as evidence in the proceedings pending before the High Court.

C. Position of Namibia with Regard to Cross-border Taking of Evidence in Civil and Commercial Matters

Namibia is neither a contracting state to the Hague Procedure Convention or Hague Evidence Convention, nor to any other international treaty on the taking of evidence in civil and commercial matters. Its legal position in relation to cross-border taking of evidence in civil and commercial matters is thus identical with that of Botswana. Since the latter has already been discussed, there is no need to further elaborate Namibia’s position.³³⁸

With regard to requests emanating from foreign states to obtain evidence on Namibian territory, the provisions in Section 29 of the High Court Act should be consolidated into the Foreign Courts Evidence Act to provide courts located abroad and litigants in foreign civil proceedings with one single method to seek evidence located in Namibia.³³⁹ In addition, Namibia should repeal or, at least, limit the ambit of Section 2 of the Second General Law Amendment Act in order to enhance judicial cooperation in evidence-taking.

³³⁵ Section 28(2)-(3) of the High Court Act.

³³⁶ See also Section 28(4) of the High Court Act.

³³⁷ *Cf.* the relevant comments made in para. III.C.2.b) above.

³³⁸ See para. IV.C above.

³³⁹ *Cf.* in this regard para. III.D above.

VI. Cross-border Taking of Evidence in Civil and Commercial Matters in Nigeria

A. General Remarks

Nigeria has not acceded to the Hague Procedure Convention, the Hague Evidence Convention, or to any other international agreement on taking evidence in civil and commercial matters. It is, however, a member of the Vienna Consular Convention.³⁴⁰

Nigeria is a federation comprising 36 states and the Federal Capital Territory, Abuja, which each have a high court. Unlike in the other countries dealt with in this thesis, there are no uniform rules on civil procedure which apply to all high courts in Nigeria.³⁴¹ Having said this, the following comments concentrate on the Rules of the High Court of the Federal Capital Territory which were introduced in 2004.³⁴²

In the light of the above, the following subchapter focuses on judicial assistance based on *courtoisie internationale*.³⁴³ It analyses the procedure for requests emanating from outside Nigeria to obtain evidence in the Federal Capital Territory, Abuja, as well as applications from litigants in civil proceedings pending before the High Court of the Federal Capital Territory, Abuja, seeking evidence abroad.

B. Taking of Evidence based on Courtoisie Internationale

1. Obtaining Evidence in the Jurisdiction of the High Court of the Federal Capital Territory, Abuja, for the Benefit of a Court Abroad

a) General Remarks

Before 1990, the Evidence by Commission Act of 1859 and the Foreign Tribunals Evidence Act of 1856 regulated requests from courts abroad wishing to obtain evidence in Nigeria. While the Evidence by Commission Act dealt with requests from other Commonwealth courts,

³⁴⁰ For a list of the contracting states to this Convention, see http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=III-6&chapter=3&lang=en#Participants (date of use: 31 January 2013). See also in this regard para. III.A and fn. 124 above.

³⁴¹ There is, however, the so-called “*Federal High Court*” that has exclusive jurisdiction with regard to specific matters, such as taxation, federal enactments relating to intellectual property, bankruptcy, and insolvency. See in this regard, Section 251 of the Constitution of the Federal Republic of Nigeria 1999. The procedure before the Federal High Court is governed by the Federal High Court (Civil Procedure) Rules 2000.

³⁴² The official title of these Rules is the “*High Court of the Federal Capital Territory, Abuja Civil Procedure Rules, 2004*”. For the sake of simplicity, these rules are referred to as “Rules of the High Court of the Federal Capital Territory” throughout the thesis.

³⁴³ For more on *courtoisie internationale*, see Chapter 2 para. V.B.1.

the Foreign Tribunals Evidence Act governed applications emanating from states outside the Commonwealth. Both acts were United Kingdom statutes³⁴⁴ and were repealed in Nigeria in 1990.³⁴⁵ They are thus no longer applicable in Nigeria, and it appears that these days, requests issued by courts located outside Nigeria are governed by the rules of the high court in whose jurisdiction the evidence to be obtained is located.

b) Taking of Evidence based on Order 38(41) of the Rules of the High Court of the Federal Capital Territory

Where it appears to the High Court of the Federal Capital Territory, Abuja, that a court located outside Nigeria is desirous to obtain the testimony of a witness domiciled in the jurisdiction of the High Court, the latter may give effect to the intention of the respective letter of request. The application to the High Court may be made by any person, provided he is duly authorised to make the application and produces the letter of request, or such other evidence.³⁴⁶ Having said this, an application under Order 38(41) of the Rules of the High Court of the Federal Capital Territory cannot only be made by the court located abroad, but also by the litigant seeking evidence in Nigeria, provided he can prove the court's desire to obtain the said evidence. Order 38(41) does not contain any further provisions on the taking of evidence for the benefit of civil proceedings pending abroad.

The wording of Order 38(41) of the Rules of the High Court of the Federal Capital Territory and that of the first portion of Section 1 of the aforesaid Foreign Tribunals Evidence Act of 1856 are very similar.³⁴⁷ This is not surprising, as it can be assumed that Order 38(41) was in-

³⁴⁴ See Aguda *TA Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria* 1980 503 n. 42.93. See also *Radio Corporation of America v Rauland Corporation and Another* [1958] 1 QB 618 at 629.

³⁴⁵ Order 1 read in conjunction with Schedule 1 Part I no. 36, 37 and 51 of the Revised Edition (Authorised Omissions) Order 1990 (S.1. 4 of 1990). In this context, it has to be kept in mind that from 1901-1960, Nigeria was a British protectorate. As a result, English law is predominant in Nigeria. *Cf.* in this regard Dina Y, Akintayo, J and Ekundayo F *Guide to Nigerian Legal Information* (January/February 2010 update) <http://www.nyulawglobal.org/globalex/Nigeria1.htm> (date of use: 31 January 2013).

³⁴⁶ Order 38(41) of the Rules of the High Court of the Federal Capital Territory.

³⁴⁷ The wording of Order 38(41) of the Rules of the High Court of the Federal Capital Territory reads as follows: "*When any civil (...) matter is pending before a court (...) of a foreign country and it is made to appear to the Court by (...) letter of request or other sufficient evidence that that court (...) is desirous of obtaining the testimony in relation to the matter of any witness (...) within the jurisdiction, the Court may, on the ex parte application of any person shown to be duly authorised to make the application on behalf of the foreign court (...) and on production of the (...) letter of request or such other evidence as the Court may require or consider sufficient make such order (...) as may be necessary to give effect to the intention of the (...) letter of request.*" The wording of Section 1 of the Foreign Tribunals Evidence Act of 1856 was as follows: "*Where, upon an application for this purpose, it is made to appear to any court (...) having authority under this Act that any court (...) of competent jurisdiction in a foreign country, before which any civil or commercial matter is pending, is desirous of obtaining the testimony in relation to such matter of any witness (...) within the jurisdiction*"

spired by the repealed Foreign Tribunals Evidence Act of 1856. Based on the law reports of Nigeria accessible to the author,³⁴⁸ there is no reported case law on Order 38(41) of the Rules of the High Court of the Federal Capital Territory. The same holds true for the Foreign Tribunals Evidence Act of 1856. The sparse legal literature in Nigeria that dealt with this Act before its repeal in 1990 made reference to the principles governing the taking of evidence in Nigeria for the benefit of foreign civil proceedings as developed by the English case law in relation to the Foreign Tribunals Evidence Act of 1856.³⁴⁹

As long as the High Court of the Federal Capital Territory, Abuja, has not established its own principles with regard to Order 38(41) of the Rules of the High Court of the Federal Capital Territory, it is submitted that the rules developed by the English courts under the Foreign Tribunals Evidence Act of 1856 should apply *mutatis mutandis*.³⁵⁰ In *Seyfang v GD Searle & Co and Another*,³⁵¹ Cooke J highlighted the following five principles that governed the examination of a witness located in England for the benefit of foreign proceedings under the Foreign Tribunals Evidence Act of 1856:

“(1) Judicial and international comity requires that any request of a foreign court for evidence to be taken under the Act of 1856 should be treated with sympathy and respect and complied with so far as the principles of English law permit.

(2) The principles of English law to be applied in the case of an application under the Act of 1856 are the same as those which the English courts apply to the calling and examination of witnesses in proceedings initiated in the courts of this country.

(3) Following those principles the English courts will generally oblige a witness to testify to a fact which is in issue.

(4) On the other hand the English courts will not as a general rule require an expert to give expert evidence against his wishes in a case where he has no connection with the facts or the history. (...).

of such first-mentioned court (...) it shall be lawful for such court (...) to order the examination upon oath, upon interrogatories or otherwise, before any person (...) named in such order, of such witness (...); and it shall be lawful for the said court (...), to command the attendance of any person named in such order, for the purpose of being examined or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced in like manner as an order made by such court (...) in a cause depending in such court (...).”

³⁴⁸ Cf. in this regard Chapter 1 para. III.

³⁴⁹ See, for instance, Aguda *TA Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria* 1980 503 n. 42.94, 506 n. 42.104.

³⁵⁰ In this context, it should be noted that the Foreign Tribunals Evidence Act of 1856 is no longer applicable in the United Kingdom, as it was repealed in 1975 following the latter's accession to the Hague Evidence Convention. See in this regard *In re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. No. 235* [1977] 3 WLR 430 at 436.

³⁵¹ [1973] QB 148 at 151 *et seq.*

(5) (...) *the English court will not allow the procedure of the Act of 1856 to be used as a means of obtaining discovery against a person not a party to the proceedings. (...).*”

With regard to the second principle, it was held in *Radio Corporation of America v Rauland Corporation and Another*³⁵² that, although the evidence-taking should generally be governed by English law, the courts “*should endeavour to comply with the requirements of the foreign court in so far as they properly can*”. In connection with the fifth principle, the same decision stated that an application having the “*the nature of a ‘fishing’ proceeding*” is not allowed under Section 1 of the Foreign Tribunals Evidence Act of 1856.³⁵³ In *Eccles & Co v Louisville and Nashville Railroad Company*,³⁵⁴ Vaughan Williams L.J. emphasised that the said Act empowers the English court to make a relevant order as will enable the evidence of a witness in England to be given before a commissioner appointed to take his evidence, but not to order the discovery of documents.³⁵⁵

As explained above, the foresaid principles should apply *mutatis mutandis* to the examination of a witness domiciled in Nigeria for the benefit of foreign civil proceedings. Consequently, the High Court of the Federal Capital Territory, Abuja, should assist courts abroad in the taking of evidence in Nigeria so far as it possibly can. Only in exceptional cases, should the High Court reject requests for judicial cooperation, for instance where such applications prejudice Nigeria’s sovereignty or security, or where a court located abroad requests a procedure which is incompatible with the Rules of the High Court of the Federal Capital Territory.

An application under Order 38(41) of the Rules of the High Court of the Federal Capital Territory can be made by the court issuing the letter of request or by any person, provided he is duly authorised by the said court to do so. The application has to be made by motion *ex parte* supported by affidavit, and should, *inter alia*, include the name of the witness to be questioned,

³⁵² [1956] 1 QB 618 at 628, 633. See furthermore *Eccles & Co v Louisville and Nashville Railroad Company* [1912] 1 KB 135 at 144; Aguda TA *Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria* 1980 506 n. 42.104.

³⁵³ At 620, 635.

³⁵⁴ [1912] 1 KB 135 at 142. See also *In re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. No. 235* [1977] 3 WLR 430 at 436 *et seq.*, 442 *et seq.*

³⁵⁵ See in this regard also *Elder v Carter* [1890] 25 QB 194 at 198; *Burchard and Others v Macfarlane and Others* [1891] 2 QB 241 at 244 *et seq.*; *Radio Corporation of America v Rauland Corporation and Another* [1956] 1 QB 618 at 628 *et seq.*, 639 *et seq.*, 643 *et seq.*

proof that the court outside Nigeria is desirous of obtaining the relevant testimony, as well as a list of questions to be put to the witness, and a summary of the facts underlying the lawsuit.³⁵⁶

When granting the application, the High Court appoints the individual before whom the examination shall take place. In case the letter of request suggests a specific person to be nominated as examiner, the High Court may either appoint such individual or any other person as it may see fit.³⁵⁷ The High Court may furthermore give directions as to the time, place, and manner of the examination. The latter is, as a general principle, conducted in accordance with the Rules of the High Court of the Federal Capital Territory. This particularly holds true for the cross-examination of the witness, the enforcement of attendance of the witness, and the consequences the latter may face when refusing to cooperate with the High Court without good cause. The examination should, however, as far as possible, comply with the requirements stated in the letter of request.³⁵⁸

2. Obtaining Evidence Abroad for the Benefit of the High Court of the Federal Capital Territory, Abuja

Order 38(11)(1) provides that the High Court may, where it appears necessary for the purpose of justice, make an order for the examination of any witness before it or any officer of the court and at any place. Where the witness examination does not take place in the presence of the trial court, the said provision constitutes an exception to the general rule under the Rules of the High Court of the Federal Capital Territory that witnesses shall be examined *viva voce* before the trial court.³⁵⁹

Order 38(11) applies to witnesses residing in and outside Nigeria. In the latter case, it is recalled that the provisions in Order 38 merely stipulate the conditions under which the High Court may grant an application for the examination of a foreign witness on commission. Whether the foreign state assists in obtaining the evidence of such witness, and if so, how such examination is conducted, depends on the laws of the foreign state.³⁶⁰

³⁵⁶ Order 38(41) read in conjunction with Order 7(8) of the Rules of the High Court of the Federal Capital Territory. *Cf.* also Obi Okoye *A Essays on Civil Proceedings Volume One* 1986 314. With regard to the content of the application, see also para. III.C.1.b) above.

³⁵⁷ *Cf.* Obi Okoye *A Essays on Civil Proceedings Volume One* 1986 315.

³⁵⁸ See also Obi Okoye *A Essays on Civil Proceedings Volume One* 1986 315.

³⁵⁹ See Order 39(2) of the Rules of the High Court of the Federal Capital Territory. For more on the nature of evidence-taking on commission, see para. III.C.2.b).

³⁶⁰ *Cf.* also para. III.C.2.b) above.

As indicated above, in civil proceedings pending before the High Court of the Federal Capital Territory, Abuja, evidence of foreign witnesses may be taken on commission, if “*it appears necessary for the purpose of justice*”.³⁶¹ In *Industrial Bank Limited (Merchant Bankers) v Central Bank of Nigeria*,³⁶² it was held that it is a matter of judicial discretion whether or not a commission is granted, and that such discretion is to be exercised according to the particular circumstances of each case. It appears that *Industrial Bank Limited (Merchant Bankers) v Central Bank of Nigeria* is the only Nigerian court decision that has been published in relation to the taking of foreign evidence on commission. In this decision, Odunowo J held that he is not aware of any local authority dealing with the issue, and that this is not entirely surprising, as applications for taking evidence abroad on commission feature only sparingly in Nigerian courts.³⁶³

According to *Industrial Bank Limited (Merchant Bankers) v Central Bank of Nigeria*, a court will refuse a grant of commission where the evidence to be adduced is not directly relevant. It was furthermore held that an application for the taking of evidence on commission will be rejected “*where it appears under the procedure of the foreign court, the witness will not be cross-examined in the ordinary way as it is done in Nigeria*”.³⁶⁴ These principles were formulated based on English case law. With reference to the English cases of *New v Burns*³⁶⁵ and *Ross v Woodford*,³⁶⁶ Aguda emphasised that a court will not, without good reasons, grant an application for commission of a foreign plaintiff to be examined outside Nigeria, as it was the plaintiff who had chosen the *forum*.³⁶⁷ A defendant domiciled abroad, however, who is sued in Nigeria is, according to Aguda, entitled to give evidence before a commissioner at the place where he lives.³⁶⁸ Based on the English decision of *Coch v Allcock & Co*,³⁶⁹ Aguda further-

³⁶¹ Order 38(11)(1) of the Rules of the High Court of the Federal Capital Territory.

³⁶² (1998) FHCLR 72 at 73, 79 with reference to *Coch v Allcock & Co* (1888) LR 21 QBD 178 at 181.

³⁶³ (1998) FHCLR 72 at 78.

³⁶⁴ (1998) FHCLR 72 at 73 *et seq.*, 78 *et seq.* with reference to *Ehrmann v Ehrmann* [1886] 2 Ch D 611 at 614 and *In re Boyse* (also known as *Crofton v Crofton*) [1882] 20 Ch D 760 at 771 *et seq.* With regard to the latter decision, see also Aguda TA *Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria* 1980 491 n. 42.48 *in fine*. In *In re Boyse*, the English court rejected an application for the examination of a witness in France by stating the following: “*The [foreign] judge will put questions, and will no doubt do his duty with great ability, but the judge will determine what questions are to be put. Now in a case of this kind I do not feel inclined [sic] delegate to any foreign tribunal the duty of determining what questions ought to be put (...) when the cross-examination of this witness is most material, and will alone enable me to judge of the effect of his examination-in-chief. I decline to delegate my discretion to any other tribunal (...).*”

³⁶⁵ (1894) 64 LJ QB 104 at 105.

³⁶⁶ [1894] 1 Ch 38 at 40.

³⁶⁷ Aguda TA *Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria* 1980 491 n. 42.47

³⁶⁸ Aguda TA *Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria* 1980 491 n. 42.47.

³⁶⁹ (1888) LR 21 QBD 178.

more concluded that where the examination of a non-party witness abroad would be much less expensive than bringing the witness to Nigeria, and the presence of the witness before the Nigerian court is not essential, a commission will be granted. In cases, however, where the attendance of the third-party witness is crucial, the litigant applying for commission must, according to Aguda, clearly show that he cannot bring the witness to Nigeria.³⁷⁰

An application under Order 38(11)(1) of the Rules of the High Court of the Federal Capital Territory is made by motion supported by an affidavit setting out the grounds on which the litigant requests the taking of evidence on commission.³⁷¹ With regard to the content of the affidavit, the comments regarding the application for commission under Rule 38(3) of the South African High Court Rules apply *mutatis mutandis*.³⁷²

Neither Order 38(11) of the Rules of the High Court of the Federal Capital Territory, nor any other provision in the said Rules stipulates the time when the application for the taking of evidence on commission is to be made. As a general rule, such application should only be granted once the litigants have concluded their pleadings. Only at this stage it is clear what evidence is required.³⁷³

Once the application under Order 38(11)(1) of the Rules of the High Court of the Federal Capital Territory is granted,³⁷⁴ the High Court issues a letter of request to take evidence abroad. The subsequent procedure differs depending on whether or not there is a relevant convention to which Nigeria and the foreign state, where the evidence is located, are parties. Where such a convention exists, the litigant making the application has to file in the Registry of the High Court an undertaking to be responsible for all the expenses incurred by the Nigerian government in respect of the execution of the letter of request.³⁷⁵ In addition, a copy of the interrogatories and cross-interrogatories to be put to the witness, and, where necessary, a translation thereof in the official language of the foreign state, have to be attached. The High Court then issues a letter of request addressed to the competent judicial authority of the foreign state in-

³⁷⁰ Aguda TA *Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria* 1980 491 n. 42.48 with reference to *Lawson v Vacuum Brake Company* [1884] LR 27 Ch D 137 at 143.

³⁷¹ Orders 7(2)(1), and 7(3) of the Rules of the High Court of the Federal Capital Territory.

³⁷² Cf. para. III.C.2.b) above.

³⁷³ See also in this regard para. III.C.2.b) above.

³⁷⁴ Order 38(13)(2) of the Rules of the High Court of the Federal Capital Territory read in conjunction with Form 63 in the Appendix to these Rules.

³⁷⁵ Order 38(14)(a) of the Rules of the High Court of the Federal Capital Territory. Cf. also Form 65 in the Appendix to these Rules.

cluding a translation in the language of such state.³⁷⁶ Based on Form 66 in the Appendix to the Rules of the High Court of the Federal Capital Territory, it seems that the High Court does not name a particular individual as commissioner in the letter of request, but leaves this issue entirely to the competent foreign authority.

In case of a convention allowing Nigerian diplomatic agents to examine witnesses in the relevant foreign country, Order 38(15) of the Rules of the High Court of the Federal Capital Territory stipulates a simplified procedure. Here, the High Court merely issues an order for the appointment of the Nigerian diplomatic agent to act as a special examiner. Based on Form 67 in the Appendix to the aforesaid Rules, it appears that such an order is not addressed to any authority of the foreign state, but only to the Nigerian diplomatic agent in the said country. Hence, it is submitted that due to the concept of sovereignty, the procedure in Order 38(15) only applies where the relevant convention or the laws of the foreign state allows Nigeria to have evidence taken by its diplomatic agents without the prior authorisation of the said state.³⁷⁷

Where no convention on cross-border taking of evidence between Nigeria and the relevant foreign state exists, Order 38(13) of the Rules of the High Court of the Federal Capital Territory applies. This provision makes reference to Form 64 in the Appendix to the said Rules, namely the letter of request addressed to the competent foreign authority, but does not, unlike Order 38(14), mention any other documents that have to accompany such request. The said Form, however, makes reference to “*the interrogatories which accompany this letter of request*”. Needless to say, the letter of request should, where necessary, be transmitted to the foreign state together with a translation in the official language of the said state. It is furthermore submitted that the litigant should also provide the High Court with the aforesaid undertaking in Form 65 in the Appendix to the Rules of the High Court of the Federal Capital Territory, unless the execution of the letter of request by the foreign state is free of charge.

In case of Order 38(13) of the Rules of the High Court of the Federal Capital Territory, the examination of the foreign witness is conducted in accordance with the rules of the state where

³⁷⁶ Order 38(14)(b)(i)-(iii) of the Rules of the High Court of the Federal Capital Territory read in conjunction with Form 66 in the Appendix to these Rules. In this context, one has to keep in mind that the procedure stipulated in Order 38(14) and in Form 66 may only apply, if it does not contravene the procedure laid down in the convention.

³⁷⁷ This may, for instance, be the case with regard to Article 5(j) of the Vienna Consular Convention, depending on the agreement Nigeria and the foreign state have in this regard, or, in absence of such agreement, on whether the taking of evidence through diplomatic agents is compatible with the laws of the foreign state.

the witness is resident.³⁷⁸ The same holds true for Order 38(14).³⁷⁹ Where the witness is interrogated through a Nigerian diplomatic officer based on Order 38(15), the examination is conducted in terms of the Rules of the High Court of the Federal Capital Territory. It goes without saying that the diplomatic officer is not allowed to exercise any compulsory power on foreign territory.³⁸⁰ From the above it follows that the obtaining of foreign evidence under Order 38(13)-(14) constitutes active judicial assistance, while Order 38(15) refers to passive judicial assistance.

C. Position of Nigeria with Regard to Cross-border Taking of Evidence in Civil and Commercial Matters

Nigeria's position in relation to the cross-border taking of evidence in civil and commercial matters is similar to that of Botswana and Namibia, as Nigeria is not party to any international agreement on evidence-taking.³⁸¹ A litigant in civil proceedings pending in Nigeria, who applies for the taking of evidence in a foreign state, is thus at the latter's mercy, as he cannot be sure whether or not that state will render judicial assistance.

Following the repeal of the Foreign Tribunals Evidence Act of 1856 and the Evidence by Commission Act of 1859 in 1990, Nigeria lacks uniform rules governing letters of request regarding the taking of evidence in civil and commercial matters issued by foreign states, as each of the 36 states of Nigeria and the Federal Capital Territory, Abuja, have their own set of rules. This not only complicates requests emanating from foreign states to obtain evidence in Nigeria, but it also hampers the development of uniform principles in dealing with foreign letters of request.

There is no doubt that the accession of Nigeria to the Hague Evidence Convention would reduce some of the foregoing shortcomings. The contracting states to the said Convention would be under a public international law obligation to execute requests for judicial assistance emanating from Nigeria.³⁸² Moreover, requests from other contracting states would be governed by the same rules, irrespective of where in Nigeria the evidence to be obtained is located. Further improvement could be achieved by Nigeria entering into bilateral treaties, at least with its

³⁷⁸ See Form 64 in the Appendix to the Rules of the High Court of the Federal Capital Territory.

³⁷⁹ Cf. Form 66 in the Appendix to the Rules of the High Court of the Federal Capital Territory. According to this provision, the High Court, however, asks the competent foreign authority to examine the witness *viva voce* in the presence of the litigants' counsel, and to allow the parties to interrogate the witness.

³⁸⁰ See Form 67 in the Appendix to the Rules of the High Court of the Federal Capital Territory.

³⁸¹ Cf. paras. IV.C and V.C above.

³⁸² Needless to say, the same applies for Nigeria with regard to requests from other contracting states.

neighbouring countries and leading trading partners, or by pursuing the creation of a regional convention in the taking of evidence in civil and commercial matters.³⁸³ Experience has shown, however, that the negotiation of bilateral treaties and the drafting of an international convention can be a lengthy and cumbersome process. A partial correction of the aforesaid shortcomings may thus be achieved faster on a national or state level. Such improvement can best be realised through the harmonisation of the rules on cross-border taking of evidence in the various states of Nigeria and the Federal Capital Territory, Abuja, for instance, by reactivating a modernised version of the repealed Foreign Tribunals Evidence Act of 1856.

VII. Cross-border Taking of Evidence in Civil and Commercial Matters in Uganda

A. General Remarks

Uganda is neither a member of the Hague Procedure Convention or the Hague Evidence Convention, nor has it entered into any other agreement on the taking of evidence in civil and commercial matters. Further, Uganda is not a party to the Vienna Consular Convention.³⁸⁴ Thus, judicial assistance in evidence-taking in civil and commercial matters between Uganda and other states, if rendered at all, is based on *courtoisie internationale*.³⁸⁵

In the light of the above, the subsequent subchapter investigates, on the one hand, the execution of requests emanating from foreign states to obtain evidence on Ugandan soil and, on the other, applications of litigants in civil proceedings pending before the High Court of Uganda seeking evidence abroad.

B. Taking of Evidence based on Courtoisie Internationale

1. Obtaining Evidence in Uganda for the Benefit of a Court Abroad

Requests for taking evidence in Uganda for the benefit of civil proceedings pending abroad are governed by Sections 5-10 of the Foreign Tribunals Evidence Act.³⁸⁶ Section 5(1) of the said

³⁸³ See also in this regard para. III.D above and Chapter 6 below.

³⁸⁴ For a list of the contracting states to this Convention, see http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtmsg_no=III-6&chapter=3&lang=en#Participants (date of use: 31 January 2013).

³⁸⁵ For more on *courtoisie internationale*, see Chapter 2 para. V.B.1.

³⁸⁶ Chapter 10. See also in this regard Section 56 of the Civil Procedure Act (Chapter 71), which provides that commissions issued by foreign courts for the examination of witnesses in Uganda shall be executed and returned in such manner as may be prescribed from time to time.

Act provides that where it appears to the High Court of Uganda³⁸⁷ that a court of competent jurisdiction in a Commonwealth country or foreign state, before which a civil or commercial matter is pending, is desirous to obtain the testimony of a witness within the jurisdiction of the High Court, the latter may order the examination of such witness upon oath, affirmation, interrogatories, or otherwise before any person named in the order. By virtue of Section 5(2) of the Foreign Tribunals Evidence Act, the High Court may command the attendance of the witness for the purpose of being examined, or the production of any document to be mentioned in the order. The Ugandan Foreign Tribunals Evidence Act was inspired by the English Foreign Tribunals Evidence Act of 1856.³⁸⁸ It therefore comes as no surprise that the wording of Section 5(1)-(2) of the Ugandan Foreign Tribunals Evidence Act is virtually identical with that of Section 1 of the English Foreign Tribunals Evidence Act of 1856.³⁸⁹

It seems that there is no reported case law on the taking of evidence on Ugandan soil for the benefit of civil proceedings pending abroad.³⁹⁰ Given the practically identical wording of Section 5 of the Ugandan Foreign Tribunals Evidence Act and Section 1 of its English counterpart, it is submitted that, when faced with a request based on the former Act, the High Court of Uganda should take into account the relevant principles developed by English case law under Section 1 of the English Foreign Tribunals Evidence Act of 1856. Since these principles have already been outlined in relation to Order 38(41) of the Rules of the High Court of the Federal Capital Territory in Nigeria, reference can be made to the relevant comments.³⁹¹

The request for obtaining evidence in Uganda has, as a general rule, to be accompanied by a certificate under the hand of a diplomatic representative of the state where the civil proceedings, for whose benefit the evidence is to be obtained, are pending. Such certificate has to state that the lawsuit, in relation to which the application is made, is a civil or commercial matter pending before a court of the country which the diplomatic agent represents, and that the said court is desirous of obtaining the testimony of a particular witness in Uganda.³⁹² It is submitted

³⁸⁷ By virtue of Section 10(1), read in conjunction with Section 5(1) of the Foreign Tribunals Evidence Act, the High Court of Uganda has authority under the said Act.

³⁸⁸ From 1894-1962, Uganda was a British protectorate. As a consequence, English law is predominant in Uganda. Cf. in this regard Mahoro B *Uganda's Legal System and Legal Sector* (August 2006) <http://www.nyulawglobal.org/globalex/uganda.htm> (date of use: 31 January 2013).

³⁸⁹ For the wording of Section 1 of the English Foreign Tribunals Evidence Act, see above fn. 347. The same holds true with regard to the wording of Sections 5(3)-9 of the Ugandan Foreign Tribunals Evidence Act which is practically identical with that of Sections 1-5 of the English Foreign Tribunals Evidence Act 1856.

³⁹⁰ See in this regard Chapter 1 para. III.

³⁹¹ Cf. para. VI.B.1.b) above.

³⁹² Section 6(1) of the Foreign Tribunals Evidence Act. See, however, Section 6(2) of the said Act where it is stated that other evidence shall be admissible, if no certificate is produced.

that the application cannot only be made by the trial court, but also by a litigant, provided the latter can produce the aforesaid certificate.³⁹³ When granting the application, the High Court may give directions as to the time, place, and manner of the examination, as well as all other matters connected with the examination as may appear reasonable and just. Such directions are enforced in like manner as an order made by the High Court in a lawsuit pending before it.³⁹⁴ The witness in Uganda may decline to answer questions tending to incriminate him, as well as other questions which he in any lawsuit pending before the High Court would be entitled to refuse to answer. The same holds true with regard to the production of documents.³⁹⁵

Apart from the aforesaid directions and the provision on the privileges of the witness, the Foreign Tribunals Evidence Act is silent on what rules govern the taking of evidence located in Uganda. Order 28(19) of the Civil Procedure Rules refers to “*commissions issued by foreign courts*”. It stipulates that the provisions as to the “*execution and return of commissions for the examination of witnesses*” shall apply to commissions emanating by courts situated in any part of the Commonwealth other than Uganda, as well as by courts of any foreign country for the time being in alliance with the state of Uganda. While it can be assumed that “*return of commissions*” refers to Order 28(7) of the Civil Procedure Rules,³⁹⁶ it is not fully clear to what Order(s) “*provisions as to the execution*” relates. It is submitted that reference is made to Order 28(16)-(18) of the aforesaid Rules, which regulates the powers of a commissioner as well as the procedure for the taking of evidence on commission in civil proceedings pending in Uganda. Neither the Foreign Tribunals Evidence Act nor the Civil Procedure Rules addresses the relation between Sections 5-10 of the said Act and Order 28(19) of the Civil Procedure Rules. It is submitted that Order 28(19) supplements the provisions in Sections 5-10 of the Foreign Tribunals Evidence Act. This makes sense, as Sections 5-10 of Foreign Tribunals Evidence Act, with the aforesaid exceptions, do not include any provisions on the conduct of the witness examination. The same applies with regard to the powers of the commissioner. In this context, it is furthermore submitted that compared to Order 28 of the Civil Procedure Rules, the Foreign Tribunals Evidence Act constitutes *lex specialis* and thus prevails over Order 28. As a consequence, the provisions in Order 28(16)-(18) of the Civil Procedure Rules should only apply, if they do not contravene any rules laid down in the Foreign Tribunals Evidence Act.

³⁹³ With regard to the content of such application, see the relevant comments in para. III.C.1.b).

³⁹⁴ Section 5(3) of the Foreign Tribunals Evidence Act.

³⁹⁵ Section 9 of the Foreign Tribunals Evidence Act.

³⁹⁶ This provision stipulates that where a commission has been duly executed, it shall be, as a general rule, returned, together with the evidence taken under it, to the court from which it was issued.

It follows from the above, that the examination of a witness residing in Uganda for the benefit of foreign civil proceedings is conducted in accordance with Ugandan law, in particular with the Civil Procedure Rules. This holds particularly true for the summoning, attendance, and questioning of the witness, as well as the measures to be taken in the event the witness fails to cooperate with the commissioner or the High Court.³⁹⁷ The commissioner may apply to the High Court by which he was appointed for the issue of any process that he may find necessary to issue to or against the witness.³⁹⁸ The High Court ordering the commission directs that the litigants shall appear before the commissioner in person, by their agents, or advocates. Where any of the parties fails to appear, the commissioner may proceed in their absence.³⁹⁹ Order 28(16)(a) of the Civil Procedure Rules stipulates that the commissioner may examine the parties and any witness whom they may produce and any other person whom the commissioner thinks proper to call upon to give evidence. The commissioner may furthermore call for and examine documents, and other things relevant to the subject of the inquiry.⁴⁰⁰ It is submitted that Order 28(16)(a) and (b) does only apply to a limited extent where a witness in Uganda is examined for the benefit of foreign civil proceedings. Here, the commissioner should only examine the witnesses mentioned in the letter of request. The same should apply with regard to the production of documents.

2. Obtaining Evidence Abroad for the Benefit of a Ugandan Court

Section 53(a) of the Civil Procedure Act⁴⁰¹ empowers the court to issue a commission to examine any person. In case the witness is resident abroad, the High Court may, *in lieu* of ordering a commission, issue a letter of request to examine the witness at any place outside Uganda.⁴⁰² Order 28(5) of the Civil Procedure Rules provides that “*where any court to which application is made for the issue of a commission for the examination of a person residing at any place not within Uganda is satisfied that the evidence of such person is necessary, the court may issue*

³⁹⁷ See Order 28(17)(1) of the Civil Procedure Rules.

³⁹⁸ Order 28(17)(2) of the Civil Procedure Rules.

³⁹⁹ Order 28(18) of the Civil Procedure Rules.

⁴⁰⁰ Order 28(16)(b) of the Civil Procedure Rules. *Cf.* also Order 28(16)(c) of the said Rules, which provides that the commissioner may at any reasonable time enter upon or into any land or building mentioned in the court order.

⁴⁰¹ Chapter 71.

⁴⁰² Section 55 of the Civil Procedure Act.

such commission or a letter of request”. This provision constitutes an exception from the general rule that under Ugandan law, witnesses give evidence *viva voce* and in open court.⁴⁰³

Order 28 of the Civil Procedure Rules includes, with the exception of Order 28(5) and (19),⁴⁰⁴ provisions on commissions for the examination of witnesses located in Uganda. In this context, one has to keep in mind that with regard to foreign witnesses, Order 28 of the said Rules can only stipulate the conditions under which a litigant in civil proceedings pending in Uganda may apply to the High Court for evidence to be taken on commission. How the examination of the witness is conducted in the foreign state, is, however, governed by the laws of such state.⁴⁰⁵

The power of the High Court to issue a commission under Order 28(5) of the Civil Procedure Rules is discretionary. Accordingly, the said provision does not issue a right to the litigant applying for commission, rather the commission has to be justified by showing good reasons.⁴⁰⁶ In *Batten & Others v Kampala African Bus Company*,⁴⁰⁷ it was held:

“the court is not bound to issue a commission if it may result in manifest injustice to any party, or where it is not calculated to permit of evidence being tested fairly, or when the application is made to avoid cross-examination before the court.”

The considerations to be taken into account when deciding whether or not to grant an application for commission were summarised in *Uganda Revenue Authority v Toro & Mityana Tea Co Ltd*.⁴⁰⁸ In this decision, the court stated that an application does not only have to be made *bona fide*,⁴⁰⁹ but also without delay. It was furthermore held that the nature of the evidence to be taken has to be considered, and that a commission will more readily be issued where the evidence required is of a formal nature than where exhaustive cross-examination is likely. Moreover, it

⁴⁰³ Cf. Order 18(4) of the Civil Procedure Rules. See also Chapter 5 para. VII.A.3.a). For more on the nature of the taking of evidence on commission, see para. III.C.2.b).

⁴⁰⁴ See in this regard para. VII.B.1 above.

⁴⁰⁵ Cf. also in this regard para. III.C.2.b) above.

⁴⁰⁶ *Uganda Revenue Authority v Toro & Mityana Tea Co Ltd* [2007] UGCommC 23 (<http://www.ulii.org/ug/judgment/commercial-court/2007/23>; date of use: 31 January 2013) with reference to *Hariprasad R Patel v Badubhai K Patel* [1994] 1 KALR 77. Cf. also *Batten & Others v Kampala African Bus Company* [1959] EA 328 at 328I; *Sarin Industrial Corporation v Charles Twongere* [2011] UGCommC 105 (<http://www.ulii.org/ug/judgment/commercial-court/2011/105>; date of use: 31 January 2013).

⁴⁰⁷ [1959] EA 328 at 329A.

⁴⁰⁸ [2007] UGCommC 23 (<http://www.ulii.org/ug/judgment/commercial-court/2007/23>; date of use: 31 January 2013) with reference to the Kenyan decision *Premchand Raichand Ltd & Anor v Quarry Services of East Africa Ltd & Others* [1969] EA 514 at 515I-516D.

⁴⁰⁹ In *Uganda Revenue Authority v Toro & Mityana Tea Co Ltd* [2007] UGCommC 23 (<http://www.ulii.org/ug/judgment/commercial-court/2007/23>; date of use: 31 January 2013), it was held that the fact, that the applicant failed to disclose the actual reasons for the refusal of the foreign witness to come to Uganda to give evidence, meant the application was not made *bona fide*. In his application, the litigant merely stated that the witness was unwilling to testify in Uganda due to personal security reasons. He, however, concealed that the witness was a wanted criminal suspect in Uganda, who had failed to appear in court and was subject to a warrant of arrest.

was pointed out that the court has to take into consideration the expenses of bringing a foreign witness to Uganda and the costs for a commission conducted abroad.⁴¹⁰

With regard to an application from foreign litigants to have evidence taken on commission, it was furthermore held in *Uganda Revenue Authority v Toro & Mityana Tea Co Ltd*⁴¹¹ that the *onus* on a plaintiff is normally substantially heavier than that on the defendant, because the plaintiff has chosen the *forum*. The court pointed out that the burden of proof is also heavier where the evidence required is that of a litigant than where it is the evidence of any third party, as the unwillingness of a litigant to appear in person as opposed to his inability is no reason to allow a commission. It was also emphasised that a litigant cannot compel the attendance of a non-party witness located abroad. The court furthermore held that in any case, the applicant must show that the evidence is necessary, and that there is some good reason why he should be excused from appearing or calling his witness, as the case may be, in person. In the case of a foreign litigant, it was stated that there may be some personal reasons, such as ill health,⁴¹² or the inability to obtain a visa. Similar reasons may apply to a non-party witness, or the application may be based on the latter's refusal to attend.

In *Uganda Revenue Authority v Toro & Mityana Tea Co. Ltd*, the application for taking evidence on commission was, amongst other things, refused as the application for commission did not aver that the foreign witness was the only competent witness, and that there was no other person aware and conversant with the particular subject of the hearing of evidence.⁴¹³

An application for the issue of a commission is made by a motion setting out the grounds for the application and supported by affidavit.⁴¹⁴ Once the application is granted, the High Court issues a letter of request, which is then sent through the diplomatic channels under the foreign

⁴¹⁰ Cf. also *Batten & Others v Kampala African Bus Company* [1959] EA 328 at 329B.

⁴¹¹ [2007] UGCommC 23 (<http://www.ulii.org/ug/judgment/commercial-court/2007/23>; date of use: 31 January 2013) with reference to *Premchand Raichand Ltd & Anor v Quarry Services of East Africa Ltd & Others* [1969] EA 514 at 515I-516D.

⁴¹² See also in this regard *Sarin Industrial Corporation v Charles Twongere* [2011] UGCommC 105 (<http://www.ulii.org/ug/judgment/commercial-court/2011/105>; date of use: 31 January 2013).

⁴¹³ [2007] UGCommC 23 (<http://www.ulii.org/ug/judgment/commercial-court/2007/23>; date of use: 31 January 2013). Cf. furthermore *Premchand Raichand Ltd & Anor v Quarry Services of East Africa Ltd & Others* [1969] EA 514 at 516D-E, where it was held that the decisions in older cases dealing with the taking of evidence on commission should only be applied with caution, and that the *onus* on an applicant today will tend to be heavier than was formerly the case. In this context, it was mentioned that with modern means of transport, a witness will in most cases be able to attend a trial without being away from his home or business for more than a few days, whereas in the past, the journey might have taken weeks or months.

⁴¹⁴ Order 28(2) read in conjunction with Order 52(1) and (3) of the Civil Procedure Rules. With regard to the reasons to be stated in the application, see the comments made in para. III.C.2.b) above.

office to the competent authority in the state where the witness is located.⁴¹⁵ It is submitted that in the letter of request, the High Court may suggest a particular individual as commissioner. The foreign authority, however, is not bound by such a proposition and may appoint any person it deems fit to examine the witness.

Order 28 of the Civil Procedure Rules is silent on the time when an application for commission can be made. Once again, such application should, as a general rule, only be granted once the litigants have concluded their pleadings.

C. Position of Uganda with Regard to Cross-border Taking of Evidence in Civil and Commercial Matters

Uganda's position regarding transborder evidence-taking in civil and commercial matters is similar to that of Botswana. In order to avoid any unnecessary repetition, reference can thus be made to the relevant comments in this regard.⁴¹⁶

VIII. Conclusion

With regard to the countries dealt with in this thesis, cross-border taking of evidence in civil and commercial matters can be divided into two main categories, namely the group composed of Botswana, Namibia, Nigeria and Uganda, and the category comprising Switzerland. This dichotomy is, on the one hand, based on the differentiation between civil- and common-law countries and, on the other, on the fact of whether judicial assistance is granted based on *courtoisie internationale*, or on a relevant international treaty. While Botswana, Namibia, Nigeria, and Uganda follow the common-law tradition and are not party to any international agreement on cross-border taking of evidence in civil and commercial matters, Switzerland is a civil-law country that is a member of both the Hague Procedure Convention and the Hague Evidence Convention. Compared to the aforesaid countries, South Africa is in an intermediate position, as it shares the common-law tradition,⁴¹⁷ but it has also acceded to the Hague Evidence Convention.

⁴¹⁵ Section 55 of the Civil Procedure Act, Order 28(5) of the Civil Procedures Rules. See also *Sarin Industrial Corporation v Charles Twongere* [2011] UGCommC 105 (<http://www.ulii.org/ug/judgment/commercial-court/2011/105>; date of use: 31 January 2013).

⁴¹⁶ *Cf.* para. IV.C above.

⁴¹⁷ Strictly speaking, South Africa, Botswana, and Namibia, follow a hybrid system. The rules on civil procedure in these countries are, however, derived from English law. Consequently, South Africa, Botswana, and Namibia share the common-law tradition with regard to civil procedure. *Cf.* also Chapter 2 para. IV.B.2.a).

Switzerland ratified the Hague Procedure Convention in 1957. Under this Convention, Switzerland renders judicial assistance based on a letter of request issued by the competent judicial authority of the requesting state. The request is executed by the competent Swiss judge in whose jurisdiction the evidence is located, in accordance with the rules of the Swiss Civil Procedure Code. Letters of request have to be transmitted by consular channels to the Federal Office of Justice which forwards it to the competent judge. In 1995, Switzerland acceded to the Hague Evidence Convention, which provides for three methods to obtain evidence abroad, namely by letter of request, through commissioners, or by diplomatic officers and consular agents. Letters of request are executed by the aforesaid Swiss judge applying Swiss law. By contrast, it is not a member of the Swiss judicial authority who acts as commissioner, but any private individual who examines the witness in Switzerland in accordance with the law of the requesting state. The same applies when a diplomatic officer or consular agent representing the requesting state in Switzerland conducts the examination of the relevant witness. Requests under the Hague Evidence Convention have to be sent to the central authority of the Swiss canton, usually the court of second instance, in whose jurisdiction the evidence is located. Applications for the taking of evidence through commissioners, diplomatic officers, and consular agents require a special authorisation of the Federal Office of Justice. With respect to requests to obtain evidence in Switzerland emanating from foreign states that are neither members of the Hague Procedure Convention, nor of the Hague Evidence Convention, Switzerland applies by analogy the provisions of the Hague Procedure Convention. Consequently, requests are executed by a Swiss judge based on Swiss law. Unlike the other countries dealt with in this thesis, Swiss law does not contain a specific rule on the conditions under which a litigant in civil proceedings pending in Switzerland may apply to the trial court for evidence to be taken abroad. In case the Swiss court gives leave to an application, it issues a request wherein the foreign state is asked to assist in taking the relevant evidence. It is up to the foreign state to decide whether, and if so, in what manner, it renders judicial assistance. Accordingly, the evidence is taken in accordance with the relevant rules of the foreign state, unless the latter allows the evidence to be examined based on the law of the requesting state. This not only holds true for letters of request issued by Swiss courts, but also for those emanating from the other countries dealt with in this thesis.

South Africa acceded to the Hague Evidence Convention in 1997. Although the provisions of this Convention have not yet been incorporated into domestic law, South Africa has in the past not only executed requests emanating from other contracting states based on the Convention,

but has also sent requests to other member states. Unlike Switzerland, South Africa only executes letters of request and applications for evidence-taking by commissioners, but not requests for the collection of evidence through diplomatic officers and consular agents. Letters of request are usually executed by the magistrate in whose jurisdiction the evidence is located in accordance with South African law, while a commissioner applies the law of the requesting state when conducting the examination in South Africa. Requests under the Hague Evidence Convention to obtain evidence in South Africa have to be sent *via* the Director-General of the Department of Justice and Constitutional Development. In case the evidence is to be taken by a commissioner, the application has to be authorised by the High Court in the jurisdiction of which the evidentiary material is situated.⁴¹⁸ Where the Hague Evidence Convention is not applicable, South African law provides two different procedures for obtaining evidence in South Africa. Under the Foreign Courts Evidence Act, a request may be lodged with the High Court in whose jurisdiction the evidence is located. If it appears to the High Court that the court in the foreign state is desirous to obtain the relevant evidence in relation to civil proceedings pending before such court, it orders the examination and appoints a commissioner. The latter conducts the examination in accordance with the rules of a magistrate's court that apply in proceedings similar to those in connection with which the evidence is sought. Alternatively, evidence in South Africa may be sought based on Section 33(1) of the Supreme Court Act. Here, the letter of request has to be addressed to the Director-General who grants the request, unless the Minister of Justice considers it desirable that the litigants should make an application directly to the High Court based on the Foreign Courts Evidence Act. Once the request is granted by the Director-General, it is forwarded to the competent High Court which makes the necessary order for the appointment of a commissioner who, in turn, examines the witness in accordance with the South African rules of procedure and evidence. Both under the Foreign Courts Evidence Act and Section 33(1) of the Supreme Court Act, a request for taking evidence in South Africa may be refused based on Section 1 of the Protection of Businesses Act. This provision prohibits the cross-border furnishing of information relating to any business conducted in or outside South Africa in response to letters of request emanating from foreign countries. Where a litigant in civil proceedings pending before the High Court of South Africa wishes to obtain evidence abroad, he has to apply for a so-called "commission *de bene esse*" based on Rule 38(3) of the High Court Rules. Under this provision, the High Court may dispense with the appearance of a foreign witness in court, if it appears convenient or necessary

⁴¹⁸ See also in this regard fn. 175.

for the purposes of justice that his evidence is taken abroad through a commissioner. The taking of evidence on commission constitutes an exception from the general rule that witnesses are examined *viva voce* before the trial court. A commission *de bene esse* is thus only granted when certain requirements are met which include, *inter alia*, the materiality and relevancy of the evidence, as well as the witness' inability to appear before the trial court. In addition, the High Court has to take into account how convenient and expensive the evidence-taking through a commissioner will be, what will be the prejudice to the party seeking the commission, if the latter is refused, and the detriment to the opponent if the commission is granted, as well as how important it would be for the trial court to observe the witness' demeanour at trial. As a general rule, South African courts are reluctant to allow foreign litigants to give evidence abroad. This particularly holds true for plaintiffs having chosen the *forum*. By contrast, applications for the taking of evidence of foreign non-party witnesses by a commissioner are usually granted, as the High Court cannot compel them to come to South Africa to testify in court. Once the High Court has granted the application for commission, it issues a letter of request to the foreign state where the evidence is located.

Botswana has not entered into any international treaty on the taking of evidence in civil and commercial matters. Between Botswana and other states, judicial assistance in evidence-taking, if rendered at all, is based on *courtoisie internationale*. Applications for obtaining evidence in Botswana for the benefit of foreign civil proceedings are, based on the Foreign Tribunals Evidence Act, to be lodged with the High Court in whose jurisdiction the evidence is located. The latter grants the application, if it appears that the court situated abroad is desirous of obtaining the relevant evidence in Botswana. The High Court appoints a commissioner who conducts the examination in accordance with the rules of procedure and evidence that apply in civil proceedings pending before the High Court. Order 44(3) of the Rules of the High Court governs applications of litigants in civil proceedings before the High Court, who wish to obtain evidence situated outside Botswana. The wording of this provision is virtually identical with that of Rule 38(3) of the South African High Court Rules. It therefore comes as no surprise that the High Court of Botswana applies the principles South African case law formulated with regard to Rule 38(3) of the South African High Court Rules.

Namibia has neither acceded to the Hague Procedure Convention and the Hague Evidence Convention, nor to any other international agreement on evidence-taking in civil and commercial matters. Namibian law provides for two methods for the obtaining of evidence in Namibia for the benefit of civil proceedings pending abroad. An application can either be lodged with

the competent High Court based on the Foreign Courts Evidence Act, or with the Permanent Secretary for Justice based on Section 29 of the High Court Act. The wording of the Namibian Foreign Courts Evidence Act is practically identical with that of the South African Foreign Courts Evidence Act. The same holds true with regard to Section 29 of the High Court Act and Section 33 of the South African Supreme Court Act. Under Section 2 of the Second General Law Amendment Act, the furnishing of information as to any business, whether operating in or outside Namibia, in compliance with any letter of request emanating from a foreign state is prohibited, except with the permission of the Minister of Trade and Industry. In terms of Section 28 of the High Court Act, a litigant in civil proceedings pending before the High Court of Namibia, who is unable to secure the attendance of a witness at the trial because of the latter's foreign domicile, may lodge an application with the High Court for the issue of a letter of request to the competent foreign authority to examine such witness.

Like Botswana and Namibia, Nigeria is not a party to any international treaty on the taking of evidence in civil and commercial matters. Where a court outside Nigeria is desirous of obtaining evidence located in the jurisdiction of the High Court of the Federal Capital Territory, Abuja, an application may, based on Order 38(41) of the Rules of the High Court of the Federal Capital Territory, be lodged with the High Court. When granting such application, the High Court appoints a commissioner who takes the evidence in accordance with Nigerian law. Order 38(11) of the aforesaid Rules governs the application of a litigant in proceedings before the High Court for obtaining evidence outside Nigeria. The High Court grants such application where it appears necessary for the purpose of justice to make an order for the examination of a foreign witness on commission. When determining whether or not to grant an application for commission, the High Court takes, *inter alia*, into consideration the relevancy of the evidence, as well as the fact whether under the foreign procedure, the witness will be cross-examined in the ordinary way. While a commission in relation to foreign non-party witnesses should generally be granted, the High Court should be more reluctant to allow a foreign litigant, in particular a plaintiff, to be examined abroad.

Since Uganda is not a party to any international agreement on evidence-taking in civil and commercial matters, judicial assistance between Uganda and other states in this regard, if rendered at all, is based on *courtoisie internationale*. Applications for obtaining evidence in Uganda for the benefit of foreign civil proceedings are governed by Section 5 of the Foreign Tribunals Evidence Act. By virtue of this provision, the High Court appoints a commissioner who conducts the examination in accordance with Ugandan law. Based on Order 28(5) of the

Civil Procedure Rules, a litigant in civil proceedings pending before the Ugandan High Court may lodge an application with the latter to have foreign evidence taken on commission. When considering whether or not to order a commission, the court takes into account, amongst other things, whether the refusal or granting of a commission will result in manifest injustice to any litigant, the application was made *bona fide* and without delay, and whether the evidence is relevant. In comparison with foreign third parties and defendants, the High Court is generally reluctant to allow a plaintiff to testify abroad. When granting a commission for the examination of a witness abroad, the High Court issues a letter of request to the competent authority in the foreign state.

The foregoing shows that the basic principles governing cross-border taking of evidence in Switzerland, South Africa, Botswana, Namibia, Nigeria, and Uganda are similar. A court in the requesting state or a litigant in civil proceedings pending in such state has to lodge a request with the competent authority of the requested state to take evidence located on the latter's territory. Where no relevant international treaty applies, such a request has either to be addressed to the department of justice of the requested state, or directly to the high court in whose jurisdiction the evidence to be obtained is situated. In both cases, it is the competent court of the requested state that makes the necessary order for the taking of the relevant evidence.⁴¹⁹ In South Africa, Botswana, Namibia, Nigeria, and Uganda, the court usually appoints a commissioner to conduct the examination of the relevant witness. By contrast, in Switzerland, no commissioner is nominated, but it is the court that questions the witness. In all of the aforesaid countries, the commissioner or court usually conducts the examination in accordance with the rules of the requested state.

With regard to the cross-border taking of evidence in civil and commercial matters, Switzerland is fairly well-positioned. In relation to its immediate neighbouring countries, as well as the member states of the European Union, the evidence-taking is either governed by the Hague Evidence Convention, or by the Hague Procedure Convention. The same holds true for the major trading partners of Switzerland. Having said this, it should be the aim of Switzerland to negotiate bilateral treaties with states that are not parties to the foregoing conventions. Only in this way can an international obligation to render judicial assistance and binding principles governing the evidence-taking in civil and commercial matters between Switzerland and these countries be established.

⁴¹⁹ Once the application has been granted by the department of justice, the latter forwards the request to the competent high court.

By acceding to the Hague Evidence Convention, South Africa ensured that its leading trading partners and the vast majority of European countries are under an international obligation to execute requests for evidence-taking emanating from South Africa. To enable litigants in civil proceedings pending before a South African court to claim direct rights under the Hague Evidence Convention, South Africa should, however, incorporate the provisions of the Convention into its domestic law. The situation is different with regard to South Africa's immediate neighbouring countries, as well as other African states. Here, in the absence of any relevant international agreement, litigants in civil proceedings in South Africa seeking evidence in another African country are at the latter's mercy, as such a state is under no international obligation to render judicial assistance. In the short-term, this shortcoming could be overcome by negotiating bilateral treaties with the aforesaid countries. In the long-term, however, the preparation of a regional convention on cross-border taking of evidence in civil and commercial matters amongst sub-Saharan African states may be a more sustainable option. Among the participating countries, the drafting of such a convention would create a uniform legal area in evidence-taking in civil and commercial matters. It is furthermore recommended that South Africa harmonise its domestic rules governing requests emanating from foreign states to obtain evidence in South Africa. Here, the provisions in Section 33 of the Supreme Court Act should be consolidated with the Foreign Courts Evidence Act. Finally, South Africa should repeal the Protection of Businesses Act. This Act not only violates South Africa's international obligation to execute requests for judicial assistance under the Hague Evidence Convention, but it practically also prohibits any form of international cooperation in evidence-taking in civil and commercial matters.

The recommendations for South Africa regarding the preparation of bilateral treaties, as well as of a regional convention also apply to Botswana, Namibia, Nigeria, and Uganda. In addition, the said countries should accede to the Hague Evidence Convention. Compared to South Africa, the need to change the *status quo* in these countries in relation to cross-border taking of evidence in civil and commercial matters is more pressing, as they are not party to the Hague Evidence Convention (and the Hague Procedure Convention). With respect to Namibia, the consolidation of the rules in Section 29 of the High Court Act with the Foreign Courts Evidence Act is recommended. Furthermore, Namibia should also repeal Section 2 of the Second General Law Amendment Act. In relation to Nigeria, consideration should be given to the harmonisation of the domestic rules governing requests emanating from foreign states to obtain

evidence in Nigeria. Currently, there are no uniform rules in this regard, although each of the 36 states and the Federal Capital Territory, Abuja, has its own set of rules.

CHAPTER 5

MEANS OF PROOF AND PROCEDURE FOR THE TAKING OF EVIDENCE IN CIVIL AND COMMERCIAL MATTERS IN SWITZERLAND, SOUTH AFRICA, BOTSWANA, NAMIBIA, NIGERIA, AND UGANDA

I. Introduction

The preceding Chapter 4 focused on the conventions, statutes, and rules that apply in Switzerland, South Africa, Botswana, Namibia, Nigeria, and Uganda, and stipulated under what conditions evidence in the said countries can be obtained for the benefit of civil proceedings pending abroad. Chapter 4 also investigated the requirements under which a litigant in civil proceedings pending in one of the aforementioned countries may apply for the taking of evidence located in a foreign state. By contrast, this Chapter outlines the means of proof¹ available in civil proceedings in Switzerland, South Africa, Botswana, Namibia, Nigeria, and Uganda, as well as the procedure for the taking of evidence in these countries.

When executing a request for obtaining evidence abroad by means of active judicial assistance, the competent authority in the requested state usually applies its own law.² As has been mentioned earlier,³ discrepancies between the means of proof and the procedures for the taking of evidence in the laws of the requesting and requested state may, in the last resort, result in the inadmissibility of the foreign evidence in the proceedings pending in the requesting state. Having said this, it is recommended that a litigant, who seeks evidence abroad, investigates first the nature of the particular means of proof as well as the procedure for the taking of evidence under the laws of the foreign state, before requesting the evidence to be taken abroad. This allows the party to better assess the prospects of success of cross-border taking of evidence, or, in other words, to evaluate whether he is able to obtain the foreign evidence and, if so, to what extent the latter will be admissible in the proceedings before the trial court.

To identify the abovementioned discrepancies, it is necessary to outline the means of proof, and the procedure for the taking of evidence in civil proceedings in each of the aforesaid countries. This analysis also forms the starting point for the establishment of basic principles for a

¹ Means of proof deal with how the affected party may tender his evidence in court. See in this regard, amongst others, Omage VA A *Digest of the Nigerian Law of Evidence* 1993 94.

² See in this regard Chapter 2 para. V.C.

³ Cf. Chapter 3 para. V.D.4.

convention on the cross-border taking of evidence in civil and commercial matters between South Africa, Botswana, Namibia, Nigeria, and Uganda dealt with in Chapter 6. A comprehensive account of the means of proof and the procedure for the taking of evidence in Switzerland, South Africa, Botswana, Namibia, Nigeria, and Uganda would by far exceed the scope of this thesis. The following comments thus only provide a general overview in this regard.

II. Switzerland

A. General Remarks

Article 168(1) of the Swiss Civil Procedure Code specifies the means of proof available in ordinary proceedings in civil and commercial matters in Switzerland,⁴ namely witness testimony,⁵ documents,⁶ inspection,⁷ expert opinions,⁸ written information,⁹ party testimony,¹⁰ and testimony given under oath.¹¹ The said rule provides for a *numerus clausus*. In other words, other means of proof than those mentioned in Article 168(1) are generally not permitted.¹²

By virtue of Article 11a(2) of the Swiss Private International Law Act,¹³ a Swiss court taking evidence for the benefit of civil proceedings pending abroad may, upon petition of the requesting authority, apply a foreign legal procedure for the enforcement of the claim abroad, unless there are important reasons in relation to the witness domiciled in Switzerland not to do so.¹⁴ Moreover, a Swiss judge may issue documents or take an affidavit from an applicant in accordance with a form of foreign law if the Swiss form is not recognised abroad and if a claim meriting protection could not be asserted there.¹⁵ As a result, the aforesaid *numerus clausus* may not be relevant where a Swiss judge takes evidence based on the law of the requesting state, and

⁴ Cf. Chapter 1. See also Article 254 of the Swiss Civil Procedure Code.

⁵ In German, so-called “*Zeugnis*”.

⁶ In German, so-called “*Urkunden*”.

⁷ In German, so-called “*Augenschein*”.

⁸ In German, so-called “*Gutachten*”.

⁹ In German, so-called “*schriftliche Auskunft*”.

¹⁰ In German, so-called “*Parteibefragung*”.

¹¹ In German, so-called “*Beweisaussage*”.

¹² See, amongst others, Weibel H and Nägeli S ‘Art. 168’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1028 n. 1, 1029 n. 4; Hafner P ‘Art. 168’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 800 n. 1; Reinert P ‘Art. 168’ in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 679 n. 1; Hasenböhler F ‘Das Beweisrecht’ 2007 *Schweizerische Zeitschrift für Zivilprozess- und Zwangsvollstreckungsrecht* 387; Spühler K, Dolge A, and Gehri M *Schweizerisches Zivilprozessrecht und Grundzüge des internationalen Zivilprozessrechts* 2010 252 n. 149 *et seq.* See, however, Article 168(2) of the Swiss Civil Procedure Code which excludes the *numerus clausus* with regard to child affairs in family disputes.

¹³ Of 18 December 1987, SR 291.

¹⁴ See also Article 9(2) of the Hague Evidence Convention.

¹⁵ Article 11a(3) of the Swiss Private International Law Act. For the (unofficial) English translation of the said Act, cf. <http://www.umbrecht.ch/de/frameset7.html#2> (date of use: 31 January 2013).

such law includes means of proof that are not listed in Article 168(1) of the Swiss Civil Procedure Code. A court in Switzerland may thus, for instance, question a non-party witness under oath, although the Swiss Civil Procedure Code does not provide for such procedure. The same holds true for the cross-examination of witnesses by the parties' counsel, a technique that is generally not available under Swiss law.¹⁶

B. Witness Testimony

1. Distinction between Party Witnesses, Non-party Witnesses, and Experts

The Swiss Civil Procedure Code distinguishes between the oral testimony of “parties” and that of “witnesses”, or in the terminology used in this thesis, of non-party and third party witnesses, respectively. A litigant cannot be a “witness” and *vice versa*.¹⁷ As a result, the rules on *viva voce* evidence of litigants are distinct from those on oral testimony of non-party witnesses. Articles 169-176 of the Swiss Civil Procedure Code on “witness testimony” thus only apply to the examination of non-party witnesses, but not to the oral evidence of litigants.

In addition, the Swiss Civil Procedure Code regards an expert not as a non-party witness, but treats the expert opinion as an independent means of proof.¹⁸ Consequently, rules other than those on the testimony of a non-party witness apply to the expert.

2. Competence and Compellability of Non-party Witnesses

Before outlining the competence of a third-party witness under the Swiss Civil Procedure Code, it is necessary to briefly explain the differences between the competence, compellability, and privileges of a witness. An individual, be it a litigant or a non-party witness, is competent to testify, if he may lawfully give evidence. He is compellable, if he may be obliged to testify. A non-compellable witness can decline altogether to enter the witness box and give evidence.

¹⁶ Müller HA ‘Art. 168’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 1017 n. 5; Spühler K, Dolge A, and Gehri M *Schweizerisches Zivilprozessrecht und Grundzüge des internationalen Zivilprozessrechts* 2010 283 n. 327; Schwander I ‘Bundesgesetz über das Internationale Privatrecht, no. 1’ in Walter G, Jametti Greiner M and Schwander I (eds) *Internationales Privatrecht und Verfahrensrecht: Texte und Erläuterungen* 2000 15 n. 4; Volken P ‘Art. 11’ in Girsberger A *et al* (eds) *Zürcher Kommentar zum IPRG* 2004 159 n. 10; Berti SV ‘Art. 11’ in Honsell H *et al* (eds) *Basler Kommentar Internationales Privatrecht* 2007 87 n. 6.

¹⁷ Article 169 of the Swiss Civil Procedure Code. See also Weibel H and Nägeli S ‘Art. 169’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1031 n. 1; Guyan P ‘Art. 169’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 807 n. 3; Reinert P ‘Art. 169’ in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 681 n. 1.

¹⁸ Article 168(1)(d) of the Swiss Civil Procedure Code.

By contrast, a person, who can merely claim a privilege, that is, a right to refuse to answer specific questions put to him by the court or by a party, is obliged to enter the witness box and must listen to the queries, but can decline to reply to a particular question which is covered by a privilege, such as the privilege against self-incrimination or the privilege of legal advisers.¹⁹

Under Swiss law, each individual, who is not a litigant, is competent to testify as non-party witness, provided he is physically and mentally fit to do so. The person must be in a position to reasonably apprehend what is going on around him, and to convey his observations in an understandable way to the court. As a result, the Swiss Civil Procedure Code does not stipulate a minimum age for non-party witnesses.²⁰

Based on Article 165(1) of the Swiss Civil Procedure Code, the following persons cannot be compelled to give evidence in court: a party's spouse,²¹ former spouse, or concubine; a person who has children with a litigant; a party's direct relatives and in-laws in the same line²² and in the parental line²³ to and including the third degree; a litigant's foster parents, foster children, and foster siblings; a party's guardian, or welfare advocate. The list in Article 165 of the Swiss Civil Procedure Code is exhaustive.²⁴ A third party falling under one of the foregoing catego-

¹⁹ See, amongst others, Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 805, 573 *et seq.*; Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 421; Osipitan T 'Competence and Compellability of Witness' in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 381.

²⁰ See Article 160(2) of the Swiss Civil Procedure Code. According to this provision, the court rules at its discretion as to whether a minor has a duty to cooperate, and takes the welfare of the child into account. For the (unofficial) English translation of the said provision, *cf.* Berti SV (ed) *ZPO, CPC, CCP* 2009 564. See also Schmid EF 'Art. 160' in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 779 n. 60; Higi P 'Art. 160' in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 956 n. 22 *et seqq.*; Reinert P 'Art. 169' in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 681 n. 3 *et seqq.*; Weibel H and Nägeli S 'Art. 169' in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1033 n. 3 *et seqq.*; Spühler K, Dolge A, and Gehri M *Schweizerisches Zivilprozessrecht und Grundzüge des internationalen Zivilprozessrechts* 2010 255 n. 164 *et seq.*

²¹ According to Article 165(2) of the Swiss Civil Procedure Code, registered partnerships are treated in the same way as marriage. For the (unofficial) English translation of the said provision, see Berti SV (ed) *ZPO, CPC, CCP* 2009 565.

²² Parents and siblings (first degree); grandparents and grandchildren (second degree); great-grandparents and great-grandchildren (third degree). See Schmid EF 'Art. 165' in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 790 n. 6. By virtue of Article 165(2) of the Swiss Civil Procedure Code, step siblings are treated in the same way as siblings. For the (unofficial) English translation of the said provision, see Berti SV (ed) *ZPO, CPC, CCP* 2009 565.

²³ Brothers and sisters (second degree; in the parental line, there is no first degree); nieces, nephews, uncles and aunts (third degree). See Schmid EF 'Art. 165' in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 790 n. 6.

²⁴ Higi P 'Art. 165' in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 987 n. 9. *Ratio legis* of the said rule is the protection of the intimacy of the family and registered partnership. A family member or member of a partnership shall be prevented from giving evidence to the detriment of another member, as cooperation with the court usually causes conflict of interests and loyalty within a family or partnership. See in this regard Swiss Federal Council *Botschaft zur Schweizerischen Zivil-*

ries can refuse to testify without giving any further reasons.²⁵

A compellable non-party witness is under an obligation to cooperate with the court. This not only includes the obligation to appear in court to give evidence, but, amongst other things, also to tell the truth when testifying, to produce documents,²⁶ or to allow experts to inspect his property.²⁷ Where a non-party witness declines to cooperate in court without good cause,²⁸ the court may impose a fine, threaten punishment pursuant to Article 292 of the Swiss Criminal Code,²⁹ order compliance by force, or impose the costs caused by the refusal.³⁰ The extent to what compliance by force can be ordered is not entirely clear, and will have to be defined by case law. There is, however, no doubt that coercive detention is excluded.³¹ Where a non-party witness refuses to collaborate, the court may not only apply one of the aforesaid measures, but may combine several measures.³² Default by a non-party witness has the same consequences as

prozessordnung (ZPO) (28 June 2006) <http://www.admin.ch/ch/d/ff/2006/7221.pdf> 7317 (date of use: 31 January 2013); Hasenböhler F ‘Art. 165’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1010 n. 6; Higi P ‘Art. 165’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 987 n. 6; Berni M ‘Art. 165’ in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 662 n. 3.

²⁵ Swiss Federal Council *Botschaft zur Schweizerischen Zivilprozessordnung (ZPO)* (28 June 2006) <http://www.admin.ch/ch/d/ff/2006/7221.pdf> 7317 (date of use: 31 January 2013). See, however, Article 296(2) of the Swiss Civil Procedure Code which stipulates a duty to cooperate in examinations to determine parentage. This duty prevails over the right to refuse to cooperate under Article 165 of the said Act. Cf. Berni M ‘Art. 165’ in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 662 n. 2.

²⁶ With the exception of correspondence between counsel relating to the professional representation of a litigant or a third party, Article 160(1)(b) of the Swiss Civil Procedure Code. For the (unofficial) translation of the said provision, cf. Berti SV (ed) *ZPO, CPC, CCP* 2009 564. For more on this issue, see, amongst others, Schmid EF ‘Art. 160’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 771 n. 16 *et seq.*; Berni M ‘Art. 160’ in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 648 n. 12; Hasenböhler F ‘Art. 160’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 993 n. 7.

²⁷ Article 160(1)(a)-(c) of the Swiss Civil Procedure Code.

²⁸ See Articles 165-166 of the Swiss Civil Procedure Code.

²⁹ Article 292 of the Swiss Criminal Code reads as follows: “Any person who fails to comply with an official order that has been issued to him by a competent authority or public official under the threat of the criminal penalty for non-compliance in terms of this Article shall be liable to a fine”. For the (unofficial) English translation of the Swiss Criminal Code, see <http://www.admin.ch/ch/e/rs/3/311.0.en.pdf> (date of use: 31 January 2013).

³⁰ Article 167(1) of the Swiss Civil Procedure Code. With regard to the (unofficial) English translation of the said provision, cf. Berti SV (ed) *ZPO, CPC, CCP* 2009 566.

³¹ Swiss Federal Council *Botschaft zur Schweizerischen Zivilprozessordnung (ZPO)* (28 June 2006) <http://www.admin.ch/ch/d/ff/2006/7221.pdf> 7320 (date of use: 31 January 2013); Hasenböhler F ‘Art. 167’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1025 n. 14; Schmid EF ‘Art. 167’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 798 n. 1; Berni M ‘Art. 167’ in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 676 n. 7; Lendemann J ‘Art. 167’ in Gehri MA and Kramer M (eds) *ZPO Kommentar* 2010 310 n. 1.

³² Swiss Federal Council *Botschaft zur Schweizerischen Zivilprozessordnung (ZPO)* (28 June 2006) <http://www.admin.ch/ch/d/ff/2006/7221.pdf> 7320 (date of use: 31 January 2013); Hasenböhler F ‘Art. 167’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1025 n. 9; Schmid EF ‘Art. 167’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 798 n. 3; Berni M ‘Art. 167’ in Baker & McKenzie (ed) *Schweizeri-*

an unjustified refusal to cooperate.³³ The order, wherein a non-party witness is requested to appear in court to give evidence or to otherwise cooperate with the court, is issued by the court.³⁴

3. Privileges of Non-party Witnesses

By virtue of Article 166 of the Swiss Civil Procedure Code, a compellable non-party witness can refuse to cooperate with the trial court in establishing particular facts which fall within the scope of a privilege listed in the said provision.³⁵ The list of privileges in the said provision is exhaustive.³⁶ The third party invoking a privilege under Article 166 has to show *prima facie* the existence of one of the reasons listed in this provision.³⁷

Article 166(1)(a) of the Swiss Civil Procedure Code provides for the privilege against self-incrimination. By virtue of this rule, a non-party witness can decline to cooperate in establishing facts that would expose him, or a person close to him, within the meaning of Article 165 of the said Code to the risk of penal investigation, or civil liability.³⁸

Article 166(1)(b) of the Swiss Civil Procedure Code guarantees the privilege of certain professionals. Cooperation can be refused, if it would fulfil the offence of divulging secrets in the meaning of Article 321 of the Swiss Criminal Code, with the exception of auditors.³⁹ Article

sche Zivilprozessordnung (ZPO) 2010 675 n. 4; Lendemann J ‘Art. 167’ in Gehri MA and Kramer M (eds) *ZPO Kommentar* 2010 310 n. 1.

³³ Article 167(2) of the Swiss Civil Procedure Code. For the (unofficial) English translation of the said provision, cf. Berti SV (ed) *ZPO, CPC, CCP* 2009 566. For the notion of “default”, see Higi P ‘Art. 167’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 1006 n. 19 *et seq.*

³⁴ Articles 136(a) and 170(1) of the Swiss Civil Procedure Code.

³⁵ Unlike under Article 165 of the Swiss Civil Procedure Code, the non-party witness cannot refuse altogether to give evidence, but can merely decline to collaborate with regard to specific facts.

³⁶ Higi P ‘Art. 166’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 993 n. 6.

³⁷ Higi P ‘Art. 166’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 993 n. 8; Berni M ‘Art. 166’ in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 668 n. 2; Schmid EF ‘Art. 166’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 794 n. 3.

³⁸ With regard to the (unofficial) English translation of Article 166(1)(a) of the Swiss Civil Procedure Code, cf. Berti SV (ed) *ZPO, CPC, CCP* 2009 566.

³⁹ For the (unofficial) English translation of Article 166(1)(b) of the Swiss Civil Procedure Code, cf. Berti SV (ed) *ZPO, CPC, CCP* 2009 566. Article 321(1)-(3) of the Swiss Criminal Code reads as follows: “1. Any person who in his capacity as a member of the clergy, lawyer, defence lawyer, notary, patent attorney, auditor subject to a duty of confidentiality under the Code of Obligations, doctor, dentist, pharmacist, midwife or as an auxiliary to any of the foregoing persons discloses confidential information that has been confided to him in his professional capacity or which has come to his knowledge in the practice of his profession shall be liable to a custodial sentence not exceeding three years or to a monetary penalty. 2. A student who discloses confidential information that has come to his knowledge in the course of his studies is also liable to the foregoing penalties. A breach of professional confidentiality remains an offence following the termination of professional employment or of the studies. 3. No offence is committed if the person disclosing the information does so with the consent of the person to whom the information pertains or on the basis of written authorisation issued in

166(1)(b) of the Swiss Civil Procedure Code protects those persons, who have access to confidential information exhaustively listed in Article 321 of the Swiss Criminal Code.⁴⁰ This is the case for members of the clergy, lawyers, defence lawyers, notaries, doctors, dentists, pharmacists, midwives, students, and any individuals acting as auxiliaries to any of the aforesaid persons.⁴¹ The privilege of these professionals is, however, not of an absolute nature. They have to give evidence, if they are under an obligation to report offences, or where they have been released from their duty to observe professional secrecy, unless they make a credible argument that their interest in maintaining secrecy outweighs the interest in learning the truth.⁴² This, however, does not apply to members of the clergy and lawyers who both have an absolute right to refuse to give evidence. It goes without saying that the right under Article 166(1)(b) of the Swiss Civil Procedure Code only exists in relation to information that was entrusted to the said persons in the normal course of the exercise of their profession, or with regard to facts they have noticed due to their profession. Put differently, there must be a connection between the professional activity and the knowledge of the relevant secret.⁴³ Both Article 166(1)(b) of the Swiss Civil Procedure Code and Article 321 of the Swiss Criminal Code apply to lawyers, who are qualified to practice as attorneys in Switzerland, as well as abroad.⁴⁴ By contrast, the question of whether in-house counsel falls under Article 166(1)(b) of the Swiss Civil Procedure Code is controversial.⁴⁵ To date, the Swiss Federal Court has not made a ruling on the matter.⁴⁶

response to his application by a superior authority or supervisory authority.” For the (unofficial) English translation of the Swiss Criminal Code, see <http://www.admin.ch/ch/e/rs/3/311.0.en.pdf> (date of use: 31 January 2013).

⁴⁰ BGE 83 IV 196 consideration D.

⁴¹ Cf. Trechsel S and Vest H ‘Art. 321’ in Trechsel S and Pieth M (eds) *Schweizerisches Strafgesetzbuch Praxiskommentar* 2013 1452 n. 4 *et seq.*

⁴² Article 166(1)(b) of the Swiss Civil Procedure Code. For the relevant (unofficial) English translation, cf. Berti SV (ed) *ZPO, CPC, CCP* 2009 566. The interest in maintaining secrecy may, for instance, override the interest in discovering the truth where a doctor refuses to testify on the terminal disease of his patient, as the doctor is afraid that the patient would be heavily stressed by the diagnosis, Swiss Federal Council *Botschaft zur Schweizerischen Zivilprozessordnung vom 28. Juni 2006* BBl 2006 7319.

⁴³ Berni M ‘Art. 166’ in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 669 n. 6 with reference to Frank R, Sträuli H, and Messmer G *Kommentar zur zürcherischen Zivilprozessordnung* 1997 495 n. 19; Hasenböhler F ‘Art. 166’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1020 n. 134; Trechsel S and Vest H ‘Art. 321’ in Trechsel S and Pieth M (eds) *Schweizerisches Strafgesetzbuch Praxiskommentar* 2013 1459 n. 21 *et seq.* With regard to the privilege of lawyers, cf., amongst others, the decision of the Swiss Federal Court 1_B.101/2008 of 28.10.2008 consideration 4.4.

⁴⁴ Trechsel S and Vest H ‘Art. 321’ in Trechsel S and Pieth M (eds) *Schweizerisches Strafgesetzbuch Praxiskommentar* 2013 1453 n. 5.

⁴⁵ Hasenböhler F ‘Art. 167’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1018 n. 21 *et seq.*

⁴⁶ See in this regard the decision of the Swiss Federal Court 1_B.101/2008 of 28.10.2008 consideration 4.2. For more on this topic, see, amongst others, Trechsel S and Vest H ‘Art. 321’ in Trechsel S and Pieth M (eds) *Schweizerisches Strafgesetzbuch Praxiskommentar* 2013 1324 n. 5; Rodriguez R ‘Der Geheimnisschutz in der neuen Schweizerischen Zivilprozessordnung’ 2010 *Zeitschrift für Zivilprozeß* 312, 318; Weber P ‘Legal privi-

By virtue of Article 166(1)(c) of the Swiss Civil Procedure Code, a non-party witness may refuse to cooperate in establishing facts entrusted to him as an official in the meaning of Article 110(3) of the Swiss Criminal Code,⁴⁷ or in his official capacity as member of an authority, or in the exercise of his office. Such persons, however, have to give evidence, where they have a duty to report offences, or where they have been authorised to testify by their superior authority.⁴⁸

Ombudsmen and mediators enjoy a privilege with regard to facts learned while acting in such capacity.⁴⁹

Article 166(1)(e) of the Swiss Civil Procedure Code refers to the privilege of professional journalists. Journalists, who are engaged in the editing department of a periodical medium, may invoke a privilege as regards the identity of an author, or the contents and sources of information. The same holds true for assistants of such journalists.⁵⁰

According to Article 166(2) of the Swiss Civil Procedure Code, other persons aware of statutorily protected secrets can decline to give evidence, if they show that the interest in maintaining secrecy overrides the interest in discovering the truth.⁵¹ This rule constitutes a catch-all provision, and includes the statutorily protected secrets not falling under Article 166(1) of the Swiss Civil Procedure Code.⁵² Unlike the individuals mentioned in the latter provision, the persons

lege für in-house lawyers?’ 2009 *Zeitschrift für Zivilprozess International* 264 *et seq.*; Schwarz J ‘Anwendung von Art. 321 StGB auf Unternehmensjuristen – Einige Gedanken zu einer laufenden Diskussion’ 2006 *Anwaltsrevue* 2006 338 *et seq.*; Pfeifer M ‘Gilt das Berufsgeheimnis nach Art. 321 StGB auch für Unternehmensjuristen?’ 2006 *Anwaltsrevue* 166 *et seq.*; Niggli MA ‘Unterstehen dem Berufsgeheimnis nach Art. 321 auch Unternehmensjuristen?’ 2006 *Anwaltsrevue* 277 *et seq.*; Wohlmann H and Weiner A ‘Die Verantwortung des Unternehmensjuristen’ 2009 *Schweizerische Juristenzeitung* 174. In recent years, the implementation of a code on rights and obligations of in-house counsel was discussed, and the Swiss Federal Council prepared a draft of a relevant code. Based on the latter, registered in-house counsel would have had a restricted right to refuse to cooperate. Since the outcome of the consultation procedure to this draft was very controversial, the Swiss Federal Council decided in 2010, to no longer pursue the aforesaid code. See also Rodriguez R ‘Der Geheimnisschutz in der neuen Schweizerischen Zivilprozessordnung’ 2010 *Zeitschrift für Zivilprozeß* 319 *et seq.*

⁴⁷ Article 110(3) of the Swiss Criminal Code reads as follows: “Public officials are the officials and employees of a public administrative authority or of an authority for the administration of justice as well as persons who hold office temporarily or are employed temporarily by a public administrative authority or by an authority for the administration of justice or who carry out official functions temporarily.” For the (unofficial) English translation of the Swiss Criminal Code, see <http://www.admin.ch/ch/e/rs/3/311.0.en.pdf> (date of use: 31 January 2013).

⁴⁸ Cf. Berti SV (ed) *ZPO, CPC, CCP* 2009 566 for the (unofficial) English translation of Article 166(1)(c) of the Swiss Civil Procedure Code.

⁴⁹ Article 166(1)(d) of the Swiss Civil Code. For the relevant (unofficial) English translation, see Berti SV (ed) *ZPO, CPC, CCP* 2009 566.

⁵⁰ For the (unofficial) English translation of the said provision, cf. Berti SV (ed) *ZPO, CPC, CCP* 2009 566.

⁵¹ See Berti SV (ed) *ZPO, CPC, CCP* 2009 566 regarding the (unofficial) English translation of Article 166(2) of the Swiss Civil Procedure Code.

⁵² Swiss Federal Council *Botschaft zur Schweizerischen Zivilprozessordnung vom 28. Juni 2006* BBl 2006 7320. See also Trechsel S and Vest H ‘Art. 321’ in Trechsel S and Pieth M (eds) *Schweizerisches Strafgesetzbuch Praxiskommentar* 2013 1456 n. 15 *et seq.*

under Article 166(2) are, as a general rule, under an obligation to give evidence. Only where they can credibly argue, that the interest in maintaining secrecy outweighs the interest in discovering the truth, may they refuse to cooperate. Statutory secrets falling under Article 166(2) of the Swiss Civil Procedure Code are, *inter alia*, business secrecy in relation to auditors,⁵³ manufacturing or trade secrecy,⁵⁴ and banking secrecy.⁵⁵

4. Examination of Non-party Witnesses

Non-party witnesses are examined *viva voce* by the court.⁵⁶ The judge questions the third-party witness on his particulars, his personal relationship with the parties, and on other circumstances which might influence the credibility of his testimony, as well as on what he witnessed with respect to the matter in question.⁵⁷ In relation to the latter, the court generally first encourages the non-party witness “to tell his story”. Where the statements of the third-party witness are unclear or ambiguous, or additional information is needed, the court puts additional questions to the non-party witness. It goes without saying that the court has to refrain from influencing the third party by, for instance, asking leading questions.⁵⁸ Once the judge has concluded the interrogation of the non-party witness, the litigants can request the court to put additional ques-

⁵³ Article 730b(2) of the Swiss Code of Obligations of 30 March 1911, SR 220. The wording of this provision is as follows: “*The auditor safeguards the business secrets of the company in its assessments, unless it is required by law to disclose such information. In its reports, in submitting notices and in providing information to the general meeting, it safeguards the business secrets of the company.*” For the (unofficial) translation of the Swiss Code of Obligations, see <http://www.admin.ch/ch/e/rs/2/220.en.pdf> (date of use: 31 January 2013).

⁵⁴ Article 162 of the Swiss Criminal Code. This provision reads as follows: “*Any person who betrays a manufacturing or trade secret that he is under a statutory or contractual duty contract [sic] not to reveal, any person who exploits for himself or another such a betrayal, shall on complaint be liable to a custodial sentence not exceeding three years or to a monetary penalty.*” For the (unofficial translation) of the Swiss Criminal Code, cf. <http://www.admin.ch/ch/e/rs/3/311.0.en.pdf> (date of use: 31 January 2013).

⁵⁵ Article 47 of the Swiss Federal Law on Banks and Savings Banks of 8 November 1934, SR 952. Article 47(1)-(2) of the said Act reads as follows: “*1. Imprisonment of up to three years or [a] fine will be awarded to persons who deliberately a. disclose a secret that is entrusted to him in his capacity as body, employee, appointee, or liquidator of a bank, as body or employee of an audit company or that he has observed in this capacity; b. attempts to induce such an infraction of the professional secrecy. 2. Persons acting with negligence will be penalized with a fine up to 250'000 francs.*” For the (unofficial) English translation of this Act, cf. http://www.kpmg.com/CH/de/Library/Legislative-Texts/Documents/pub_20090101-BankA.pdf (date of use: 31 January 2013). For more on statutorily protected secrets, see, amongst others, Schmid EF ‘Art. 166’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 796 n. 16 *et seq.*; Berni M ‘Art. 166’ in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 673 n. 15 *et seq.*

⁵⁶ See Article 172 of the Swiss Civil Procedure Code. With regard to the testimony of a third party questioned by a private individual, see ZR 106 (2007) no. 14 consideration VI.5.

⁵⁷ Article 172 of the Swiss Civil Procedure Code. Cf. Berti SV (ed) *ZPO, CPC, CCP* 2009 568 for the (unofficial) English translation of the said provision.

⁵⁸ Weibel H and Nägeli S ‘Art. 171’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1044 n. 8; Guyan P ‘Art. 171’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 815 n. 6; Higi P ‘Die richterliche Zeugenbefragung im Zivilprozess – Technik und Praxis’ 2006 *Aktuelle Juristische Praxis* 1097 *et seq.* For the notion of “leading questions”, see para. III.A.3.a).

tions to the third party. With the court's consent, the parties are allowed to directly question the non-party witness.⁵⁹ As a general principle, the third party must testify from memory. Where the issues on which the non-party witness testifies are complex, the court may, however, allow him to refer to documents.⁶⁰

Based on the principle of judicial control over the procurement of evidence, the court has the power to recall a non-party witness who has already testified. Due to the principle of party presentation, the court, however, is not allowed to call a third party as a witness whose testimony has not been proffered by one of the litigants.⁶¹

The Swiss Civil Procedure Code does not provide for the administration of oath or affirmation by non-party witnesses.⁶² Before testifying, the non-party witness, however, is exhorted to tell the truth and, if he is older than 14 years, informed of the penal consequences of perjury pursuant to Article 307 of the Swiss Criminal Code.⁶³ According to Article 176(1) of the Swiss Civil Procedure Code, a record is kept of the essential contents of the testimony, and a litigant can request the recording of questions that were disallowed by the court.⁶⁴ The said provision does not exclude *per se a verbatim* transcript, but does not issue a right to third parties and litigants

⁵⁹ Article 173 of the Swiss Civil Procedure Code. For the (unofficial) English translation of this provision, *cf.* Berti SV (ed) *ZPO, CPC, CCP* 2009 568.

⁶⁰ Article 171(3) of the Swiss Civil Procedure Code. With regard to the (unofficial) translation of the said provision, *cf.* Berti SV (ed) *ZPO, CPC, CCP* 2009 567. For more on the examination of non-party witnesses and litigants, see, amongst others, Weibel H and Nägeli S 'Art. 171' in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1043 n. 6; Higi P 'Die richterliche Zeugenbefragung im Zivilprozess – Technik und Praxis' 2006 *Aktuelle Juristische Praxis* 1093-1105; Schumacher P 'Einvernahmetechnik im Zivilprozess' 2005 *Aktuelle Juristische Praxis* 695-704.

⁶¹ *Cf.* Chapter 2 paras. IV.B.2.b) and IV.B.2.d). See, however, Article 153 of the Swiss Civil Procedure that provides for the taking of evidence *ex officio*. Based on this rule, the court takes evidence of its own motion where the facts are to be ascertained *ex officio* (e.g. in certain disputes relating to lease of living accommodation; see, amongst others, Articles 247 and 296 of the Swiss Civil Procedure Code), or where the court has substantial doubts as to the correctness of an undisputed fact. For the (unofficial) English translation of Article 153, *cf.* Berti SV (ed) *ZPO, CPC, CCP* 2009 563.

⁶² Guyan P 'Art. 171' in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 812 n. 2.

⁶³ Article 171(1) of the Swiss Civil Procedure Code. For the (unofficial) English translation of the said provision, *cf.* Berti SV (ed) *ZPO, CPC, CCP* 2009 567. Article 307(1) of the Swiss Criminal Code reads as follows: "Any person who appears in judicial proceedings as a witness, expert witness, translator or interpreter and gives false evidence or provides a false report, a false expert opinion or a false translation in relation to the case shall be liable to a custodial sentence not exceeding five years or to a monetary penalty." For the (unofficial) English translation of the Swiss Criminal Code, see <http://www.admin.ch/ch/e/rs/3/311.0.en.pdf> (date of use: 31 January 2013).

⁶⁴ With regard to the (unofficial) English translation of Article 176(1), see Berti SV (ed) *ZPO, CPC, CCP* 2009 568.

to have their testimony literally recorded.⁶⁵ In practice, in the vast majority of the cases, no *verbatim* record is made.

The Swiss Civil Procedure Code does not recognise the concept of written testimony, be it in form of deposition or affidavit.⁶⁶ It merely provides for the so-called “*written information*” in cases, where the oral examination of a non-party witness appears unnecessary.⁶⁷

Under Swiss law, the communication of a counsel with a potential non-party witness or expert is, as a general rule, regarded as a violation of the counsel’s obligation to exercise his profession in a thorough and diligent manner.⁶⁸ This obligation follows from the principle of judicial control over the procurement of evidence, and includes, *inter alia*, that a counsel refrains from exercising undue influence on non-party witnesses or experts. The communication of a counsel with a potential third-party witness or expert is thus only allowed, if justified by an objective reason. Such reason may, for instance, exist where the communication is necessary to assess the chances of success of a lawsuit, or is in relation to a motion to take evidence.⁶⁹ Where there is an objective reason, the counsel should observe the following rules: first, the communication has to serve the interests of his client. Second, the establishing of the facts through the court must be safeguarded, and the counsel has to refrain from influencing the non-party witness or expert. Finally, there must be an objective need for the communication.⁷⁰ In the light of the

⁶⁵ Swiss Federal Council *Botschaft zur Schweizerischen Zivilprozessordnung vom 28. Juni 2006* BBl 2006 7322 with reference to BGE 129 I 85 and BGE 126 I 15. See also Müller HA ‘Art. 176’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 1059 n. 7 *et seq.*; Weibel H and Nägeli S ‘Art. 176’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1058 n. 3 *et seq.*; Guyan P ‘Art. 176’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 822 n. 7. For more on the record of hearings, see Article 235 of the Swiss Civil Procedure Code.

⁶⁶ Müller HA ‘Art. 171’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 1031 n. 4 *in fine*; Berni M ‘Art. 171’ in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 687 n. 6; Dolge A ‘Art. 177’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 827 n. 12; Spühler K, Dolge A, and Gehri M *Schweizerisches Zivilprozessrecht und Grundzüge des internationalen Zivilprozessrechts* 2010 253 n. 152; Frank R, Sträuli H, and Messmer G *Kommentar zur zürcherischen Zivilprozessordnung* 1997 528 n. 3.

⁶⁷ Article 190(2) of the Swiss Civil Procedure Code. For more on written information, see para. II.G below.

⁶⁸ Decision of the Swiss Federal Court 2C_8/2010 of 4.10.2010 consideration 3.2.1 with further references; Fellmann W ‘Art. 12’ in Fellmann W and Zindel GG (eds) *Kommentar zum Anwaltsgesetz: Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (Anwaltsgesetz, BGFA)* 2011 150 n. 23a. See also Article 12(a) of the Law on Advocates of 23 June 2000, SR 935.61.

⁶⁹ Fellmann W ‘Art. 12’ in Fellmann W and Zindel GG (eds) *Kommentar zum Anwaltsgesetz: Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (Anwaltsgesetz, BGFA)* 2011 149 n. 22, 150 n. 23; Müller-Chen M ‘Aus dem US-amerikanischen Discovery-Verfahren gewonnene Beweise im internationalen Zivilprozess- und Schiedsrecht in der Schweiz’ in Gauch P, Werro F and Pichonnaz P (eds) *Mélanges en l’honneur de Pierre Tercier* 2008 941 *et seq.*

⁷⁰ Fellmann W ‘Art. 12’ in Fellmann W and Zindel GG (eds) *Kommentar zum Anwaltsgesetz: Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (Anwaltsgesetz, BGFA)* 2011 150 n. 23 with further references; Nater H ‘Zur Zulässigkeit anwaltlicher Zeugenkontakte im Zivilprozess’ 2006 *Schweizerische Juristenzeitung* 257 *et seq.*; 2006 *Basler Juristische Mitteilungen* 48 *et seq.*; 1991 *Basler Juristische Mitteilungen*

above, it is clear that a “preparation” of a non-party witness or expert by a counsel prior to the witness examination is considered inadmissible under Swiss law.⁷¹ Such contact would not only be a breach of the Law of Advocates,⁷² but would, at least from the view of the counsel conducting the “preparation”, be self-defeating. A Swiss judge will have serious doubts about the reliability of the testimony of a third-party witness or expert who previously has discussed the case with counsel, or who has consulted unduly with a party.⁷³

C. Evidence by Litigants

1. Competence and Compellability of Litigants

A litigant is, as with a non-party witness, competent to give evidence if he is physically and mentally fit to do so. Thus, the comments made in relation to the competence of non-party witnesses apply here *mutatis mutandis*.⁷⁴ In contrast to non-party witnesses, however, litigants competent to testify are always compellable to cooperate with the court, and can merely invoke, if at all, a privilege under Article 163 of the Swiss Civil Procedure Code.⁷⁵

The duty of parties to cooperate in the taking of evidence is the same as that of non-party witnesses.⁷⁶ Where a litigant declines to collaborate without good cause, the court takes into account such refusal when weighing the evidence.⁷⁷ In cases where, for instance, a defendant rejects to produce a document as requested by the plaintiff, the court can assume that the content of such document corresponds to the allegations made in the plaintiff’s pleadings.⁷⁸ Unlike in

163; ZR 106 (2007) no. 81; ZR 96 (1997) no. 44; ZR 95 (1996) no. 43; ZR 81 (1982) no. 40; ZR 53 (1954) no. 174; ZR 52 (1953) no. 68; ZR 49 (1950) no. 46; ZR 47 (1948) no. 123. On how the counsel can avoid any undue influence, see the decision of the Swiss Federal Court 2C_8/2010 of 4.10.2010 consideration 3.2.1 with further references; Fellmann W ‘Art. 12’ in Fellmann W and Zindel GG (eds) *Kommentar zum Anwaltsgesetz: Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (Anwaltsgesetz, BGFA)* 2011 150 n. 23a.

⁷¹ Such “preparation” may, for instance, include the rehearsal of the answers to be given by the non-party witness at the hearing.

⁷² Based on Article 17 of the Law on Advocates, the counsel, who “prepared” a non-party witness or expert, is subject to disciplinary sanctions.

⁷³ See Langbein JH ‘The German Advantage in Civil Procedure’ 1985 *University of Chicago Law Review* 834.

⁷⁴ Cf. para. II.B.2 above.

⁷⁵ See para. II.C.2 below.

⁷⁶ Article 160(1) of the Swiss Civil Procedure Code. See also para. II.B.2 above.

⁷⁷ Article 164 of the Swiss Civil Procedure Code. With regard to the (unofficial) English translation of this provision, cf. Berti SV (ed) *ZPO, CPC, CCP* 2009 565.

⁷⁸ Higi P ‘Art. 164’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 983 n. 8; Schmid EF ‘Art. 164’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 788 n. 2; Hasenböhler F ‘Das Beweisrecht’ 2007 *Schweizerische Zeitschrift für Zivilprozess- und Zwangsvollstreckungsrecht* 383, 384. See, however, Hasenböhler F ‘Art. 164’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1006 n. 4 *et seqq.* and Berni M ‘Art. 164’ in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 660 n. 7 who argue that a litigant’s refusal does not result in a reversal of the burden of proof, but merely in a relaxation of the *onus*.

the case of an unjustified refusal by a non-party witness, the court cannot apply any coercive measures or other sanctions mentioned in Article 167(1) of the Swiss Civil Procedure Code in relation to a recalcitrant litigant. The court may, however, by analogy to Article 167(1)(d), impose on the litigant the costs caused by his refusal.⁷⁹ The reason for the differential treatment between non-party witnesses and litigants is that the latter are, unlike third parties, under no obligation to cooperate, but merely under a procedural burden.⁸⁰

2. Privileges of Litigants

In comparison to third parties,⁸¹ the privileges of litigants to refuse to collaborate in the taking of evidence are more limited. The list of privileges in Article 163 of the Swiss Criminal Code is exhaustive.⁸² A litigant invoking such privilege has to show *prima facie* the existence of one of the reasons mentioned in the said provision.⁸³ By virtue of Article 163(1)(a) of the Swiss Civil Procedure Code, a litigant can decline cooperation where it would subject a closely related person within the meaning of Article 165 of the Swiss Civil Procedure Code to the risk of penal investigation, or civil liability.⁸⁴ As a result, a litigant cannot refuse to give evidence in order to protect himself from the risk of penal investigation, or civil liability.⁸⁵

Article 163(1)(b) of the Swiss Civil Procedure Code provides for the professional privilege of litigants. Since this provision is virtually identical with Article 166(1)(b) of the said Code, reference can be made to the foregoing comments.⁸⁶ The same applies to the privilege of parties

⁷⁹ Schmid EF ‘Art. 164’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 788 n. 3.

⁸⁰ In German, so-called “*prozessuale Last*”. See Higi P ‘Art. 164’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 983 n. 7; Schmid EF ‘Art. 164’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 788 n. 1.

⁸¹ See para. II.B.3 above.

⁸² Higi P ‘Art. 163’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 977 n. 2, 978 n. 6; Berni M ‘Art. 163’ in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 656 n. 1.

⁸³ Schmid EF ‘Art. 163’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 786 n. 7.

⁸⁴ For the (unofficial) English translation of Article 163(1)(a) of the Swiss Civil Procedure Code, cf. Berti SV (ed) *ZPO, CPC, CCP* 2009 565. With regard to Article 165 of the Swiss Civil Procedure Code, see para. II.B.3 above.

⁸⁵ Swiss Federal Council *Botschaft zur Schweizerischen Zivilprozessordnung vom 28. Juni 2006* BBl 2006 7317. For criticism in this regard, see, amongst others, Schmid EF ‘Art. 163’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 786 n. 5 *et seq.*; Hasenböhler F ‘Art. 163’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1002 n. 8 *et seq.*

⁸⁶ See para. II.B.3.

who are privy to statutory secrets other than those covered by Article 163(1)(b) of the Swiss Civil Procedure Code.⁸⁷

3. Examination of Litigants

With regard to the oral testimony of litigants, the Swiss Civil Procedure Code distinguishes between two forms, namely the party testimony under Article 191, and the testimony given under oath pursuant to Article 192. The difference between these two means of proof is the sanction a litigant may face when willingly making a false statement. Article 191(2) of the said Code provides for a disciplinary sanction, namely a fine, while Article 192(2) stipulates a criminal penalty by referring to Article 306 of the Swiss Criminal Code.⁸⁸

In relation to the party testimony, the testimony given under oath is of subsidiary nature. In other words, the court first questions a litigant pursuant to Article 191 of the Swiss Civil Procedure Code, and then decides, based on the statements of the litigant, whether the latter is to be examined under Article 192 of the said Code.⁸⁹ The court determines *ex officio*, whether a litigant has to testify under oath. The request of a party to be examined or having the opponent interrogated under oath is thus not sufficient. An order for a testimony given under oath should only be made to eliminate the last doubts of the court.⁹⁰ By being questioned under oath, the party is put under additional pressure to tell the truth, as false statements may trigger criminal penalties.⁹¹

⁸⁷ Article 163(2) of the Swiss Civil Procedure Code. Cf. in this regard the relevant comments in para. II.B.3.

⁸⁸ Article 306(1) of the Swiss Criminal Code reads as follows: “Any person who is a party to civil proceedings and, following an express caution by the judge that he must tell the truth and notification of the penalties for failure to do so, gives false evidence in relation to the case shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.” For the (unofficial) English translation of the Swiss Criminal Code, see <http://www.admin.ch/ch/e/rs/3/311.0.en.pdf> (date of use: 31 January 2013).

⁸⁹ Müller HA ‘Art. 191’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 1171 n. 36, 1172 n. 39; Müller HA ‘Art. 192’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 1176 n. 3, 1183 n. 23; Hafner P ‘Art. 191’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 889 n. 1; BGE 112 Ia 369. See, however, Leuenberger C ‘Parteiberfragung und Beweisaussage im Entwurf für eine Schweizerische Zivilprozessordnung’ in Leupold M *et al* (eds) *Der Weg zum Recht: Festschrift für Alfred Bühler* 2008 61.

⁹⁰ Swiss Federal Council *Botschaft zur Schweizerischen Zivilprozessordnung vom 28. Juni 2006* BBl 2006 7326. See also Müller HA ‘Art. 192’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 1177 n. 5, 1180 n. 17 *et seq.*; Carcagni Roesler R ‘Art. 192’ in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 750 n. 2 *et seq.*

⁹¹ Hasenböhler F ‘Das Beweisrecht’ 2007 *Schweizerische Zeitschrift für Zivilprozess- und Zwangsvollstreckungsrecht* 392; Leuenberger C ‘Parteiberfragung und Beweisaussage im Entwurf für eine Schweizerische Zivilprozessordnung’ in Leupold M *et al* (eds) *Der Weg zum Recht: Festschrift für Alfred Bühler* 2008 59.

The examination of litigants is conducted and recorded in the same way as that of non-party witnesses.⁹² Reference can thus be made to the foregoing comments.⁹³

D. Documentary Evidence

Compellable litigants and third parties have a duty to produce documents, unless they can claim a privilege.⁹⁴ Pursuant to Articles 221(1)(e) and 222(2) of the Swiss Civil Procedure Code, the evidence offered for the allegations of fact has to be indicated in the statement of claim and the statement of defence, respectively. This particularly holds true where a litigant requires documents that are in the possession or under the control of the opponent or a third party. As has been explained earlier,⁹⁵ Swiss law forbids so-called “fishing expeditions”.⁹⁶ Consequently, a litigant has to specify the documents he requires from the opponent, or a third party by, at least, indicating the type and content of the documents. The opponent or third party must easily be able to determine what document is requested.⁹⁷

Once the litigants have concluded their pleadings, the court issues an order for the taking of evidence⁹⁸ which indicates the evidence admitted and specifies which party bears the *onus* of proof for which facts.⁹⁹ Where such order includes documents, which are not in the possession or under the control of the party requesting them, but in that of the opponent, the order directs the latter to submit the relevant documents to the court, which keeps them in its court files. Where documents are to be obtained from a third party, the judge issues a separate order wherein he instructs the particular third party to supply the court with the relevant docu-

⁹² Müller HA ‘Art. 191’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 1165 n. 17. With regard to the record, see also Article 193 of the Swiss Civil Procedure Code.

⁹³ See para. II.B.4.

⁹⁴ Article 160(1)(b) of the Swiss Civil Procedure Code.

⁹⁵ See Chapter 4 para. II.B.3.a) *in fine*.

⁹⁶ In German, so-called “*Ausforschungsbeweis*”.

⁹⁷ Leuenberger C ‘Art. 221’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen* 2010 1269 n. 53; Schmid EF ‘Art. 160’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 772 n. 23 *et seq.*; decision of the Swiss Federal Court 1P.32/2005 of 11.7.2005 consideration 3.2; ZR 108 (2009) no. 3 consideration 1.4.c; ZR 95 (1996) no. 62 192; ZR 60 (1961) no. 72; ZR 50 (1951) no. 216; 1998 *Basler Juristische Mitteilungen* 158 *et seqq.*

⁹⁸ In German, the so-called “*Beweisverfügung*”.

⁹⁹ Article 154 of the Swiss Civil Procedure Code. For the (unofficial) translation of the said provision, *cf.* Berti SV (ed) *ZPO, CPC, CCP* 2009 563.

ments.¹⁰⁰ It goes without saying that the litigants have a right of access to the court files, and to make copies of the documents.¹⁰¹

E. Evidence by Inspection

According to Article 181(1) of the Swiss Civil Procedure Code, the court can carry out an inspection to gain a personal impression, or a better understanding of the facts.¹⁰² By means of an inspection, the court is able to examine a location, or movable or immovable property at first hand. The object of inspection must be brought to the court where this is possible without causing the object detriment.¹⁰³

A party, who proffered movable property as evidence located outside the state where the civil proceedings are pending, should try to have it brought to the trial judge to be inspected. Where it is not possible to bring the evidence to the trial court, or where the inspection refers to a location or to immovable property, the inspection has to take place abroad. In this case, one has to bear in mind that it is usually not the trial court which gains a personal impression, but the competent foreign authority or the commissioner¹⁰⁴ executing the relevant request for judicial assistance that inspects the particular evidence. Having said this, it is doubtful whether the taking of foreign evidence by inspection makes sense, unless a member of the trial court participates in the inspection.¹⁰⁵

Litigants and third parties have a duty to allow the inspection of their property or person, unless they have a right to refuse to cooperate.¹⁰⁶ The litigants and their counsel have a right to be present at the inspection.¹⁰⁷ Where the participation of non-party witnesses or experts is necessary at the inspection, the court may summon them. As in the case of an ordinary examination

¹⁰⁰ Infanger D ‘Art. 63’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 747 n. 5.

¹⁰¹ Article 53(2) of the Swiss Civil Procedure Code.

¹⁰² For the (unofficial) English translation of Article 181(1) of the Swiss Civil Procedure Code, see Berti SV (ed) *ZPO, CPC, CCP* 2009 569.

¹⁰³ Article 181(3) of the Swiss Civil Procedure Code. With regard to the relevant (unofficial) English translation, see Berti SV (ed) *ZPO, CPC, CCP* 2009 569.

¹⁰⁴ Or the diplomatic officer or consular agent.

¹⁰⁵ It goes without saying that such participation is only possible based on a relevant international agreement or, in absence of the latter, if it is allowed by the law of the requested state.

¹⁰⁶ Article 160(1)(c) of the Swiss Civil Procedure Code. See in this regard also Dolge A ‘Art. 181’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 838 n. 8. With regard to the compellability and privileges of witnesses, cf. paras. II.B.2, II.B.3, II.C.1, and II.C.2 above.

¹⁰⁷ Article 155(3) of the Swiss Civil Procedure Code. See also Dolge A ‘Art. 181’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 838 n. 9 *et seq.*; Müller HA ‘Art. 181’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 1091 n. 13; Weibel H and Nägeli S ‘Art. 181’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1081 n. 13 *et seq.*

in a courtroom, the judge may interrogate litigants, non-party witnesses, or experts during the inspection. The same holds true for a litigant, who may, generally *via* the court, put questions to the opposing party, non-party witnesses, and experts.¹⁰⁸ The court makes a record of the inspection which may be supplemented with plans, drawings, photographs, and other technical means.¹⁰⁹

F. Expert Evidence

With regard to civil proceedings pending outside Switzerland, the Swiss rules on expert evidence only apply where the trial court requests a Swiss court to obtain an expert opinion in Switzerland. In this context, it is recalled that, where an expert opinion is necessary with regard to foreign evidence in civil proceedings pending before a civil-law court, the latter generally prefers to appoint a domestic expert.¹¹⁰ In practice, the situation referred to at the outset of this paragraph thus rarely occurs.

1. Appointment and Instruction of Experts

As indicated earlier,¹¹¹ under Swiss law, experts in the sense of Articles 183-188 of the Swiss Civil Procedure Code are appointed by the court, and not by the parties.¹¹² Consequently, experts are considered as neutral aides of the court who perform a judicial act.¹¹³ The grounds for incapacity to act as a judge thus also apply to experts.¹¹⁴ By contrast, individuals selected as

¹⁰⁸ Weibel H and Nägeli S ‘Art. 181’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1081 n. 13 *et seq.*, 1082 n. 16 *et seq.* See also para. II.B.4.

¹⁰⁹ Article 182 of the Swiss Civil Procedure Code. For the (unofficial) English translation of the said provision, *cf.* Berti SV (ed) *ZPO, CPC, CCP* 2009 569. See also Weibel H and Nägeli S ‘Art. 182’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1084 n. 6 *et seq.*

¹¹⁰ *Cf.* Chapter 4 para. V.G.2.

¹¹¹ See Chapter 4 para. V.G.2.

¹¹² The expert fees have thus to be paid by the party who ultimately loses the lawsuit.

¹¹³ Experts are therefore, based on Article 184(2) of the Swiss Civil Procedure Code, subject to the official secrecy obligations under Article 320 of the Swiss Criminal Code.

¹¹⁴ Article 183(2) of the Swiss Civil Procedure Code. The grounds for incapacity to act as a judge are listed in Article 47 of the Swiss Civil Procedure Code. By virtue of this provision, a person may not be appointed as an expert if he has, amongst other things, a personal interest in the case, is married to a party or a party’s counsel, or might lack impartiality due to friendship or enmity with a litigant or a litigant’s lawyer. For the (unofficial) translation of Articles 183 and 47, see Berti SV (ed) *ZPO, CPC, CCP* 2009 569. See also Dolge A ‘Art. 183’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 849 n. 28; Müller HA ‘Art. 184’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 1104 n. 3; BGE 118 Ia 144 consideration I.c. For more on the impartiality of experts, see, amongst others, Bühler A ‘Die Stellung von Experten in der Gerichtsverfassung – insbesondere im Spannungsfeld zwischen Gericht und Anwaltschaft’ 2009 *Schweizerische Juristenzeitung* 329-334; Cavelti UJ ‘Die Expertise im Bauprozess’ in Koller A (ed) *Bau- und Bauprozessrecht: Ausgewählte Fragen* 1996 303 *et seq.*

“experts” by litigants¹¹⁵ do not constitute experts in the sense of the aforesaid provisions, but are regarded as mere non-party witnesses falling under Articles 169-176 of the Swiss Civil Procedure Code. As a result, Swiss courts treat opinions drafted by party-selected experts in the same way as an allegation of a party.¹¹⁶

Before appointing an expert, the court must hear the parties.¹¹⁷ The judge may invite the litigants to make proposals as to whom it shall appoint as expert. However, the court is not bound by any such suggestion.¹¹⁸

By virtue of Article 185(1) of the Swiss Civil Procedure Code, the court instructs the expert, and puts the relevant questions in writing, or orally at a hearing.¹¹⁹ The court gives the parties the opportunity to comment on the questions and to suggest changes or additions.¹²⁰ The instructions to the expert not only include the questions to be answered by the expert, but also other directions, for instance regarding the rights and duties of the expert,¹²¹ the investigations to be conducted by the expert,¹²² or the form of the opinion.¹²³

¹¹⁵ In German, so-called “*Parteigutachter*”.

¹¹⁶ Müller HA ‘Art. 183’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 1103 n. 23; Dolge A ‘Art. 183’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 845 n. 17; Weibel TH ‘Art. 183’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1089 n. 15; Perroulaz K ‘Art. 183’ in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 714 n. 4; Bühler A ‘Gerichts- und Privatgutachten im Immaterialgüterrechtsprozess’ 2007 *SIC! - Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht* 610 *et seq.*; ZR 105 (2006) no. 77; BGE 132 III 87 consideration 3.4.

¹¹⁷ Article 183(1) *in fine* of the Swiss Civil Procedure Code.

¹¹⁸ Müller HA ‘Art. 183’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 1100 n. 15; Dolge A ‘Art. 183’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 849 n. 29; Perroulaz K ‘Art. 183’ in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 716 n. 14; Bühler A ‘Gerichtsgutachter und –gutachten im Zivilprozess’ in Heer M and Schöbi C (eds) *Gericht und Expertise – La justice et l’expertise* 2005 44 *et seq.*, 46.

¹¹⁹ For the (unofficial) English translation of Article 185, see Berti SV (ed) *ZPO, CPC, CCP* 2009 570. It is submitted that where expert evidence is to be obtained for the benefit of civil proceedings outside Switzerland, the request for judicial assistance should, *inter alia*, be accompanied by the questions to be put to the expert.

¹²⁰ Article 185(2) of the Swiss Civil Procedure Code. *Cf.* Berti SV (ed) *ZPO, CPC, CCP* 2009 570 for the (unofficial) English translation of the said provision. It is submitted that this rule does not apply where expert evidence is obtained for the benefit of a court located outside Switzerland, provided the questions were submitted together with the request for international judicial assistance.

¹²¹ Article 184(1) of the Swiss Civil Procedure Code.

¹²² Article 186 of the Swiss Civil Procedure Code.

¹²³ Article 187 of the Swiss Civil Procedure Code.

2. Preparation and Form of the Expert Opinion

The expert is bound by the truth,¹²⁴ and is liable under Article 307(1) of the Swiss Criminal Code when providing a false opinion.¹²⁵ In relation to the litigants, the expert has a strict obligation of neutrality.¹²⁶

With the court's consent, the expert can make his own investigations.¹²⁷ In the course of such investigations, as well as throughout the preparation of his opinion, the expert has to ensure the litigants' right to be heard, and the principle of the equality of the parties.¹²⁸ The expert is not allowed to apply any coercive measures against litigants or third parties, who refuse to collaborate, but may apply to the court for appropriate assistance. The court may take the evidence pursuant to the rules governing the evidentiary proceedings (Articles 169-182 and 190-193 of the Swiss Civil Procedure Code) or may, with regard to a recalcitrant third party, apply the measures stipulated in Article 167(1) of the Swiss Civil Procedure Code. In relation to a litigant, the judge may take into account an unjustified refusal when weighing the evidence.¹²⁹

The court can order that the opinion be given orally, or in writing.¹³⁰ Once the court has received the expert opinion, it gives the litigants the opportunity to request elucidation of the

¹²⁴ Article 184(1) of the Swiss Civil Procedure Code. With regard to the (unofficial) English translation of the said provision, see Berti SV (ed) *ZPO, CPC, CCP* 2009 569.

¹²⁵ Article 184(2) of the Swiss Civil Procedure Code.

¹²⁶ Müller HA 'Art. 184' in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 1106 n. 9; Bühler A 'Gerichtsgutachter und -gutachen im Zivilprozess' in Heer M and Schöbi C (eds) *Gericht und Expertise – La justice et l'expertise* 2005 35. See also Article 183(2) read in conjunction with Article 47 of the Swiss Civil Procedure Code.

¹²⁷ Article 186(1) of the Swiss Civil Procedure Code. For the (unofficial) English translation of Article 186(1), cf. Berti SV (ed) *ZPO, CPC, CCP* 2009 570. Such investigations may, for instance, include the inspection of a location or the obtaining of documents.

¹²⁸ Dolge A 'Art. 184' in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 855 n. 7.

¹²⁹ Müller HA 'Art. 186' in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 1120 n. 14; Dolge A 'Art. 186' in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 864 n. 5.

¹³⁰ Article 187(1) of the Swiss Civil Procedure Code. For the (unofficial) English translation of the said provision, cf. Berti SV (ed) *ZPO, CPC, CCP* 2009 570. With regard to the conduct of an oral examination of an expert, see para. II.B.4 above. Where expert evidence is obtained for civil proceedings pending outside Switzerland, the opinion should be given in writing.

opinion, or to put additional questions to the expert.¹³¹

G. Written Information

According to Article 190 of the Swiss Civil Procedure Code, the court can request an authority or private individual to provide written information. In the latter case, however, such a request can only be made where examination as a witness under Article 169-176 of the said Code seems unnecessary.¹³² By contrast, litigants cannot provide written information.¹³³ Whether authorities and private individuals have a duty to cooperate is controversial.¹³⁴

Written information under Article 190 of the Swiss Civil Procedure Code must be requested by the court. Accordingly, a written statement of an authority or a private individual, which is submitted without the court's request, does not fall under the said provision.¹³⁵

As a matter of practice, courts request written information mainly from authorities¹³⁶ as it can be expected that the latter provide true information. In addition, such information is generally limited to details recorded in official files.¹³⁷ By contrast, courts are normally reluctant to obtain written information from private individuals, unless the information is confined to simple and clear events, which are undisputed.¹³⁸ In any event, a court should not request written information, because a private individual prefers to make a statement in writing, or is not able to

¹³¹ Article 187(4) of the Swiss Civil Procedure Code. For the relevant (unofficial) English translation, see Berti SV (ed) *ZPO, CPC, CCP* 2009 570. It is submitted that this rule does not apply where the expert opinion is obtained for the benefit of a court located abroad. Here, after receiving the said opinion, the Swiss court should transmit it without delay to the trial court. It is the latter that should decide whether and, if so, to what extent the litigants be given the opportunity to request clarification or amendment of the expert opinion.

¹³² With regard to the (unofficial) English translation of Article 190, see Berti SV (ed) *ZPO, CPC, CCP* 2009 571.

¹³³ Müller HA 'Art. 190' in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 1157 n. 26.

¹³⁴ See, for instance, Müller HA 'Art. 190' in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 1155 n. 19 who advocates a duty to cooperate. However, Perroulaz K 'Art. 190' in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 745 n. 4 and Weibel H and Nägeli S 'Art. 190' in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1120 n. 5 reject such a duty.

¹³⁵ Müller HA 'Art. 190' in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung* 1152 n. 8, 1157 n. 27 *et seq.*; Perroulaz K 'Art. 190' in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 744 n. 2; Hafner P 'Art. 190' in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 886 n. 1; Weibel H and Nägeli S 'Art. 190' in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1121 n. 7.

¹³⁶ Weibel H and Nägeli S 'Art. 190' in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1121 n. 9.

¹³⁷ Müller HA 'Art. 190' in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 1153 n. 10.

¹³⁸ *E.g.* details of a bank account provided by the bank.

attend court due to time constraints.¹³⁹ The same applies where the private individual is domiciled abroad, and has to be examined through channels of judicial assistance.¹⁴⁰ Moreover, written information of a private individual is not feasible where the particular subject of the hearing of evidence plays an important role, or is complex, or where it is not clear whether that person is biased.¹⁴¹

III. South Africa

In civil proceedings pending before the High Court of South Africa, a party may tender evidence in three different ways: by the testimony of a witness, the presentation of documentary evidence, and the presentation of real evidence. The testimony of a witness covers litigants, as well as third parties, including experts. When called as witnesses, litigants, third parties and experts are thus generally subject to the same rules. Different rules, however, apply with regard to documentary evidence. Only litigants, but not third parties, are subject to discovery proceedings.¹⁴²

The foregoing remarks also apply to civil proceedings before the High Court of Botswana, of Namibia, and of Nigeria, and the High Court of the Federal Capital Territory, Abuja, respectively.

A. Testimony of Witnesses

1. Competence and Compellability of Witnesses

By virtue of Section 8 of the Civil Proceedings Evidence Act,¹⁴³ every person is presumed to be competent and compellable to give evidence in any civil proceedings, unless the Act or any other law provides otherwise.¹⁴⁴ Based on Section 9 of the said Act, a mentally disordered or

¹³⁹ Müller HA ‘Art. 190’ in Brunner A, Gasser D, and Schwander I (eds) *Schweizerische Zivilprozessordnung (ZPO) Kommentar* 2011 1153 n. 10 *et seq.*; Perroulaz K ‘Art. 190’ in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 746 n. 9 *et seq.*; Hafner P ‘Art. 190’ in Spühler K, Tenchio L, and Infanger D (eds) *Basler Kommentar Schweizerische Zivilprozessordnung* 2010 886 n. 4.

¹⁴⁰ Weibel H and Nägeli S ‘Art. 190’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1120 n. 2.

¹⁴¹ Weibel H and Nägeli S ‘Art. 190’ in Sutter-Somm T, Hasenböhler F, and Leuenberger C (eds) *Kommentar zur Schweizerischen Zivilprozessordnung* 2010 1122 n. 10; Perroulaz K ‘Art. 190’ in Baker & McKenzie (ed) *Schweizerische Zivilprozessordnung (ZPO)* 2010 746 n. 8. See also ZR 102 (2003) no. 14.

¹⁴² For more on discovery in South Africa, see para. III.B below.

¹⁴³ No. 25 of 1965.

¹⁴⁴ See in this regard also Section 42 of the Civil Proceedings Evidence Act. This provision stipulates that the law relating to the competency and compellability of witnesses, which was in force in respect of civil proceedings on 13 May 1961, shall apply in any case not provided for by the Act, or any other law. For the distinction between the competence, compellability, and privileges of witnesses, see para. II.B.2 above.

intoxicated individual is incapable of being a witness, if deprived of the proper use of reason. In other words, a person, who appears mentally disordered, but whose mental condition still allows him to convey his observations in an understandable way to the court, is a competent witness.¹⁴⁵

The Civil Proceedings Evidence Act does not contain a rule on the competence of children to give evidence in court. It is, however, recognised that a child may testify if he appreciates the duty of speaking the truth, has sufficient intelligence, and can communicate effectively.¹⁴⁶ Accordingly, there is no specific age limit in relation to a child's competence to give evidence.¹⁴⁷

The spouse of a litigant in civil proceedings is a competent and compellable witness for and against the party concerned.¹⁴⁸

Judges and magistrates are not competent to give evidence on matters related to their judicial function.¹⁴⁹

A litigant, who desires the attendance of a witness to give evidence at the trial, may have issued *subpoenas* by the office of the Registrar for that purpose.¹⁵⁰ The *subpoena* provides, amongst other things, that a non-cooperative witness may render himself liable to a fine, or to imprisonment.¹⁵¹ Where the *subpoena* was duly served upon the witness, and the relevant witness expenses were offered, but the witness fails without reasonable excuse to attend court, the court may issue a warrant for his arrest.¹⁵² The same applies where the witness appears before the court, but refuses to be sworn in or to make an affirmation, to answer any questions put to him, or to produce a document without any just excuse.¹⁵³

¹⁴⁵ *S v Zanzile* 1992 (1) SACR 444 (C) at 446. For the test to be applied by the court as to whether a person with a mental disorder is a competent witness or not, see *S v Zanzile* 1992 (1) SACR 444 (C) at 446G, 446I-447A; *S v Malcolm* 1999 (1) SACR 49 (SE) at 53A with reference to *S v Thurston en n'Ander* 1968 (3) SA 284 (D & CLD).

¹⁴⁶ Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 423.

¹⁴⁷ Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 812; Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 423.

¹⁴⁸ Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 427.

¹⁴⁹ Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 815; Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 425. With regard to the competence and compellability of deaf and mute persons, heads of state, and diplomats, see, amongst others, Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 425, 429 *et seq.*

¹⁵⁰ Section 30(1) of the Supreme Court Act read in conjunction with Rule 38(1)(a) of the High Court Rules. A *subpoena* is a notice to a witness telling him that he is required to attend court to give evidence, Petè S *et al Civil Procedure: A Practical Guide* 2008 264.

¹⁵¹ See Form 16 of the First Schedule to the High Court Rules.

¹⁵² Section 30(2) of the Supreme Court Act.

¹⁵³ Section 31(1) of the Supreme Court Act.

2. Privileges of Witnesses

A compellable witness may decline to answer questions which tend to expose him to a criminal charge, a penalty, or forfeiture.¹⁵⁴ No privilege, however, applies to answers that may establish that the witness owes a debt, or is otherwise subject to a civil suit.¹⁵⁵

The communication between a legal adviser and his client is privileged,¹⁵⁶ provided the following requirements are cumulatively fulfilled: the legal adviser was acting in his professional capacity¹⁵⁷ and was consulted in confidence,¹⁵⁸ the communication was made for the purpose of obtaining legal advice,¹⁵⁹ and the advice does not facilitate the commission of a crime or fraud.¹⁶⁰ The professional legal privilege also extends to in-house counsel, provided the communications could be equated to the confidential advice of an independent legal adviser.¹⁶¹ In

¹⁵⁴ That is, a loss of property as a result of an offence or a breach of an undertaking. For the notion of “forfeiture”, see, for instance, Quansah EK *The Botswana Law of Evidence* 2008 72 fn. 399.

¹⁵⁵ Section 14 of the Civil Proceedings Evidence Act. See also *R v Camane* 1925 AD 570 at 575; Zeffert DT and Paizes AP *Essential Evidence* 2010 188. With regard to the fact that the privilege against self-incrimination can only be invoked in relation to specific questions, see *R v Kuyper* 1915 TPD 308 at 316; *Waddell v Eyles NO and Welsh NO* 1939 TPD 198 at 204.

¹⁵⁶ So-called “legal advice privilege”.

¹⁵⁷ See, amongst others, *R v Fouche* 1953 (1) SA 440 (W) at 445D-447E; *S v Kearney* 1964 (2) SA 495 (A) at 499E; *Lane and Another NNO v Magistrate, Wynberg* 1997 (2) SA 869 (C) at 879G; *Mohamed v President of the Republic of South Africa and Others* 2001 (2) SA 1145 (C) at 1153B-G; *Smit v Maritz Attorneys v Lourens NO* 2001 (1) SACR 152 (W) at 160G.

¹⁵⁸ Cf., amongst others, *Giovagnoli v Di Meo* 1960 (3) SA 393 (D) at 399A; *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing and Others* 1979 (1) SA 637 (C) at 648E-G; *Kelly v Pickering and Another* (1) 1980 (2) SA 753 (R) at 757; *Bank of Lisbon and South Africa Ltd v Tandrien Beleggings (Pty) Ltd and Others* (2) 1983 (2) SA 626 (W) at 629G. See also Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 659; Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 148.

¹⁵⁹ *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1962 (2) SA 408 (C) at 409 *et seq.*; *S v Kearney* 1964 (2) SA 495 (A) at 499 *et seq.*; *Danzfuss v Additional Magistrate, Bloemfontein and Another* 1981 (1) SA 115 (O) at 120A-212E; *Lane and Another NNO v Magistrate, Wynberg* 1997 (2) SA 869 (C) at 882A-I, 885B-D. See also Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 660 *et seq.*

¹⁶⁰ *Schlosberg v Attorney-General of the Transvaal and the Additional Magistrate, Johannesburg, In re R v Sanding and Others* 1936 WLD 59 at 65; *Botes v Daly and Another* 1976 (2) SA 215 (N) at 222; *Harksen v Attorney-General of the Province of the Cape of Good Hope and Others* 1998 (2) SACR 681 (C) at 691H-I; *Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 590 (W) at 593.

¹⁶¹ *Mohamed v President of the Republic of South Africa and Others* 2001 (2) 1145 (C) at 1156J. At 1154F-H of this decision, Hoffman AJ stated the following: “To limit the scope of legal professional privilege to clients and lawyers in private practice is not justified in law. This would considerably dislocate the established practice and would force (...) private corporations with in-house legal advisers to reorganise (...) their modus operandi so that all advice required is received from independent legal advisers rather than engaging salaried staff to give legal advice. There is no warrant for doing this, provided that ‘in-house’ legal advisers remain mindful of Lord Denning’s exhortation to be scrupulously aware of the distinction between communications made in their capacity as legal adviser and other communications which would not be of a privileged nature.” See in this regard also *Van den Heever v Die Meester en Andere* 1997 (3) SA 93 (T) at 102B-F with reference to *Alfred Crompton Amusement Machines Ltd v Commissioner of Customs and Excise* (2) [1972] 2 All ER 353 (CA); *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SE) at 446D; Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 147 *et seq.*; Olivier L ‘Privilege and tax practitioners’ 2008 *South African Law Journal* 506 *et seq.*; Landman A ‘Stretching professional legal privilege beyond breaking point’

addition, the privilege applies to interpreters, articled clerks, secretaries, and other employees in a law firm.¹⁶²

Not only communications between a legal adviser and his client are privileged, but also those between a counsel or his client and an agent or third party.¹⁶³ In this context, however, a privilege can only be claimed, if the communications have been made for the purpose of submitting to the counsel in order to enable him to advise¹⁶⁴ and after litigation was contemplated.¹⁶⁵ Compared to the aforesaid legal advice privilege, the litigation privilege is limited. While the former applies irrespective of whether litigation is envisaged or not, the latter privilege only extends to communications that were made with regard to a possible litigation.¹⁶⁶

In *Israelsohn v Power NO and Ruskin NO (1)*,¹⁶⁷ it was held that the privilege being for the protection of the client in his subjective freedom of consultation, it would plainly be defeated if the disclosure of the confidences, though not compellable from the legal adviser, were still obtainable from the client. As a consequence, the client's own testimony is equally privileged. In other words, the witness cannot, as a general principle, be asked what communications, if any, he made to his attorney for the purpose of obtaining the attorney's or counsel's opinion.

2001 *South African Law Journal* 20 *et seq.*; Zeffert D 'Confidentiality and the courts' 1974 *South African Law Journal* 448 *et seq.*

¹⁶² *S v Mushimba en Andere* 1977 (2) SA 829 (A) at 388D-F.

¹⁶³ So-called "litigation privilege". The third party may, for instance, be a detective, as in *International Tobacco Co (SA) v United Tobacco Cos (South) Ltd* (3) 1953 (4) SA 251 (W) at 255G-256H. See also *R v Steyn* 1954 (1) SA 324 (A) at 334D; *Vengtas v Nydoo and Others* 1963 (2) SA 504 (D) at 504G-H; Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 678 *et seq.*; Unterhalter D 'Professional Privilege and the Proof of Innocence' 1998 *South African Law Journal* 295 *et seq.*

¹⁶⁴ *Cf. A Sweidan and King (Pty) Ltd and Others v Zim Israel Navigation Co Ltd* 1986 (1) SA 515 at 518A, 519A. See also Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 803 *et seq.*; Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 680.

¹⁶⁵ *General Accident, Fire and Life Assurance Corporation Ltd v Goldberg* 1912 TPD 494 at 504; *United Tobacco Companies (South) Ltd v International Tobacco Co (SA) Ltd* 1953 (1) SA 66 (I) at 70; *Potter v South British Insurance Co Ltd* 1963 (3) SA 5 (W) at 6A-F, 7A-C; *Boyce v Ocean Accident & Guarantee Corporation Ltd* 1966 (1) SA 544 (SR) at 546D-547C; *Dingana v Bay Passenger Transport* 1971 (1) SA 540 (E) at 542F-G; *Bagwandeem v City of Pietermaritzburg* 1977 (3) SA 727 (N) at 733C; *S v B* 1980 (2) SA 946 (A) at 952G-H. See also Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 802 *et seq.*; Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 680 *et seq.*; Landman A 'Stretching professional legal privilege beyond breaking point' 2001 *South African Law Journal* 23 *et seq.*

¹⁶⁶ Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 668; Zeffert DT and Paizes AP *Essential Evidence* 2010 207 *et seq.*; Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 148 *et seq.* For the question of whether or not a document in the possession of a third party is privileged, *cf.* Zeffert D 'A privileged document in the possession of a third party' 1989 *South African Law Journal* 262 *et seq.*

¹⁶⁷ 1953 (2) SA 499 (W) at 501B-C.

Professionals other than legal advisers do not enjoy a professional privilege.¹⁶⁸ This holds particularly true for doctors,¹⁶⁹ clergymen,¹⁷⁰ journalists,¹⁷¹ insurers,¹⁷² or accountants.¹⁷³ One has, however, to keep in mind that by virtue of Section 14(d) of the Constitution of the Republic of South Africa, 1996, everyone has the right to privacy which includes, amongst others, the right not to have the privacy of their communications infringed. It may thus be arguable that the communications of professional relationships other than the lawyer-client relationship may be protected by the Constitution.¹⁷⁴ In recent years, several South African court decisions dealt with the question of whether and, if so, under what circumstances communications involving professionals other than legal advisers should be protected. This holds particularly true for communications of clergymen. Both in *S v Makhaye*¹⁷⁵ and in *O v O*,¹⁷⁶ the courts hinted that a privilege of spiritual advisers may exist.¹⁷⁷ Future case law will show whether and, if so, to

¹⁶⁸ Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 668; Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 152 *et seq.*; Olivier L 'Privilege and tax practitioners' 2008 *South African Law Journal* 513; Zeffert D 'Confidentiality and the courts' 1974 *South African Law Journal* 434 *et seq.*

¹⁶⁹ *Botha v Botha* 1972 (2) SA 559 (N) at 559G-560E; *Davis v Additional Magistrate, Johannesburg* 1989 (4) SA 299 (W) at 303E-H. See in this regard also Zeffert D 'Confidentiality and the courts' 1974 *South African Law Journal* 434 *et seqq.*

¹⁷⁰ *Smit v Van Niekerk NO* 1976 (4) SA 293 (A) at 302A-303G. *Cf.* also *S v Bierman* 2002 (5) SA 243 (CC) at 244H-245A. See furthermore Zeffert D 'Confidentiality and the courts' 1974 *South African Law Journal* 444 *et seqq.*

¹⁷¹ *S v Cornelissen; Cornelissen v Zeehe NO* 1994 (2) SACR 41 (W) at 51E-F with reference to *S v Pogrund* 1961 (3) SA 868 (T) at 871A, *F Matisonn v Additional Magistrate, Cape Town, and Another* 1980 (2) SA 619 (K) at 631H, and *R v Parker* 1965 (4) SA 47 (SRA) at 51 *et seq.* In *S v Cornelissen; Cornelissen v Zeehe NO*, the court held that journalists cannot claim a professional privilege, but that, in the circumstances of the case, the journalist had a just excuse for not testifying. See also *Bosasa Operation (Pty) Ltd v Basson and Another* (09/29700) [2012] ZAGPJHC 71 (26 April 2012), an unreported decision of the South Gauteng High Court, Johannesburg, where it was held in a defamation case that a newspaper publisher does not have to disclose its journalistic sources. The decision does not recognise a blanket privilege of journalists to safeguard their sources, but acknowledges that the protection of journalistic sources is the basic condition for the freedom of press guaranteed in Section 16(1)(a) of the Constitution. On page 15 of the decision, the court stated the following: "It is apparent that journalists, subject to certain limitations, are not expected to reveal the identity of their sources. If indeed freedom of the press is fundamental and sine qua non of democracy, it is essential that in carrying out this public duty for the public good, the identity of their sources should not be revealed, particularly, when the information so revealed, would not be publicly known. This essential and critical role of the media, which is more pronounced in our nascent democracy, founded on openness, where corruption has become cancerous, needs to be fostered rather than denuded." For the text of the decision, *cf.* <http://www.saflii.org/za/cases/ZAGPJHC/2012/71.pdf> (date of use: 31 January 2013). See furthermore *Munusamy v Hefer NO* 2004 (5) SA 112 (O) at 122H-123D; Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 670; Zeffert D 'Confidentiality and the courts' 1974 *South African Law Journal* 446 *et seqq.*; Nel S 'Journalistic privilege: does it merit legal protection?' *Comparative and International Law Journal of Southern Africa* 99 *et seqq.*

¹⁷² *Howe v Mabuja* 1961 (2) SA 635 (N) at 636A-B.

¹⁷³ Olivier L 'Privilege and tax practitioners' 2008 *South African Law Journal* 507 *et seq.* *Cf.* also *Chantrey Martin v Martin* [1953] 2 QB 286 at 294.

¹⁷⁴ Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 670; Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 153.

¹⁷⁵ 2007 (1) SACR 369 (N) at 373 *et seq.*

¹⁷⁶ 1995 (4) S 482 (W) at 489.

¹⁷⁷ See also Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 66.

what extent the professional privilege will be extended to professionals other than legal advisers.

In terms of Section 10 of the Civil Proceedings Evidence Act, no spouse can be compelled to disclose any communication made to him by the other spouse during the marriage.¹⁷⁸ Based on the wording of the provision, it appears that only the spouse to whom the communication was made, but not the spouse who made the communication, may invoke the privilege.¹⁷⁹ The marital privilege continues after divorce for communications made during the marriage.¹⁸⁰

Section 12 of the Civil Proceedings Evidence Act stipulates that a person may refuse to give evidence in cases where his spouse would be able to invoke a privilege. Consequently, a witness may, for instance, decline to answer questions, which would incriminate the spouse, or refer to marital communications made to the spouse. By contrast, a third party, who intercepts the communication between the spouses cannot refuse to reveal it.¹⁸¹

Section 13 of the Civil Proceedings Evidence Act excludes the disclosure of evidence on the grounds of public policy or public interest, which includes, *inter alia*, national security, state secrets, or matters of great international diplomatic importance.¹⁸² Under this provision, a witness is not compellable to testify, unless the evidence relates to a communication alleging the commission of an offence, and the making of that communication *prima facie* constitutes an offence.¹⁸³

Finally, correspondence made “without prejudice” is privileged. This includes correspondence that was made explicitly or impliedly “without prejudice” in the course of *bona fide* efforts of both parties to an action to settle their dispute. A statement of a party is not privileged, because it contains the phrase “without prejudice”. The decisive aspect is whether the statement was

¹⁷⁸ According to Section 10A of the Civil Proceedings Evidence Act, any customary law marriage or customary law union, and any marriage concluded under any system of religious law, is regarded as a valid marriage for the purposes of the law of evidence.

¹⁷⁹ This view is shared by Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 706.

¹⁸⁰ Cf. Section 10(2) of the Civil Proceedings Evidence Act. See also Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 807; Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 707; Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 154.

¹⁸¹ Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 154.

¹⁸² This privilege is called “state privilege” or “public interest immunity”. See, for instance, *S v Baleka (4)* 1988 (4) SA 688 (T) at 702 *et seq.* where it was held that the disclosure of discussions and deliberations between a president, judicial officers, and assessors is against public policy. See also *Minister van Justisie v Alexander* 1975 (4) SA 530 (A) at 544 *et seq.*; *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (TPD) at 343E-344D; Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 158.

¹⁸³ See Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 777 *et seqq.*

made in a genuine attempt to negotiate a settlement. In other words, a statement not prefaced with the words “without prejudice” may be privileged, provided it constitutes a *bona fide* attempt to resolve a dispute. Statements which have no connection with the settlement negotiations are not covered by the privilege.¹⁸⁴

3. Examination of Witnesses

As a general rule, litigants and third parties, including experts, give their evidence *viva voce* before the trial court.¹⁸⁵ In addition, the evidence of witnesses may also be taken on commission, by interrogatories, or on affidavit.¹⁸⁶

a) Oral Testimony before the Trial Court

The examination of witnesses at the trial is conducted by the litigants, and not by the judge. The counsel of the litigant, who bears the burden of proof, first calls and examines each of his witnesses.¹⁸⁷ In this so-called “examination-in-chief”, the counsel leads the witness through the latter’s version of events, the method usually being that of question-and-answer.¹⁸⁸ Following his examination-in-chief, the witness may be cross-examined by the counsel for the opposing party. The counsel, who originally questioned the witness, may then re-examine the latter.¹⁸⁹ Once all witnesses called by the counsel of the party bearing the *onus* have been examined, the same procedure applies with regard to the witnesses called by the opponent. Leading questions, that is, questions that suggest an answer or assume disputed facts, are, as a general principle,

¹⁸⁴ *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 at 669 *et seq.* See also *De Beers Consolidated Mines Ltd v Etling* 1906 TS 418 at 678H; *Patlansky v Patlansky* (2) 1917 WLD 10 at 13 *et seq.*; *Brauer v Markow* 1946 TPD 344 at 350; *Hoffend v Elgeti* 1949 (3) SA 91 (A) at 108; *Millward v Glaser* 1950 (3) SA 547 (W) at 554; *Wemyss v Stuart* 1961 (3) SA 889 (D) at 890; *Kapeller v Rondalia Versekeringskorporasie van Suid-Afrika Bpk* 1964 (4) SA 722 (T) at 728; *Gcabashe v Nene* 1975 (3) SA 912 (D) at 914; *Jili v South African Eagle Insurance Co Ltd* 1995 (3) SA 269 (N) at 275B; *Waste-Tech (Pty) Ltd v Van Zyl and Glanville NNO* 2002 (1) SA 841 (E) at 846; *Lynn & Main Inc v Naidoo* 2006 (1) SA 59 (N) at 65A-C. See also Zeffert DT and Paizes AP *Essential Evidence* 2010 213; Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 809; Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 322 *et seq.*

¹⁸⁵ Order 38(2) of the High Court Rules.

¹⁸⁶ Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 830; Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 362.

¹⁸⁷ Order 39(5), (8), and (13) of the High Court Rules.

¹⁸⁸ Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 364.

¹⁸⁹ For more on cross- and re-examination, see, amongst others, Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 921; Zeffert DT and Paizes AP *Essential Evidence* 2010 296 *et seq.*; Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 373 *et seq.* Cf. also Chapter 2 para. IV.B.2.c).

not allowed in examination-in-chief and re-examination, but can be asked in cross-examination.¹⁹⁰

As a general rule, a witness has to testify without using any documents. Under certain circumstances, however, he may refer to a document to refresh his memory.¹⁹¹

The judge may, at any stage of the proceedings, put questions to the witness to clarify ambiguous points. Such interrogation, however, should not be extensive. In *S v Rall*,¹⁹² it was held that the judge should conduct the trial in a manner that his open-mindedness, impartiality, and fairness are manifest to all concerned. The court further stated that the judge should refrain from questioning witnesses in a way or to an extent which conveys partiality. Finally, it was held that the judge should avoid interrogating witnesses in such a manner that may intimidate or disconcert the witness, and thus affect his demeanour, or impair credibility.¹⁹³

Only with the consent of the parties may the court call a witness.¹⁹⁴ The court, however, may, without the litigants' approval, recall a witness for further examination.¹⁹⁵

¹⁹⁰ Petè S *et al* *Civil Procedure: A Practical Guide* 2008 284; Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 892, 895 *et seq.*; Zeffert DT and Paizes AP *Essential Evidence* 2010 287; Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 362, 365. See also *Rex v Ngcobo* 1925 AD 561 at 564; *Carroll v Carroll* [1947] 4 All SA 10 (D) at 13; *S v Aitken and Another* 1988 (4) SA 394 (C) at 397E-I. In *S v Rall* 1982 (1) SA (A) 828 at 831D-E, the reason for this rule was summarised as follows: "Counsel is prohibited from putting leading questions to his own witness because of the risk that the witness may perhaps think that such questions are an invitation, suggestion, or even instruction to him to answer them, not unbiasedly or truthfully, but in a way that favours the party calling him" For the exception to this rule, see, amongst others, Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 895 *et seq.*; Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 364.

¹⁹¹ See, *inter alia*, Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 897 *et seq.*; Zeffert DT and Paizes AP *Essential Evidence* 2010 288 *et seq.*; Van der Merwe SE 'Refreshing the memory of a witness' 1991 *Stellenbosch Law Review* 62 *et seq.*

¹⁹² 1982 (1) SA 828 (A) at 831H-832C.

¹⁹³ See also *S v Wood* 1964 (3) SA 103 (O) at 105G; *Hamman v Moolman* 1968 (4) SA 340 (A) at 344E; *Rondalia Versekeringskorporasie van SA Bpk v Lira* 1971 (2) SA 586 (A) at 589G; *Solomon and Another NNO v De Waal C* 1972 (1) SA 575 (A) at 580H; *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 (A) at 570B-571A; *S v Gerbers* 1997 (2) SACR 601 (SCA) at 607B-C; 608H-I; *S v Mathabathe* 2003 (2) SACR 28 (T) at 30A-32G; *S v Joors* 2004 (1) SACR 494 (C) at 502H-505B; *Take and Save Trading CC v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) at 5B-6F; *S v Msithing* 2006 (1) SACR 266 (N) at 273A-274C; *S v Mseleku and Others* 2006 (2) SACR 237 (NPD) at 241F-244G. Cf. furthermore Zeffert DT and Paizes AP *The South African Law of Evidence* 2009 896; De Vos WL and Van Logerenberg DE 'The Activism of the Judge in South Africa' 1991 *Tydskrif vir die Suid Afrikaanse Reg* 602; Petè S *et al* *Civil Procedure: A Practical Guide* 2008 285; Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 374 *et seq.*

¹⁹⁴ *Rowe v Assistant Magistrate Pretoria* 1925 TPD 361. See also Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 437.

¹⁹⁵ *Pauley v Marine and Trade Insurance Co Ltd* 1963 (3) SA 657 (W) at 658B-659D; *Mlombo v Fourie* 1964 (3) SA 350 (T) at 357B-C; *Hladhla v President Insurance Co Ltd* 1965 (1) SA 614 (A) at 621D. See also Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 437.

As a general principle, witnesses are to be examined under oath. Individuals, however, who object to taking an oath, can make an affirmation. Witnesses, who are unable to understand the nature or religious obligation of an oath or affirmation, may be allowed to give evidence without being upon oath or affirmation.¹⁹⁶ The testimony of a witness is recorded in a *verbatim* transcript.¹⁹⁷

Communications prior to the trial between counsel and non-party witnesses, including experts, are allowed under South African law. This is a consequence of the principle of party control over the procurement of evidence prevailing in South African law.¹⁹⁸ In practice, such communications are the rule; non-party witnesses may meet counsel to give a statement, or to be prepared for delivering testimony at the trial.¹⁹⁹

b) Evidence on Commission

By virtue of Order 38(3) of the High Court Rules, the court may, where it appears convenient or necessary for the purpose of justice, make an order for taking the evidence of a witness before a commissioner. Since the nature and general principles of a commission *de bene esse* have already been discussed,²⁰⁰ reference can be made to the comments in this regard. In practice, the court may order the examination before a commissioner where, for instance, the witness domiciled in South Africa is unable to appear before court due to illness,²⁰¹ old age,²⁰² or great inconvenience.²⁰³

The examination of the witness before the commissioner appointed by the trial court is conducted in accordance with Rule 38(3)-(8) of the High Court Rules. The evidence is adduced upon oral examination in the presence of the commissioner, the litigants and their counsel, and

¹⁹⁶ Sections 39-41 of the Civil Proceedings Evidence Act.

¹⁹⁷ Rule 39(16)(b) of the High Court Rules.

¹⁹⁸ See in this regard Chapter 2 para. IV.B.2.c).

¹⁹⁹ Petè S *et al Civil Procedure: A Practical Guide* 2008 266.

²⁰⁰ See Chapter 4 para. III.C.2.b).

²⁰¹ Cf., amongst others, *Botha v Van Rooyen* (1909) 30 NLR 13 at 14; *Estate Goosen v Estate Kellerman* 1920 CPD 588 at 589. Cf. also Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 862 *et seq.*

²⁰² *Trollip v Tromp & Van Zweel* (1880) 1 NLR 32 at 32; *Ex parte Preller qq Viljoen* (1883) 1 SAR 54 at 54.

²⁰³ Such inconvenience may, for instance, result from the fact that the absence of the witness from his business might result in serious loss, as in *Bruhns v Frylinck* 1924 CPD 299 at 300. For further examples, see Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 863. Where the evidence of the witness, however, is important, and where it is desirable for the court to observe the witness' demeanour, the inconvenience is not to be taken into account. See in this regard *Westaway v Leibbrandt* (1884) 4 EDC 38 at 39; *Langerman v Milnerton Estates Ltd* 1912 CPD 870 at 871; *Bruhns v Frylinck* 1924 CPD 299 at 300.

the witness is subject to cross- and re-examination.²⁰⁴ The evidence taken on commission is recorded in the same manner as evidence taken before the trial court.²⁰⁵

c) Evidence based on Interrogatories

The evidence of a witness on commission is generally adduced upon *viva voce* examination.²⁰⁶ The court, however, may deviate from this rule, and order that a witness testifies by way of interrogatories.²⁰⁷ The difference between these two methods of taking evidence is that the oral examination relates to general evidence, while in the case of interrogatories, specific questions are put to the witness.²⁰⁸ Both forms, however, have in common that they deviate from the normal procedure for examining witnesses²⁰⁹ by allowing the latter to be questioned in the absence of the trial court.

The litigant who requests the examination by interrogatories provides the court with the list of questions he wants to be put to the witness.²¹⁰ The opposing party may ask the court for permission to have cross-interrogatories be directed to the witness.²¹¹ The court may also add questions of its own.²¹² The commissioner appointed by the court then puts the questions to the witness. The latter gives evidence in the presence of the commissioner alone, that is, in the absence of the parties and their counsel. Consequently, there is no cross-examination or re-examination.²¹³ The commissioner records the answers, and returns the record to the trial court where the interrogatories are read as evidence at the trial.²¹⁴

d) Evidence on Affidavit

By virtue of Rule 38(2) of the High Court Rules, the court may, upon request and for sufficient reason, order that evidence be given on affidavit. An affidavit is a written and sworn statement

²⁰⁴ Rule 38(5) of the High Court Rules. See para. III.A.3.a) above.

²⁰⁵ Rule 38(7) of the High Court Rules. *Cf.* in this regard para. III.A.3.a) above.

²⁰⁶ *Cf.* para. III.A.3.b).

²⁰⁷ Section 32(1) of the Supreme Court Act; Rule 38(5) of the High Court Rules.

²⁰⁸ Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 873; Petè S *et al Civil Procedure: A Practical Guide* 2008 272 *et seq.*; Theophilopoulos C *Fundamental Principles of Civil Procedure* 2006 293.

²⁰⁹ Oral testimony before the trial court. *Cf.* para. III.A.3.a) above.

²¹⁰ Section 32(2) of the Supreme Court Act.

²¹¹ Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 873; Petè S *et al Civil Procedure: A Practical Guide* 2008 272 *et seq.*; Theophilopoulos C *Fundamental Principles of Civil Procedure* 2006 293.

²¹² Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 393.

²¹³ *Nxasana v Minister of Justice* 1976 (3) SA 745 (D) at 751. See also Petè S *et al Civil Procedure: A Practical Guide* 2008 272 *et seq.*

²¹⁴ Section 32(3) and (6) of the Supreme Court Act.

of evidence given by an individual which replaces the *viva voce* evidence.²¹⁵ As witnesses are generally to be examined orally in the presence of the trial court,²¹⁶ judges are usually reluctant to allow evidence to be proved by affidavit. In practice, evidence by affidavit is thus usually limited to the proof of isolated facts,²¹⁷ to evidence of a formal nature,²¹⁸ or to evidence that is unlikely to be contested by the opposing party.²¹⁹ Where it appears to the court that the opposing party reasonably requires the attendance of the particular witness for cross-examination, and the witness can be produced, evidence may not be given on affidavit.²²⁰

e) Expert Witnesses

In civil proceedings before the High Court of South Africa, experts are appointed and paid by the parties.²²¹ This fact, however, does not make the experts mere partisan witnesses. Rather, an expert owes allegiance to the court, and not to the party who called him.²²² In *Schneider NO and Others v AA and Another*,²²³ Davis J summarised the role of experts in civil proceedings as follows:

*“An expert comes to court to give the court the benefit of his (...) expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his (...) expertise is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his (...) expertise, as possible. An expert is not a hired gun who dispenses his (...) expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess.”*²²⁴

²¹⁵ See, amongst others, Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 35. Cf. also *Goodwood Municipality v Rabie* 1954 (2) SA 404 (C) at 406.

²¹⁶ See para. III.A.3.a) above.

²¹⁷ *Hughes v Irvine* (1880) 1 EDC 16 at 17.

²¹⁸ Such evidence may, for instance, include the evidence of a bank official who testifies regarding the exchange rate on a particular day, Petè S *et al Civil Procedure: A Practical Guide* 2008 273 *et seq.*

²¹⁹ *Irvine v Els* (1880) 1 EDC 21 at 22; *Trustees of Francis v Standen* (1883) 3 EDC 149 at 149; *Barnet v Stewart* 1911 OPD 8 at 9. See also Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 875 *et seq.*; Harms LTC *Civil Procedure in the Superior Courts Students' Edition* 2003 249 *et seq.*; Petè S *et al Civil Procedure: A Practical Guide* 2008 273 *et seq.*; Theophilopoulos C *Fundamental Principles of Civil Procedure* 2006 294. Cf. also Section 22 of the Civil Proceedings Evidence Act which provides that the proof of facts requiring any skill in bacteriology, biology, chemistry, physics, astronomy, anatomy, or pathology may be ascertained by affidavit.

²²⁰ Rule 38(2) of the High Court Rules.

²²¹ See also Chapter 3 para. V.G.2.

²²² Meintjes-Van der Walt L 'The Proof of the Pudding: the Presentation and Proof of Expert Evidence in South Africa' 2003 *Journal of African Law* 92. See also Meintjes-Van der Walt L 'Science friction: The nature of expert evidence in general and scientific evidence in particular' 2000 *South African Law Journal* 775, 777 *et seq.*; *Doyle v Sentraoer (Co-operative) Ltd* 1993 (3) SA 176 (SE) at 181A.

²²³ 2010 (5) SA 203 (WCC) 203 at 211H-212B.

²²⁴ See also *S v Huma* (2) 1995 (1) SACR 409 (W) at 410H-I.

Prior to the hearing, a litigant has to notify the opponent of his intention to call an expert, and to provide him with a written summary of the expert's opinion.²²⁵ The *ratio* of this provision is to remove the element of surprise for the opposing party, and to enable experts to exchange their views before the hearing.²²⁶

Experts, as any other witnesses, are subject to cross-examination and re-examination by the litigants' counsel.²²⁷

B. Documentary Evidence

According to Rule 35(1) of the High Court Rules, a party to any action may require any other party to make discovery on oath of all documents relating to any matter in question in such action which are or have been, at any time, in the possession or control of such other party.²²⁸ The time for a litigant to seek discovery is generally after the close of pleadings.²²⁹

A litigant may require only discovery from the opposing party, but not a third party.²³⁰ Where a litigant wishes to obtain documents from a third party, he may have issued a so-called "*subpoena duces tecum*" by the office of the Registrar.²³¹ In other words, the litigant has to call the

²²⁵ Rule 36(9) of the High Court Rules.

²²⁶ *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (AD) at 353G; *Boland Construction Co (Pty) Ltd v Lewin* 1977 (2) SA 506 (C) at 508G-H; *Uni-Erections v Continental Engineering Co Ltd* 1981 (1) SA 240 (W) at 250E-F; *Doyle v Sentraoer (Co-operative) Ltd* 1993 (3) SA 176 (SE) at 180F-181E; *Hall v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 195(C) at 200. Petè S *et al Civil Procedure: A Practical Guide* 2008 268; Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 843 *et seq.*; Harms LTC *Civil Procedure in the Superior Courts, Students' Edition* 2003 242. With regard to medical examinations, *cf.* Rule 36(1)-(5A) and (8) of the High Court Rules.

²²⁷ *Cf.* para. III.A.3.a) above. See also Meintjes-Van der Walt L 'The Proof of the Pudding: the Presentation and Proof of Expert Evidence in South Africa' 2003 *Journal of African Law* 100 *et seq.* *Cf.* also Section 22 of the Civil Proceedings Evidence Act which allows experts to give evidence by way of affidavit.

²²⁸ See also Rule 35(11) of the High Court Rules, which allows the court to order the production of documents relating to any matter in question as the court may think meet. Rule 35(12) of the said Rules stipulates that a party may require the discovery of specific documents referred to in the opponent's pleadings or affidavits.

²²⁹ Rule 35(1) *in fine* of the High Court Rules. See in this regard *STT Sales (Pty) Ltd v Fourie and Others* 2010 (6) SA 272 (GSJ) at 275 *et seq.*, where the following was held: "*The right of a party in a trial to discovery arises in the ordinary course only after the close of pleadings, by which time the legal issues have been identified. (...) The essential feature of discovery is that a person requiring discovery is in general only entitled to discovery once the battle lines are drawn and the legal issues established. It is not a tool designed to put a party in a position to draw the battle lines and establish the legal issues. Rather, it is a tool used to identify factual issues once legal issues are established.*" Mention has furthermore to be made of Rule 37(1) of the High Court Rules, which provides that a litigant has to make discovery, even if he has not been requested to do so by the opponent. *Cf.* in this regard Petè S *et al Civil Procedure: A Practical Guide* 2008 249.

²³⁰ Rule 35(1) of the High Court Rules.

²³¹ Babalola describes the "*subpoena duces tecum*" as a process by which the court, at the instance of a party, commands a witness who has in his possession or control some document that is pertinent to the issues of a pending suit to produce it at trial, Babalola A 'Witnesses' in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 439. By contrast, the so-called "*subpoena ad testificandum*" requires a witness to attend court to give evidence without producing any document.

particular individual who is required to produce the specified document(s) to the court at the trial as a witness.²³²

A party may request only the documents relevant to any matter in question, irrespective of whether or not such matter is one arising between the party requiring discovery and the party requested to make discovery.²³³ In the English case *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Company*,²³⁴ Brett L.J. stated the following:

“It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which (...) contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words “either directly or indirectly,” because, (...) a document can properly to be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.”

Brett L.J. went on to say that:

“in order to determine whether certain documents are within that description, it is necessary to consider what are the questions in the action: the Court must look not only at the statement of claim and the plaintiff’s case, but also at the statement of defence and the defendant’s case.”

The principles laid down in this decision were adopted by South African case law.²³⁵ Notwithstanding the broad meaning ascribed to the relevancy of documents under Rule 35(1) of the

²³² Rule 38(1)(a)(2) of the High Court Rules. By virtue of Rule 38(1)(b) of the said Rules, the third party has to hand the document(s) over to the Registrar as soon as possible. Once the litigants have inspected the document(s), the latter are returned to the third party. See also Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 810; Peté S *et al Civil Procedure: A Practical Guide* 2008 250, 264 *et seq.*

²³³ Rule 35(1) of the High Court Rules.

²³⁴ (1882) 11 QBD 55 at 63.

²³⁵ See, amongst others, *Bilbrough v Mutual Life Insurance Co of New York*, 1906 TH 53 at 55 *et seq.*; *Robinson v Farrar Others*, 1907 TS 740 at 742; *Power v Wilson*, 1909 TH 254 at 256; *Maxwell and Another v Rosenberg and Others* 1927 WLD 1 at 3 *et seq.*; *Northern Assurance Co Ltd v Rosenthal* 1927 WLD 209 at 210 *et seq.*; *Schlesinger v Donaldson and Another* 1929 WLD 54 at 57; *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082; *Federal Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) at 753D-G; *SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd* 1968 (3) SA 381 (W) at 385A-C; *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 596 *et seq.*; *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (NA) at 564A; *Carpede v Choene NO and Another* [1986] 2 All SA 117 (O) at 124 *et seq.*; *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (TPD) at 316A-317; *STT Sales (Pty) Ltd v Fourie and Others* 2010 (6) SA 272 (GSJ) at 275G.

High Court Rules,²³⁶ so-called “fishing expeditions” are not permitted under South African law.²³⁷

Under Rule 35(1) of the High Court Rules, discovery extends to any document which is or has at any time been in the possession or control of a party. The litigant required to make discovery has to specify on oath²³⁸ the documents in his or his agent’s possession,²³⁹ the documents regarding which he has a valid objection to produce,²⁴⁰ as well as the documents that are no longer in his or his agent’s possession.²⁴¹ Statements of witnesses, as well as communications between attorney and client, and between attorney and advocate do not have to be disclosed.²⁴² Where the party who requested discovery believes that there are, in addition to the documents listed in the affidavit, other documents relevant to any matter in question, he may require further discovery.²⁴³

Based on Rule 35(6) of the High Court Rules, a party may require the other party, who made discovery, to make the documents falling under Rule 35(2)(1)(a) of the High Court Rules

²³⁶ See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (TPD) at 316I-J with reference to *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (NA) at 564A.

²³⁷ *STT Sales (Pty) Ltd v Fourie and Others* 2010 (6) SA 272 (GSJ) at 276E. For more on fishing expeditions, see Chapter 4 para. II.B.3.a).

²³⁸ See Rule 35(2) of the High Court Rules read in conjunction with Form 11 of the First Schedule to the said Rules, which sets out the content of the affidavit to be given by the party required to make discovery.

²³⁹ In this context, see Form 11 of the First Schedule to the High Court Rules (para. 7), which not only mentions the possession, custody and power of the particular party, but also the possession, custody and power of the party’s counsel or agent, or of any other person on the party’s behalf. In addition, Form 11 not only makes reference to the original of the documents, but also to a copy, or extract thereof. See in this regard also Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 797.

²⁴⁰ In other words, documents in relation to which the party may invoke a privilege. With regard to the privileges of witnesses, see para. III.A.2 above; Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 800 *et seq.*; 806 *et seq.*

²⁴¹ Rule 35(2)(1)(a)-(c) of the High Court Rules. With regard to the specification of documents by the party required to make discovery, see Rule 35(2)(2) of the said Rules.

²⁴² Rule 35(2)(2) *in fine* of the High Court Rules.

²⁴³ Rule 35(3) of the High Court Rules. See also *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (TPD) at 321E-323E with reference to *Richardson’s Woolwasheries Ltd v Minister of Agriculture* 1971 (4) SA 62 (E); *Tractor & Excavator Spares (Pty) Ltd v Groenedijk* 1976 (4) SA 359 (W) at 363F, *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A; *SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd* 1968 (3) SA 381 (W), and *Maxwell and Another v Rosenberg and Others* 1927 WLD 1. For more in this regard, *cf.* Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 813 *et seq.* See also Rule 35(8) of the High Court Rules. According to this provision, a litigant may request the opposing party to specify the documents the latter intends to use at the trial.

available for inspection.²⁴⁴ Privileged documents²⁴⁵ have to be discovered under Rule 35(2) of the High Court Rules, but are not subject to inspection under Rule 35(6) of the said Rules.²⁴⁶

If a party fails to give discovery or inspection, the other party may apply to the court, which may order compliance with the relevant rules and, failing such compliance, may dismiss the claim, or strike out the defence.²⁴⁷

C. Real Evidence

In *S v M*,²⁴⁸ real evidence is described as “an object which, upon proper identification, becomes, of itself, evidence”. Real evidence may include any object, person,²⁴⁹ or place which is examined by the court in order to draw a conclusion as to any factual issue.²⁵⁰ Where real evidence includes a location or an object, which cannot be produced in court, the judge conducts a so-called “inspection *in loco*”.²⁵¹

A litigant in civil proceedings pending abroad will only request evidence located in South Africa to be examined in South Africa, if such evidence cannot be brought to the trial court. This is particularly the case for immovable property, and locations. The following comments thus focus on inspections *in loco*. The remarks made earlier in relation to Swiss law on whether or not an inspection abroad for the benefit of a trial court makes sense, also apply here.²⁵²

²⁴⁴ For more on such inspection, see, amongst others, Cilliers AC, Loots C, and Nel HC (eds) *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa Volume 1* 2009 817 *et seq.*; Petè S *et al Civil Procedure: A Practical Guide* 2008 253 *et seq.*

²⁴⁵ For instance, a document implicating a party in a criminal offence, which is protected under the privilege against self-incrimination, or a document from one spouse to another spouse that is protected by the spousal privilege, Petè S *et al Civil Procedure: A Practical Guide* 2008 251.

²⁴⁶ *Tractor & Excavator Spares (Pty) Ltd v Groenedijk* 1976 (4) SA 359 (W) at 362G-H with reference to *Ferreira v Endley* 1966 (3) SA 618 (E) at 620H-621A and *Lenz Township Co (Pty) Ltd v Munnick and Others* 1959 (4) SA 567 (T) at 575C-F. See also Petè S *et al Civil Procedure: A Practical Guide* 2008 250 *et seq.*

²⁴⁷ Rule 35(7) of the High Court Rules.

²⁴⁸ 2002 (2) SACR 411 (SCA) at 432C-D.

²⁴⁹ See, for instance, *R v P* 1957 (3) SA 444 (A) at 448G; *S v Mavundla and Another*; *S v Sibisi* 1976 (2) SA 162 (N) at 165A-D; *Newell v Cronje and Another* 1985 (4) SA 692 (EDC) at 697A, 697H. For more in this regard, *cf.*, amongst others, Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 397 *et seq.*; Zeffert DT and Paizes AP *Essential Evidence* 2010 271 *et seq.*

²⁵⁰ Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 395; Zeffert DT and Paizes AP *Essential Evidence* 2010 271.

²⁵¹ Zeffert DT and Paizes AP *Essential Evidence* 2010 271. *Cf.* also Rule 39(16)(d) of the High Court Rules, which provides for the power of court to hold inspections *in loco*. See in this regard *East London Municipality v Van Zyl* 1959 (2) SA 514 (E) at 516F-517B.

²⁵² See para. II.E above.

As a general rule, litigants and their counsel have the right to be present at an inspection *in loco*.²⁵³ The judge conducting the inspection should make a record of the observations he made on the spot, and communicate them to the litigants present at the inspection in order to be able to clarify any ambiguities or disputes regarding his observations.²⁵⁴ At the inspection, the parties and any non-party witnesses are neither under oath nor subject to cross-examination, and the judge can thus not rely on statements such persons made during the inspection. Following the inspection, the judge should therefore recall the litigants and non-party witnesses to give evidence on what was indicated in the course of the inspection.²⁵⁵

IV. Botswana

A. Testimony of Witnesses

1. Competence and Compellability of Witnesses

As a general rule, every person is competent to give evidence in civil proceedings pending before the High Court of Botswana.²⁵⁶ An individual, however, afflicted with insanity, or labouring under imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, is incompetent to testify while under the influence of such malady or disability.²⁵⁷

Pursuant to Section 5(1) of the Evidence in Civil Proceedings Act, a child is competent to testify, provided he understands the nature and recognises the religious obligation of an oath. It is submitted that a child must also be in a position to comprehend the questions put to him, and to give reasonable answers.

²⁵³ *Hansen v Rex* 1924 NPD 318 at 320 *et seq.* 322 *et seq.*; *R v Mouton* 1934 TPD 101 at 102, 103. For an exception to such rule, see *Akoon v Rex* 1926 NPD 306 at 306 *et seq.*

²⁵⁴ *Kruger v Ludick* 1947 (3) SA 23 (A) at 31; *R v Trotsky* 1947 (1) SA 612 (SWA) at 614; *Rex v Smith* 1949 (4) SA 782 (O) at 785; *R v Barnardo* 1960 (3) SA 552 (A) at 552, 554, ; *HA Millard & Son (Pty) Ltd v Enzenhofer* 1968 (1) SA 330 (T) at 334B-C; *JN De Kock en Seun (EDMS) Bpk v Elektrisiteitsvoorsieningskommissie* 1983 (3) SA 160 (A) at 170F-G; *Newell v Cronje and Another* 1985 (4) SA 692 (EDC) at 697B-D, 697A-E; *Bayer South Africa (Pty) Ltd and Another v Viljoen* 1990 (2) SA 647 (A) at 659I.

²⁵⁵ *Rex v Van der Merwe* 1950 (4) SA 17 (OPD) at 20A-G; Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2010 401. For the pre-trial procedure regarding the inspection of movable or immovable property, see Rule 36(6)-(8) of the High Court Rules.

²⁵⁶ Section 2 of the Evidence in Civil Proceedings Act, Chapter 10:02. For the distinction between the competence, compellability, and privileges of witnesses, see para. II.B.2 above.

²⁵⁷ Section 4 of the Evidence in Civil Proceedings Act.

By virtue of Section 7 of the aforesaid Act, no person is incompetent to testify due to any relation, either by consanguinity or affinity, subsisting between such person and the person for or against whom he shall give evidence. This particularly holds true for the spouse of a litigant.

Where a competent witness fails without reasonable cause to attend court to give evidence, the court may issue a warrant for his arrest, provided the *subpoena* was duly served, and the relevant expenses have been paid or offered to the witness.²⁵⁸

2. Privileges of Witnesses

A witness may refuse to answer any question which might have a tendency to expose him to any pains, penalty or punishment, forfeiture, or criminal charge, or to degrade his character.²⁵⁹ No privilege, however, can be invoked with regard to questions that may expose the witness to a risk of civil liability.²⁶⁰

By virtue of Section 25 of the Evidence in Civil Proceedings Act, no spouse can be compelled to disclose any communication made to him by the other spouse during the marriage.²⁶¹ Section 9 of the said Act makes marital communications privileged after the dissolution of the marriage.²⁶² Furthermore, a witness cannot be compelled to answer questions which his spouse, if under examination, might lawfully refuse.²⁶³ By contrast, individuals, who intercepted marital communications, cannot invoke the privilege.²⁶⁴

Section 10 of the Evidence in Civil Proceedings Act provides for the legal professional privilege. Under this provision, not only communications between counsel and client are protect-

²⁵⁸ Section 19(1) of the High Court Act, read in conjunction with Order 44(1) of the High Court Rules. The wording of Section 19 of the High Court Act of Botswana is virtually identical with the wording of Section 30 of the South African Supreme Court Act. With regard to Section 30 of the South African Supreme Court Act, see the relevant comments in para. III.A.1. For the content of a *subpoena*, cf. Form 18 in the First Schedule to High Court Rules.

²⁵⁹ Section 21 of the Evidence in Civil Proceedings Act. This rule refers to “*any similar case depending in the Supreme Court of Judicature in England*”. A similar reference can, amongst others, be found in Sections 10 (privilege of professional advisers) and 23 (privilege on ground of public policy, or regard to the public interest) of the said Act. As a result, courts in Botswana shall follow English law when dealing with these provisions. See in this regard also *Swart and Another v Klerck and Another* [1979-1980] BLR 156 (HC) at 160; Quansah EK *The Botswana Law of Evidence* 2008 3 *et seq.*

²⁶⁰ Section 22 of the Evidence in Civil Proceedings Act.

²⁶¹ The wording of this provision is identical with that of Section 10(1) of the South African Civil Proceedings Evidence Act. With regard to the latter, see para. III.A.2 above.

²⁶² Quansah EK *The Botswana Law of Evidence* 2008 75.

²⁶³ Section 8 of the Evidence in Civil Proceedings Act.

²⁶⁴ Quansah EK *The Botswana Law of Evidence* 2008 75 with reference to *Rumping v Director of Public Prosecutors* [1964] AC 814.

ed,²⁶⁵ but also those between counsel or client and third parties.²⁶⁶ In the first case, the information communicated by the lawyer to his client or *vice versa* has to be furnished for the purpose of obtaining legal advice and has to be of a confidential nature.²⁶⁷ The legal advice privilege does thus not extend to non-confidential facts the counsel or party observed in the course of their relationship as legal adviser and client.²⁶⁸ Not only counsel in private practice can invoke the legal professional privilege, but also in-house legal advisers.²⁶⁹

In order to be protected under the litigation privilege, the communications have to be made for the purpose of pending or contemplated litigation. This includes, *inter alia*, discussions with potential witnesses, including experts, and their means of proof.²⁷⁰ Communications are made in contemplation of litigation, if they were for the dominant purpose of obtaining legal advice, or aiding in litigation.²⁷¹ Under both the legal advice and the litigation privilege, confidential communications are not privileged, if they relate to any crime or offence that was made before the legal adviser was professionally employed, or consulted with regard to the defence of the client.²⁷² Moreover, no legal privilege can be invoked where the relationship between counsel and client is in fact a front for the commission or furtherance of some crime or fraudulent act.²⁷³

Confidential professional communications other than those between legal advisers and clients, as well as between counsel or clients and third parties are not protected. This holds particularly

²⁶⁵ So-called “legal advice privilege”.

²⁶⁶ So-called “litigation privilege”.

²⁶⁷ *Moremi and Another v African Banking Corporation of Botswana Ltd* [2009] 2 BLR 18 (HC); *Masita v Mukuwa and Others in Re Leseriseri Pty Ltd and Another v Mukuwa and Others* [2010] 1 BLR 581 (HC) at 583. Cf. also Quansah EK *The Botswana Law of Evidence* 2008 76 *et seq.* with reference to *Minter v Priest* [1930] AC 558 at 568.

²⁶⁸ Quansah EK *The Botswana Law of Evidence* 2008 77 with reference to *Re Cathcard, Ex parte Campbell* (1870) 5 Ch App 703, *R v Davies* 1956 (3) SA 52 (A) at 58, *Brown v Foster* (1957) 1 H & N 736, *The State v Alexander & Ors (1)* 1965 (2) SA 796 at 812, *State v Mpumlo & Others* 1987 (SA) 442 at 449, *Balabel v Air India* [1988] 2 All ER 246 at 247-255, and *Nederlands Reassurance Groep Holding NV v Bacon & Woodrow* [1995] 1 All ER 976.

²⁶⁹ Quansah EK *The Botswana Law of Evidence* 2008 76 with reference to *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No. 2)* [1972] 2 All ER 353 at 376.

²⁷⁰ Quansah EK *The Botswana Law of Evidence* 2008 78 with reference to *Anderson v Bank of British Columbia* [1876] 2 Ch D 644, *Wheeler v Le Marchant* [1881] 17 Ch D 675 (CA), *Seabrook v British Transport Commission* [1959] 2 All ER 15, and *Longthorn v British Transport Commission* [1959] 2 All ER 32.

²⁷¹ Quansah EK *The Botswana Law of Evidence* 2008 78 *et seq.* with reference to *Birmingham & Midland Motor Omnibus Co v London & North Western Railway Co* [1913] 3 KB 850, *Seabrook v British Transport Commission* [1959] 2 All ER 15, *Waugh v British Railways Board* [1980] AC 521, *Guinness Peat Ltd v Fitzroy Robinson* [1987] 1 WLR 1027 at 1036 *et seq.*, and *The Sagheera* [1997] 1 Lloyd’s Rep 160 at 168. See also *A Sweidan and King (Pty) Ltd and Others v Zim Israel Navigation Co Ltd* 1986 (1) SA 515 (D) cited in Solo K *The Law of Evidence in Botswana, Cases and Materials* 1999 90 *et seqq.*

²⁷² Section 10(2) of the Evidence in Civil Proceedings Act. See also Quansah EK *The Botswana Law of Evidence* 2008 81 *et seq.*

²⁷³ Quansah EK *The Botswana Law of Evidence* 2008 81 *et seq.*

true for communications between priest and penitent,²⁷⁴ doctor and patient,²⁷⁵ or a journalist and his source.²⁷⁶

By virtue of Section 23(1) of the Evidence in Civil Proceedings Act, a witness may refuse to give evidence on the ground of public policy or public interest. In other words, evidence is prevented from being disclosed in civil proceedings, if its communication would prejudice public policy or public interest, such as national security or international relations.²⁷⁷

Finally, statements that were made “without prejudice” in the course of negotiating a settlement of a legal dispute are privileged, and can thus not be given in evidence without the consent of the parties.²⁷⁸

3. Examination of Witnesses

In civil proceedings before the High Court of Botswana, litigants and third parties, including experts, are generally examined *viva voce* before the trial court.²⁷⁹ In certain cases, however, witnesses may give evidence on commission, or based on interrogatories or affidavits.

a) Oral Testimony before the Trial Court

Witnesses are questioned by the parties’ counsel, and are subject to the latter’s examination-in-chief, cross-examination, and re-examination.²⁸⁰ Leading questions cannot be asked in exami-

²⁷⁴ *State v Moloigaswe* [2009] 1 BLR 311 (HC) at 318. See also Quansah EK *The Botswana Law of Evidence* 2008 82 with reference to *Smit v Van Niekerk* 1976 (4) SA 293 (A).

²⁷⁵ *State v Moloigaswe* [2009] 1 BLR 311 (HC) at 318. Cf. also Quansah EK *The Botswana Law of Evidence* 2008 82 with reference to *Parkes v Parkes* 1916 CPD 702 and *D v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589 at 618.

²⁷⁶ Quansah EK *The Botswana Law of Evidence* 2008 82 with reference to *Attorney General v Mulholland* [1963] 2 QB 477, *Attorney General v Clough* [1963] 1 QB 773, *Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] AC 133, *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, and *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339.

²⁷⁷ Quansah EK *The Botswana Law of Evidence* 2008 86 *et seq.* See also *Conway v Rimmer and Another* [1968] AC 910 cited in Solo K *The Law of Evidence in Botswana, Cases and Materials* 1999 70 *et seq.*

²⁷⁸ Quansah EK *The Botswana Law of Evidence* 2008 83 *et seq.* With respect to the requirements regarding statements “without prejudice”, Quansah makes reference to the relevant case law in South Africa and England. For such case law, see above para. III.A.2. See also *Rush & Tompkins Ltd Greater London Council and Another* [1988] (3) All ER 737 cited in Solo K *The Law of Evidence in Botswana, Cases and Materials* 1999 94 *et seq.*

²⁷⁹ Order 44(2) of the Rules of the High Court.

²⁸⁰ Order 45(5) and (7)-(8) of the Rules of the High Court. See also *Van Wyk v McLelland* [1999] BLR 203 (HC) at 205. For more on examination-in-chief, cross-examination, and re-examination, see Quansah EK *The Botswana Law of Evidence* 2008 193 *et seq.*, 201 *et seq.*, 208 *et seq.*; Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 161. Cf. also the relevant comments in relation to South African law in para. III.A.3.a) above and Chapter 2 para. IV.B.2.c).

nation-in-chief and re-examination, but are allowed in cross-examination.²⁸¹

A witness has to testify without referring to any documents. Under certain conditions, however, he may be allowed to use documents to refresh his memory before giving evidence.²⁸²

The court has the power to put questions to witnesses. According to Aguda JA, the judge should, however,

*“refrain from asking questions in such a way as to create the impression that he is not conducting the trial in an open-minded or impartial manner”.*²⁸³

Without the parties’ consent, the judge is not allowed to call witnesses.²⁸⁴ It is, however, submitted that the court may *suo motu* recall a witness, who has already testified.

As a general rule, witnesses give evidence upon oath. Individuals, who decline to take an oath, can make an affirmation.²⁸⁵ A child who lacks the capacity to understand the nature and religious obligation of an oath cannot give unsworn evidence and, thus, is not able to testify.²⁸⁶ A *verbatim* record is made of evidence given by witnesses.²⁸⁷

The comments on communications between counsel and non-party witnesses prior to the trial made in relation to South African law apply *mutatis mutandis* to Botswana law.²⁸⁸

²⁸¹ Quansah EK *The Botswana Law of Evidence* 2008 193 *et seq.*, 201, 208.

²⁸² Quansah EK *The Botswana Law of Evidence* 2008 194 *et seq.* with reference to *Anderson v Whalley* (1852) 3 Car & K 54, *R v Harvey* (1869) 11 Cox CC 546, *R v Langton* (1876) 2 QBD 296, *R v Isaacs* 1916 TPD 390, *Senat v Senat* [1965] P 172, *R v Richardson* (1971) 55 Cr App 244 at 251, *R v Fotheringham* [1975] Crim LR 710 (CA), *R v Kelsey* (1982) 74 Cr App R 213, and *R v Da Silva* [1990] 1 All ER 29.

²⁸³ *Lemme v The State* [1985] BLR 576 (CA) at 580. See in this regard also *State v Jeremane* [1984] BLR 169 (HC) at 170; *State v Ntshupetsang* [1984] BLR 1 (HC); *State v Moshotle* [1985] BLR 131 (HC) at 133; *State v Mogotsi and Another* [1990] BLR 497 (HC) at 504; *Kefilwe v The State* [1992] BLR 276 (CA) at 278 *et seq.*

²⁸⁴ Quansah EK *The Botswana Law of Evidence* 2008 192.

²⁸⁵ Sections 6 and 29 of the Evidence in Civil Proceedings Act. See also Quansah EK *The Botswana Law of Evidence* 2008 57; *State v Mopirwa* [1981] BLR 211 at 212; *The State v Onkemetse Kegopotse* [1982] 2 BLR 62 at 62 *et seq.*; *Komanyane v The State* [1997] BLR 11 at 12.

²⁸⁶ Section 5(2) of the Evidence in Civil Proceedings Act. See also Quansah EK *The Botswana Law of Evidence* 2008 58. For the test to be applied by the court to determine whether a child understands the nature of an oath or not, *cf. State v Dimakatso Zhoba* High Court Criminal Trail No. F9 of 1990 cited in Solo K *The Law of Evidence in Botswana, Cases and Materials* 1999 30 *et seq.* See, however, Section 30 of the Evidence in Civil Proceedings Act, which provides that persons, who from ignorance arising from youth, defective education, or other cause shall be found not to understand the nature, or recognise the religious obligation, of an oath, may be admissible to give evidence in any court, without being sworn upon oath. In this case, the court admonishes the witness to tell the truth.

²⁸⁷ *Cf. Order 45(16)(b) of the Rules of the High Court.*

²⁸⁸ See in this regard para. IV.A.3.a) *in fine.*

b) Evidence on Commission

In terms of Order 44(3) of the Rules of the High Court, the court may, where it appears convenient or necessary for the purpose of justice, make an order for taking the evidence of a witness before a commissioner. Since the nature and general principles of a commission *de bene esse* have already been outlined,²⁸⁹ there is no need to further elaborate in this regard.

The wording of the provisions in Order 44(3)-(8) of the Rules of the High Court, which outline the requirements and procedure for a commission *de bene esse*, is virtually identical with the wording of Rule 38(3)-(8) of the South African High Court Rules. Reference can thus be made to the relevant comments under South African law.²⁹⁰ Accordingly, the evidence is adduced upon oral evidence in the presence of the commissioner, the parties, and their counsel, and the witness is subject to cross- and re-examination.²⁹¹ The testimony of the witness is recorded in the same way when taken before a judge.²⁹²

c) Evidence based on Interrogatories

Based on Order 44(5) of the Rules of the High Court, the court may, when ordering a commission *de bene esse*, direct that witnesses are to be examined by interrogatories and cross-interrogatories. The nature of such interrogatories has already been explained earlier, and reference can thus be made to the relevant comments.²⁹³

The wording of Order 44(5) of the Rules of the High Court and that of Rule 38(5) of the South African High Court Rules are identical.²⁹⁴ The commissioner therefore questions the witness in the absence of the parties and their counsel based on the list of interrogatories and cross-interrogatories prepared by the litigants.²⁹⁵

²⁸⁹ Chapter 4 para. III.C.2.b). See also Section 18 of the Evidence in Civil Proceedings Act.

²⁹⁰ See in this regard para. III.A.3.b) above. See also Quansah EK *The Botswana Law of Evidence* 2008 186 *et seq.*; Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 154 *et seqq.*

²⁹¹ Order 44(5) of the Rules of the High Court.

²⁹² Order 44(7) of the Rules of the High Court.

²⁹³ *Cf.* para. III.A.3.c) above.

²⁹⁴ See para. III.A.3.c) above. *Cf.* also Quansah EK *The Botswana Law of Evidence* 2008 187; Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 158.

²⁹⁵ Quansah EK *The Botswana Law of Evidence* 2008 187; Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 158.

d) Evidence on Affidavit

By virtue of Order 44(2) of the Rules of the High Court, the court may allow witnesses to give evidence on affidavit.²⁹⁶ Again, the wording of this provision is identical with that of Rule 38(2) of the South African High Court Rules.²⁹⁷ Hence, the taking of evidence by affidavit is generally limited to the proof of evidence of a formal nature, of isolated facts, or facts that are unlikely to be contested by the opposing party. The court does not allow evidence to be given on affidavit where the opposing party reasonably requires the attendance of the particular witness for cross-examination, and such witness can be produced.²⁹⁸

e) Expert Witnesses

In civil proceedings before the High Court of Botswana, experts are regarded as ordinary third-party witnesses, who are appointed by the litigants, and are subject to cross- and re-examination through the parties' counsel.²⁹⁹

In *Eurafric (Pty) v Leading Auto Engineering (Pty) Ltd*,³⁰⁰ the court was faced with the divergent opinions of several expert witnesses. In this case, Gyeke-Dako J held that each of the experts departed from the role of an expert, as they each tailored the respective evidence so that it would support the claim of the party calling him. The role of an expert, however, is, according to Gyeke-Dako J, to furnish the judge with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable him to form his own independent judgement of the application of these criteria to the facts proved in evidence. Having said this, Gyeke-Dako J pointed out that he is not bound to adopt the view of an expert, even if this view stands uncontradicted. From this it follows, that experts should not be mere partisan witnesses, but that they should provide the court with as objective and unbiased an expert opinion as possible.³⁰¹

²⁹⁶ For more on affidavits, see, for instance, *Charles v Botswana National Front* [2009] 2 BLR 36 (HC) para. F.

²⁹⁷ See para. III.A.3.d) above.

²⁹⁸ Order 44(2) *in fine* of the Rules of the High Court. See also Quansah EK *The Botswana Law of Evidence* 2008 185 *et seq.*; Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 158.

²⁹⁹ For more on examination-in-chief, cross-examination, and re-examination, see para. III.A.3.a) above and Chapter 2 para. IV.B.2.c).

³⁰⁰ [1994] BLR 165 (HC) at 179.

³⁰¹ *Cf.* also para. III.A.3.e) above.

Prior to the hearing, a litigant has to give notice of his intention to call an expert witness, and has to deliver a summary of the expert's opinion.³⁰²

B. Documentary Evidence

By virtue of Order 39(1) of the Rules of the High Court, a party may apply to the court for an order directing any other party to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question.³⁰³ Neither Order 39 of the said Rules, nor any other statutory provision determines the stage at which a party may apply for discovery. According to Kakuli, courts will not, as a general rule, order a defendant to produce documents until a writ of summons has been served upon him. With regard to documents in the possession of a plaintiff, Kakuli maintains that discovery should not be granted until the plaintiff has filed his declaration, or statement of claim.³⁰⁴

Discovery of documents can only be requested from a litigant, but not from a third party.³⁰⁵ Where a litigant wishes to obtain documents from a non-party witness, the issue of a *subpoena duces tecum* is required.³⁰⁶

A party may only request the discovery of documents “*relating to any matter in question*”.³⁰⁷ Whether this requirement is fulfilled or not, is to be determined based on the relevant principles developed in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Company*.³⁰⁸ Since these principles have already been discussed in relation to discovery under South African law, there is no need to further elaborate in this regard.³⁰⁹ It should, however, be emphasised that so-called “fishing expeditions” are not allowed.

Discovery under Order 39(1) of the Rules of the High Court extends to all documents, which are or have been in the possession or power of the party required to make discovery. Such party has to specify by affidavit the aforesaid documents as well as the documents regarding which

³⁰² Order 41(9) of the Rules of the High Court. The wording of this rule is virtually identical with that of Rule 36(9) of the South African High Court Rules. With regard to the latter, see para. III.A.3.e) above. See also Quansah EK *The Botswana Law of Evidence* 2008 123.

³⁰³ Cf. also Order 39(5) of the Rules of the High Court, which entitles a party to request the production of documents that were referred to in the opponent's pleadings, or affidavits.

³⁰⁴ Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 135 *et seq.*

³⁰⁵ Order 39(1) of the Rules of the High Court. See also Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 133.

³⁰⁶ With regard to the so-called “*subpoena duces tecum*”, see para. III.B above. See also Order 44(1)(2) of the Rules of the High Court.

³⁰⁷ Order 39(1) of the Rules of the High Court.

³⁰⁸ (1882) 11 QBD 55. See Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 136.

³⁰⁹ See the relevant comments made in para. III.B.

he has a valid objection to produce.³¹⁰ Where the party requesting discovery believes that the opponent is in possession or power of relevant documents, which were not disclosed in the affidavit, he may apply to the court for further discovery.³¹¹

By virtue of Order 39(3) of the High Court Rules, a litigant may, at any time during which the claim is pending or during the hearing, apply to the judge for an order for the production of documents.³¹² Privileged documents have to be disclosed in the affidavit, but are not subject to inspection.³¹³

A party, who fails to comply with an order for discovery or inspection of documents, is liable to committal. Where a plaintiff fails to cooperate, the court may dismiss the claim for want of prosecution. With regard to a defendant, the court may strike out the defence, and may place the defendant in the same position, as if he had not entered a defence.³¹⁴

C. Real Evidence

The comments on what constitutes real evidence made in relation to South African law,³¹⁵ also apply to civil proceedings before the High Court of Botswana. The same holds true for the earlier remarks on whether or not an inspection of evidence located in Botswana for the benefit of foreign civil proceedings makes sense.³¹⁶

With regard to an inspection *in loco*, it was held in *Tshipidi v The State*,³¹⁷ that both parties must be accorded an opportunity to be present. The court decision furthermore stated that the

³¹⁰ Order 39(2) of the Rules of the High Court read in conjunction with Form 12 in the First Schedule to the said Rules. Form 12 (para. 5) not only mentions documents in the possession, custody, or power of the party, but also those in the possession, custody, or power of his attorney, agent, or any other person on his behalf. Also, Form 12 (para. 5) not only makes reference to original documents, but also to copies thereof. See Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 136. With regard to privileged documents, cf. para. III.B above. See also Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 137, 136 with reference to *R v Strachan* [1895] 1 Ch 439 at 445, 447 *et seq.*; *Knapp v Harvey* [1911] 2 KB 725 (CA) at 730 *et seq.*

³¹¹ Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 138 with reference to *Jones v The Monte Video Gas Co* (1880) 5 QBD 556, *Kent Coal Concessions Ltd v Duguid* [1910] 1 KB 904, *British Association of Glass Bottle Manufacturers Ltd v Nettleford* [1912] 1 KB 369, and *Federated Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E).

³¹² According to Kakuli GM *Civil Procedure and Practice in the High Court of Botswana* 2005 138 *et seq.*, this provision only extends to documents, which are in the sole legal possession of the litigant making discovery. See also Order 39(8)(2) of the Rules of the High Court.

³¹³ See in this regard para. III.B above.

³¹⁴ Order 39(10) of the Rules of the High Court.

³¹⁵ See para. III.C above.

³¹⁶ Cf. para. II.E above.

³¹⁷ [2004] (1) BLR 166 (HC).

judge should record his observations made at the inspection,³¹⁸ and share them with the parties at the spot, so that, if there is a disagreement, he can have a second look and form his opinion. It was also pointed out that no reliance should be made in statements made at the inspection by a witness as they are not made under oath and the witness is not subject to cross-examination. Accordingly, the court decision emphasised that when the hearing is resumed after the inspection, the judge should call the witness to give evidence in open court under oath in relation to the explanations made at the inspection.³¹⁹

V. Namibia

In Namibia, the law of evidence in regard to civil proceedings pending before the High Court is governed by the South African Civil Proceedings Evidence Act No. 25 of 1965 as applied in South Africa as of 12 November 1979.³²⁰ The rules on the conduct of civil proceedings before the Namibian High Court are contained in the High Court Act³²¹ and the Rules of the High Court of Namibia.³²²

A. Testimony of Witnesses

1. Competence and Compellability of Witnesses

Sections 8 and 9 of the Namibian Civil Proceedings Evidence Act are identical with Sections 8 and 9 of its South African counterpart. The remarks in relation to the competence and compellability of witnesses made under South African law thus apply *mutatis mutandis* to Namibian

³¹⁸ See also Order 45(16)(d) of the Rules of the High Court, which states, *inter alia*, that a record shall comprise the “proceedings of the court generally including any inspection in loco”.

³¹⁹ *Tshipidi v The State* [2004] (1) BLR 166 (HC) at 167 with reference to *Kruger v Ludick* 1947 (3) SA 23 (A) at 31 and *Rex v Van der Merwe* 1950 (4) SA 17 (O) at 20A. See also *Modise v The State* [1989] BLR 126 (HC) at 129 *et seq.* with reference to *R v Holland* 1950 (3) SA 37 (C) at 40A-B; *Maiphethlo and Others v The State* [1990] BLR 580 (HC) at 583.

³²⁰ While Namibia was under the administration of South Africa, the administration of some South African laws, including the South African Civil Proceedings Evidence Act, was transferred to Namibia. Such transfer had the effect of “freezing” the statutes as they stood at the date of the transfer. The administration of the South African Civil Proceedings Evidence Act was transferred on 12 November 1979. At the independence of Namibia, the said Act was inherited by Namibia. See in this regard Legal Assistance Centre *Namlex: Index to the Laws of Namibia* (2010 update) <http://www.lac.org.na/namlex/Intro.pdf> Introduction-2, Introduction-5, History-1 *et seqq.* (date of use: 31 January 2013); Legal Assistance Centre *Namlex: Index to the Laws of Namibia - Evidence* (2010 update) <http://www.lac.org.na/namlex/Evidence.pdf> Evidence-1 (date of use: 31 January 2013). In order to avoid any confusion between the Act applicable in South Africa and that in Namibia, reference will be made hereinafter either to the “South African Civil Proceedings Evidence Act” or the “Namibian Civil Proceedings Evidence Act”.

³²¹ No. 16 of 1990.

³²² Both the High Court Act and the Rules of the High Court of Namibia were enacted after 1990, that is, after Namibia gained independence.

law.³²³ Accordingly, every person is competent and compellable to testify, unless he suffers from insanity or intoxication, and is thereby deprived of the proper use of reason. A child is a competent witness, provided he is able to comprehend the questions put to him, and to answer rationally. A spouse is competent and compellable to testify in civil proceedings where his wife or husband acts as a party.

The attendance of a person to give evidence at the trial can be secured by the issue of *subpoenas* based on Rule 38(1) of the Rules of the High Court of Namibia.³²⁴ Where the *subpoena* was duly served, and the witness expenses have been paid or offered, the court may issue a warrant for the arrest of any person, who, without reasonable excuse, fails to obey the *subpoena*.³²⁵ The same applies where the witness attends court, but declines to be sworn, to make an affirmation, or to answer any questions put to him without any just excuse.³²⁶

2. Privileges of Witnesses

Sections 10-14 of the Namibian Civil Proceedings Evidence Act on the privileges of witnesses are virtually identical with Sections 10-14 of its South African counterpart. However, one has to bear in mind that the Namibian Civil Proceedings Evidence Act applies in the version applicable in South Africa as per 12 November 1979. While Sections 10(2) and 10A of the current version of the South African Civil Proceedings Evidence Act do not apply in Namibia,³²⁷ Section 11 of the said Act in its version of 1979 is still applicable.³²⁸ According to this provision, the marital privilege continues after the dissolution or annulment of the marriage.³²⁹ To the above extent, the comments on Sections 10-14 of the South African Civil Proceedings Evidence Act thus apply *mutatis mutandis* to Namibian law.³³⁰ As a result, Namibian law recog-

³²³ See para. III.A.1 above.

³²⁴ The wording of this provision is virtually identical with that of Rule 38(1) of the South African High Court Rules. With respect to the latter, see para. III.A.1 above.

³²⁵ Section 26(1) of the High Court Act. This provision is identical to Section 30(2) of the South African Supreme Court Act. Regarding the latter, see para. III.A.1 above.

³²⁶ Section 27(1) of the High Court Act. The wording of this Section is identical to that in Section 31(1) of the South African Supreme Court Act. With regard to the latter, see para. III.A.1 above.

³²⁷ These provisions were only inserted in 1988 and 1996, respectively. See also Legal Assistance Centre *Namlex: Index to the Laws of Namibia - Evidence* (2010 update) <http://www.lac.org.na/namlex/Evidence.pdf> Evidence-1 (date of use: 31 January 2013).

³²⁸ In South Africa, this provision was only repealed in 1988. *Cf.* also Legal Assistance Centre *Namlex: Index to the Laws of Namibia - Evidence* (2010 update) <http://www.lac.org.na/namlex/Evidence.pdf> Evidence-1 (date of use: 31 January 2013).

³²⁹ Section 11 of the Namibian Civil Proceedings Evidence Act reads as follows: “No person whose marriage has been dissolved or annulled shall be compelled to give evidence as to any fact, matter or thing which occurred during the subsistence of the marriage or supposed marriage, and as to which he or she could not have been compelled to give evidence if the marriage were subsisting.”

³³⁰ *Cf.* para. III.A.2 above.

nises the privilege against self-incrimination,³³¹ the privilege on the grounds of public policy or public interest,³³² as well as the privilege of spouses.

In addition, Namibian law guarantees the legal professional privilege. In *Alexander v Minister of Home Affairs and Others*,³³³ it was held that such privilege not only includes communications between a legal adviser and his clients made for the purpose of litigation, but extends to all communications made for the purpose of giving or receiving legal advice.³³⁴

There is no reported case law on the privilege of professionals other than legal advisers. Accordingly, it can be assumed that under Namibian law, the professional privilege is only applied to legal advisers, but not to other professionals, such as doctors, clergymen, or journalists. In this context, however, mention must be made of Section 13(1) of the Constitution of the Republic of Namibia, which provides for the right to privacy in relation to correspondence and communications. Future case law will show whether certain professional communications will be protected under the said Section of the Constitution, and whether the professional privilege will be extended to professionals other than legal advisers.

Finally, communications “without prejudice” are privileged, provided they were made by the parties in the course of negotiations to settle a legal dispute.³³⁵

3. Examination of Witnesses

Witnesses are generally examined orally in the presence of the trial court.³³⁶ In certain cases, however, the court may order that evidence is given on commission, by means of interrogatories, or by affidavit.³³⁷

³³¹ See *Gases and Others v The Social Security Commission and Others* 2005 NR 325 (HC) at 337 *et seq.* Cf. also in this regard Section 12(1)(f) of the Constitution of the Republic of Namibia, 1990. According to this provision, no persons shall be compelled to give testimony against themselves, or their spouses who shall include partners in a marriage by customary law.

³³² See, amongst others, *S v Nassar* 1994 NR 233 (HC) at 107G-H.

³³³ 2010 (1) NR 226 (HC) at 229 *et seq.*

³³⁴ For more on the legal privilege, see para. III.A.2 above.

³³⁵ *National Address Buro v South West African Broadcasting Corporation* 1991 NR 35 (HC) at 67 *et seq.*; *SOS Kinderdorf International v Effie Lentin Architects* 1992 NR 390 (HC) at 399 with reference to *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A). For more on “without prejudice” communications, see para. III.A.2 above.

³³⁶ Rule 38(2) of the Rules of the High Court of Namibia. The wording of this provision is virtually identical with that of Rule 38(2) of the South African High Court Rules. See in this regard para. III.A.3.a) above.

³³⁷ Cf. *S v Koch* 2006 (2) NR 513 (SC) at 542.

a) Oral Testimony before the Trial Court

In civil proceedings pending before the High Court of Namibia, witnesses are generally questioned by the litigants' counsel, and are subject to the latter's cross- and re-examination.³³⁸ The provisions regarding the examination of witnesses in the Rules of the High Court of Namibia and those in the South African High Court Rules are identical.³³⁹ Accordingly, the relevant comments made in relation to South African law apply *mutatis mutandis* to Namibian law.³⁴⁰

In *S v Wasserfall*,³⁴¹ Strydom JP pointed out that a judge should refrain from questioning any witnesses in a way that, because of its frequency, length, timing, form, tone, contents or otherwise, conveys or is likely to convey that the judge is no longer open-minded, impartial or fair to all those who are concerned in the trial and its outcome. Strydom JP emphasised that questions by a judge should therefore be aimed at clearing up uncertainties or to elicit or elucidate the truth more fully in respect of relevant aspects of the case subject to the aforesaid limitations. In *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others*,³⁴² it was held that the court has not the power to call witnesses without the parties' consent. There is no reported case law on whether or not leading questions are allowed in cross-examination.³⁴³ It is, however, submitted that the relevant remarks under South African law also apply with regard to Namibian law.³⁴⁴ The same holds true for the the court's power to recall witnesses as well as the use of documents by a witness to refresh his memory during examination.

Witnesses are generally examined upon oath.³⁴⁵ Exceptions, however, apply to individuals who object to testifying under oath, or are incapable of understanding the nature and religious obli-

³³⁸ See Rule 40(8) of the Rules of the High Court of Namibia.

³³⁹ Cf. Rule 40 of the Rules of the High Court of Namibia and Rule 39 of the South African High Court Rules.

³⁴⁰ See para. III.A.3.a) above.

³⁴¹ 1992 NR 18 (HC) at 21 *et seq.* with reference to *S v Rall* 1982 (1) SA 828 (A) at 831H-832B, *S v Van Niekerk* 1981 (3) SA 787 (T) at 795C, and *S v Meyer* 1972 (3) SA 480 (A) at 483D.

³⁴² 2011 (2) NR 469 at 483B-D with reference to *Buys v Nancefield Trading Stores* 1926 TPD 513 and *Simon Alias Kwayipa v Van den Berg* 1954 (2) SA 612 (SR) at 613F-614.

³⁴³ Cf., however, *S v Malumo and Others* 2006 (1) NR 323 (HC) at 336, where it was stated that putting a leading question to a witness is generally prohibited.

³⁴⁴ See para. III.A.3.a) above.

³⁴⁵ Section 39(1) of the Namibian Civil Proceedings Evidence Act.

gation of an oath.³⁴⁶ Evidence given by witnesses is recorded in the form of a *verbatim* transcript.³⁴⁷

The comments regarding the communications between counsel and non-party witnesses prior to the trial, which have been made in relation to South African law, apply *mutatis mutandis* to Namibian law.³⁴⁸

b) Evidence on Commission

According to Rule 38(3) of the Rules of the High Court of Namibia, the court may, where it appears convenient or necessary for the purposes of justice, make an order for taking the evidence of a witness before a commissioner. The nature of a commission *de bene esse* has already been discussed earlier and reference can thus be made to the relevant comments.³⁴⁹

Rule 38(3)-(8) of the Rules of the High Court of Namibia governing the procedure for a commission *de bene esse* is identical with Rule 38(3)-(8) of the South African High Court Rules. Accordingly, the explanations given with regard to the latter provisions apply *mutatis mutandis* to Namibian law.³⁵⁰ Hence, the witness gives evidence *viva voce* in the presence of the commissioner, the parties and their counsel, and is subject to cross- and re-examination.³⁵¹ The evidence taken on commission is recorded in the same manner as evidence taken before the trial court.³⁵²

c) Evidence based on Interrogatories

When giving leave to a request for a *commission de bene esse*, the court may, based on Rule 38(5) of the Rules of the High Court of Namibia, order that the evidence of the witness is not adduced upon oral examination, but by means of interrogatories and cross-interrogatories. With regard to the nature of interrogatories, reference can be made to the relevant comments under South African law.³⁵³

³⁴⁶ Sections 39-41 of the Namibian Civil Proceedings Evidence Act. Since these provisions are identical with Sections 39-41 of the South African Civil Proceedings Evidence Act, reference can be made to the comments in para. III.A.3.a). See also *S v Boois* 2004 NR 74 (HC) at 75 *et seqq.*

³⁴⁷ See Rule 40(16)(b) of the Rules of the High Court of Namibia. The wording of this provision is identical with that of Rule 39(16) of the South African High Court Rules.

³⁴⁸ See in this regard para. III.A.3.a) *in fine.*

³⁴⁹ *Cf.* Chapter 4 para. III.C.2.b).

³⁵⁰ See para. III.A.3.b) above.

³⁵¹ Rule 38(5) of the Rules of the High Court of Namibia.

³⁵² Rule 38(7) of the Rules of the High Court of Namibia.

³⁵³ See para. III.A.3.c) above.

The aforesaid Rule and Rule 38(5) of the South African High Court Rules are virtually identical. Consequently, the remarks made with regard to the latter provision apply *mutatis mutandis* to interrogatories under Namibian law.³⁵⁴ Accordingly, the interrogatories and cross-interrogatories prepared by the parties are put to the witness. The latter gives evidence in the presence of the commissioner alone, and is not subject to cross- and re-examination.

d) Evidence on Affidavit

By virtue of Rule 38(2) of the Rules of the High Court of Namibia, the court may, for sufficient reason, order that a witness give evidence on affidavit. Since this provision is identical with Rule 38(2) of the South African High Court Rules, the comments in relation to South African law apply accordingly.³⁵⁵ Evidence on affidavit is thus generally limited to the proof of isolated facts, the evidence of a formal nature, or facts the opposing party is unlikely to contest.³⁵⁶ Where it appears that the opposing party reasonably requires the attendance of the witness for cross-examination, and the witness can be produced, courts usually do not allow evidence to be given on affidavit.³⁵⁷

e) Expert Witnesses

In civil proceedings pending before the High Court of Namibia, experts are regarded as ordinary non-party witnesses. Consequently, they are appointed by the litigants, and are subject to cross- and re-examination by the parties' counsel.³⁵⁸ There is no reported case law setting out the duties expert witnesses may have towards the trial court. Future case law will show whether the High Court of Namibia will adopt principles similar to those developed by the South African courts in this regard.³⁵⁹

³⁵⁴ Cf. para. III.A.3.c) above.

³⁵⁵ See para. III.A.3.d) above.

³⁵⁶ Cf. in this regard *Gabrielsen v Crown Security CC* 2011 (1) NR 121 (HC) at 124 *et seq.* In this decision, the High Court allowed the plaintiff's expert, who was domiciled abroad, to give evidence on affidavit. This was based on the facts that the defendant did not call his own experts, that the *viva voce* evidence of the plaintiff's expert would have been very expensive, and that the cross-examination of the expert could be lead by the defendant in writing.

³⁵⁷ Rule 38(2) of the Rules of the High Court of Namibia.

³⁵⁸ See para. V.A.3.a) above.

³⁵⁹ Cf. in this regard para. III.A.3.e) above.

A party, who wants to call an expert witness, has not only to give notice to the opponent prior to the hearing, but he has also to deliver a summary of the expert's opinion before the beginning of the trial.³⁶⁰

B. Documentary Evidence

By virtue of Rule 35(1) of the Rules of the High Court of Namibia, a party to any action may require any other party to make discovery on oath of all documents relating to any matter in question, which are or have been in the possession or control of such other party. Rule 35 of the said Rules, which sets out the procedure for the discovery and inspection of documents, is virtually identical with Rule 35 of the South African High Court Rules. Reference can thus be made to the comments on documentary evidence in relation to South African law.³⁶¹

Accordingly, a party may only seek discovery after the close of pleadings. Moreover, a litigant may only require discovery from the opposing party, but not from third parties.³⁶² With regard to documents controlled by non-party witnesses, the issue of *subpoenas duces tecum* is necessary.³⁶³

The party requested to make discovery has to specify on oath the documents that are or have been in his or his agent's possession or control, as well as the documents in respect of which he has a valid objection to produce.³⁶⁴ Discovery is limited to documents which relate to any matter in question, and fishing expeditions are thus not allowed.³⁶⁵ The litigant who required discovery may request the opposing party to make the disclosed documents, with the exception of

³⁶⁰ Rule 36(9) of the Rules of the High Court of Namibia. The wording of this rule is identical with that of Rule 36(9) of the South African High Court Rules. See in this regard para. III.A.3.e) above. With regard to medical examinations, cf. Rule 36(1)-(5) of the Rules of the High Court of Namibia.

³⁶¹ See para. III.B above.

³⁶² Rule 35(1) *in fine* of the Rules of the High Court of Namibia.

³⁶³ Cf. Rule 38(1) *in fine* of the Rules of the High Court of Namibia.

³⁶⁴ Rule 35(2) of the Rules of the High Court of Namibia read in conjunction with Form 11 of the First Schedule to the said Rules.

³⁶⁵ Rule 35(1) of the Rules of the High Court of Namibia. See also *South African Sugar Association v Namibia Sugar Distributors (Pty) Ltd* 1999 NR 241 (HC) at 244 *et seq.*; *Waltraut Fritzsche t/a Reit Safari v Telecom Namibia Ltd* 2000 NR 201 (HC) at 205; *Kanyama v Cupido* 2007 (1) NR 261 (HC) at 219I-220F with reference to *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 311A and *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55. See also *Marco Fishing (Pty) Ltd v Government of the Republic of Namibia and Others* 2008 (2) NR 742 (HC) at 748D-F.

privileged documents, available for inspection.³⁶⁶ Where a party fails to give discovery or inspection, the court may dismiss the claim, or strike out the defence.³⁶⁷

C. Real Evidence

The remarks on the notion of “real evidence” made under South African law also apply here.³⁶⁸ The same holds true for the comments on whether or not an inspection of evidence located in Namibia for the benefit of a trial court located abroad makes sense.³⁶⁹

There is no reported case law setting out the general principles for the conduct of an inspection *in loco*. Future case law will show whether the High Court will adopt principles, which are similar to those developed by the South African courts, when dealing with the conduct of an inspection *in loco*.³⁷⁰ Accordingly, the parties and their counsel should have the right to be present at the inspection. Any comments or observations made by the court, litigants, or non-party witnesses at the spot should be recorded by the court.³⁷¹ Following the inspection, the court should recall the parties and non-party witnesses to give evidence on oath on their observations during the inspection.

VI. Nigeria

As has been mentioned earlier,³⁷² there are no uniform rules on the procedure of civil proceedings before the high courts of Nigeria. By contrast, the law of evidence is regulated by a federal statute, the Evidence Act,³⁷³ which applies to all Nigerian high courts.

A. Testimony of Witnesses

1. Competence and Compellability of Witnesses

By virtue of Section 175(1) of the Evidence Act, all persons are competent to testify, unless the court considers them prevented from understanding the questions put to them or from giving

³⁶⁶ Rule 35(6) of the Rules of the High Court of Namibia.

³⁶⁷ Rule 35(7) of the Rules of the High Court of Namibia. See also Rule 35(4) of the said Rules which provides that an undisclosed document may not, save with the leave of the court, be used for any purpose at the trial by the party who was obliged, but failed to disclose it, provided that the other party may use such document.

³⁶⁸ See para. III.C above. See also in this regard *S v Malumo and Others* 2006 (2) NR 629 (HC) at 636 *et seq.*; *S v Auala* 2008 (1) NR 223 (HC) at 232; *S v Malumo and 116 Others (No. 3)* 2008 (2) NR 512 (HC) at 513 *et seq.*; *S v Malumo and 116 Others (No. 4)* 2008 (2) NR 515 (HC) at 516.

³⁶⁹ *Cf.* para. III.C above.

³⁷⁰ See para. II.E above.

³⁷¹ *Cf.* Rule 40(16)(d) of the Rules of the High Court of Namibia.

³⁷² See Chapter 4 para. VI.A.

³⁷³ No. 18 of 2011.

rational answers, by reason of tender years, extreme old age, disease, or any other cause of the same kind. In other words, all individuals, irrespective of age, are competent to give evidence in court, provided they have the mental capacity and the intelligence to understand the questions and rationally answer them.³⁷⁴ This particularly holds true for children,³⁷⁵ and persons of unsound mind. The latter are competent witnesses during lucid intervals.³⁷⁶

Parties to the suit, as well as their spouses are competent witnesses, not only for themselves, but also for the opposing party.³⁷⁷

Bankers or officers of a bank or other financial institution are, in any legal proceedings to which such institution is not a party, not compellable to produce any banker's book or financial book the contents of which can be proved in the manner provided in Section 89 of the Evidence Act.³⁷⁸

³⁷⁴ *Okoye v The State* (1972) 12 SC 115; *Monsuru Solola v The State* [2005] 11 NWLR (Pt. 937) 460 at 487A-D; Osipitan T 'Competence and Compellability of Witness' in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 382; Babalola A 'Witnesses' in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 403.

³⁷⁵ According to Osipitan T 'Competence and Compellability of Witness' in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 383, a person below the age of 14 years is considered a child. Cf. also Section 209(1) of the Evidence Act, which mentions the same age in relation to the unsworn evidence of a child. See also *Monsuru Solola v The State* [2005] 2 NWLR (Pt. 937) 460 at 487C-D. For the test to be applied by the court to determine whether or not a child is a competent witness, see *Okoye v The State* (1972) 12 SC 115; *Garba Adamu and Anor v The State* CA/K24/95 on 23.10.1986; *Ngwuta Mbele v The State* [1990] 7 SCNJ 12; *Isaac Sambo v The State* [1990] 7 SCNJ (Pt.1) 128; *Ogunsi v State* [1994] 4 NWLR (Pt. 332) at 590. See also Babalola A 'Witnesses' in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 413 *et seq.*; Oji SI 'Competency of Children as Witnesses' 1996 *Nigerian Current Law Review* 235 *et seq.*; Adah CE *The Nigerian Law of Evidence* 2000 138 *et seq.*, Tobi N *Case Book on the Law of Evidence in Nigeria* 2002 109 *et seq.*; Edeko SE *Introduction to the Law of Evidence* 2003 137 *et seq.*; Akaniro EG *Study Manual on Law of Evidence and Procedure II* 1997 85 *et seq.* With regard to the taking of an oath by a child, see para. VI.A.3.a) below.

³⁷⁶ Section 175(2) of the Evidence Act. See also Adah CE *The Nigerian Law of Evidence* 2000 142. With regard to dumb persons, cf. Section 176 of the Evidence Act. It is submitted that this provision applies *mutatis mutandis* to deaf-mute individuals. For more on Section 176 of the said Act, see Akintola AL and Adedeji AA *Nigerian Law of Evidence: A Book of Readings* 2006 294; Adah CE *The Nigerian Law of Evidence* 2000 143; Akaniro EG *Study Manual on Law of Evidence and Procedure II* 1997 88 *et seq.*; Aguda TA *Law and Practice relating to Evidence in Nigeria* 1980 300 n. 23-07.

³⁷⁷ Section 178 of the Evidence Act. See *Elias v Disu and Others* [1962] 1 All NLR 214 at 217; *Obolo v Akuko & Ors* [1976] NMLR 334 at 335; *Edokpolo and Company Limited v Sem-Edo Wire Industries Ltd and Others* (1980) FHCLR 81 at 84 *et seq.*; *Jinadu v Esurombi-Aro 2* [2005] 14 NWLR (Pt. 944) 142 at 190D. Cf. also Adah CE *The Nigerian Law of Evidence* 2000 143 *et seq.*; Aguda TA *The Law of Evidence* 1999 312 *et seq.* Special rules apply for the evidence of spouses as to adultery. See in this regard Section 186 of the Evidence Act.

³⁷⁸ Section 177 of the Evidence Act. The same holds true for the appearance as witnesses to prove matters, transactions, and accounts recorded in the banker's book. See also *Aprofim S.A. Geneva v Nigeria National Supply Company Limited* (1986) FHCLR 350 at 354 *et seq.* Section 89 of the Evidence Act allows, as an exception, the use of secondary evidence for the proof of the existence, condition or contents of a document.

A party requiring the attendance of a particular individual as a witness at the hearing may *subpoena* such person.³⁷⁹ Where the latter refuses, without sufficient cause, to appear in court, to be sworn, to make an affirmation, or to give evidence, he is liable to a fine, and imprisonment.³⁸⁰

2. Privileges of Witnesses

Section 183 of the Evidence Act provides for the privilege against self-incrimination. Under this *proviso*, no witness can be compelled to answer any question, if the answer thereto would, in the opinion of the court, have a tendency to expose the witness or his spouse to any criminal charge, penalty, or forfeiture. The privilege, however, does not extend to questions, which may establish that the witness owes a debt, or is otherwise liable to any civil suit.³⁸¹

By virtue of Section 187 of the Evidence Act, no spouse can be compelled to disclose any communications made to him during marriage by any person to whom he has been married, unless this person gives consent. The privilege also exists after the dissolution of the marriage, provided the communications were made during the marriage.³⁸² It, however, extends only to spouses, but not to third parties who intercepted marital communications.³⁸³

Judges and other persons, before whom a proceeding is being held, are not compelled to answer any question as to their conduct in court, or as to anything which came to their knowledge in court.³⁸⁴ Similarly, magistrates, police officers, and other public officers authorised to investigate or prosecute offences cannot be compelled in relation to the source of any information as to the commission of any offence.³⁸⁵

³⁷⁹ Order 38(29) of the Rules of the High Court of the Federal Capital Territory.

³⁸⁰ Section 92 of the High Court Act (Chapter 510) and Order 38(17) of the Rules of the High Court of the Federal Capital Territory read in conjunction with Section 133(2) of the Criminal Code Act (Chapter 77).

³⁸¹ Section 183(b) of the Evidence Act. Section 183(a) and (c) provide for further exceptions, which, however, relate to criminal proceedings. See also Adah CE *The Nigerian Law of Evidence* 2000 105 *et seq.*; Tobi N *Case Book on the Law of Evidence in Nigeria* 229; Akaniro EG *Study Manual on Law of Evidence and Procedure II* 1997 106 *et seq.*; Aguda TA *Law and Practice relating to Evidence in Nigeria* 1980 330 n. 24-22 *et seq.*

³⁸² Adah CE *The Nigerian Law of Evidence* 2000 94.

³⁸³ Adah CE *The Nigerian Law of Evidence* 2000 94 with reference to *Rumping v DDP* [1962] 2 All ER 256. See also Akaniro EG *Study Manual on Law of Evidence and Procedure II* 1997 101.

³⁸⁴ Section 188 of the Evidence Act. Such persons, however, may be examined in relation to other matters, which occurred in their presence while they were in their respective function, Section 188 *in fine* of the said Act. See *Elabanjo v Tijani* (1986) 17 NSCC (Pt. II) 1367 at 1372 *et seq.*; Adah CE *The Nigerian Law of Evidence* 2000 95 *et seq.*; Akaniro EG *Study Manual on Law of Evidence and Procedure II* 1997 102 *et seq.*; Aguda TA *The Law of Evidence* 1999 318 n. 163.

³⁸⁵ Section 189 of the Evidence Act. See also Boade OA 'Privilege' in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 166 *et seq.*

Section 190(1) of the Evidence Act prohibits the disclosure of any unpublished official records relating to affairs of state, as well as of evidence derived from such records. The provision extends to records that may be injurious to the public interest, public security, public service, national defence, or diplomatic relations. Not only the character of the document is decisive, but also the possible consequences of its publication by the state.³⁸⁶ By virtue of Section 191 of the Evidence Act, a public officer³⁸⁷ cannot be compelled to reveal communications made to him in official confidence, when he considers that the public interest would suffer by the disclosure.³⁸⁸ In this context, mention has to be made of Section 243(1) of the said Act, which stipulates that the Minister may in any proceedings object to the production of documents or request the exclusion of oral evidence, when he is satisfied that the disclosure of documents or the oral evidence are against public interest.³⁸⁹

Section 192 of the Evidence Act provides for the privilege of legal advisers. No counsel is, without his client's consent, compellable to disclose any communication made to him in the course and for the purpose of his professional employment, or on behalf of his client, or to reveal any advice given by him to his client. The same applies to the contents or condition of any document with which he has become acquainted in his function as legal adviser.³⁹⁰ Communications made in furtherance of any illegal purpose, and any fact observed by the lawyer in the course of his employment, showing that any crime or fraud has been committed since the commencement of his employment, are not protected by privilege.³⁹¹ The privilege extends to legal advisers in full-time employment of the client, who are on a monthly salary.³⁹² In other

³⁸⁶ According to Section 190(2) of the Evidence Act, the court, however, can allow evidence derived from official records to be given to the judge alone in chambers. See also Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 442 *et seq.*; Adah CE *The Nigerian Law of Evidence* 2000 96; Karibi-Whyte AG *The Federal High Court: Law and Practice* 1986 211; Akaniro EG *Study Manual on Law of Evidence and Procedure II* 1997 108 *et seq.*; Aguda TA *Law and Practice relating to Evidence in Nigeria* 1980 323 n. 24-07; Boade OA 'Privilege' in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 178.

³⁸⁷ A person employed in the public service, Akaniro EG *Study Manual on Law of Evidence and Procedure II* 1997 109.

³⁸⁸ Based on Section 191(2) of the Evidence Act, the judge, however, can receive evidence derived from such communications alone in chambers.

³⁸⁹ According to Section 243(3) of the Evidence Act, the court has a discretion whether or not to uphold the objection made under Section 243(1) of the Evidence Act.

³⁹⁰ See also *Horn v Richard* (1963) NNLR 67; *Dawaki Gen Ent Ltd v Amafco Ent Ltd* [1999] 3 NWLR (Pt. 594) 224 at 236D-E; *Abubakar v Chuks* (2007) 12 SC 1 at 28 *et seqq.*

³⁹¹ Section 192(1)(a)-(b) of the Evidence Act. With regard to the waiver of the legal professional privilege by the client, see Section 194 of the Evidence Act.

³⁹² Aguda TA *Law and Practice relating to Evidence in Nigeria* 1980 327 n. 24-16 with reference to *Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners (No. 2)* [1972] 2 All ER 353 (CA) at 376; Boade OA 'Privilege' in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 169 with reference to Suit No. HAD/10/75 of 6 June 1978.

words, in-house counsel are covered by the aforesaid privilege. Legal professional privilege extends not only to legal advisers, but also to their interpreters, clerks, and agents.³⁹³

Documents which were drafted for the dominant purpose of assisting a party or for use by his counsel in an existing or contemplated litigation are also protected.³⁹⁴ This includes, *inter alia*, not only draft pleadings, but also documents prepared by an agent of the party for the use of his counsel for the purpose of a pending or contemplated claim.³⁹⁵

Professionals other than legal advisers do not enjoy a professional privilege. This holds particularly true for doctors, clergymen, and journalists.³⁹⁶ In this context, however, Boade maintains that the judge may, if he thinks fit, allow the aforesaid professionals not to answer a request concerning confidential information.³⁹⁷ In this regard, mention must be made of Section 37 of the Constitution of the Federation of Nigeria, which, amongst other things, protects the privacy of citizens, their correspondence, and telephone conversations.³⁹⁸

By virtue of Section 195 of the Evidence Act, a person, who has consulted a legal adviser, cannot be compelled to disclose any confidential communication, which has been exchanged between him and the counsel.

A third party cannot be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to incriminate him.³⁹⁹ Similarly, a witness is not compellable to reveal documents in his possession, which any other person would be entitled to refuse to produce, if they were in his possession.⁴⁰⁰

³⁹³ Section 193 of the Evidence Act.

³⁹⁴ Nwadialo F *Civil Procedure in Nigeria* 1990 512 n. 29.42 with reference to *Anderson v Bank of British Columbia* [1876] 2 Ch D 644 at 650 and *Seabrook v British Transport Commission* [1959] 1 WLR 509.

³⁹⁵ Nwadialo F *Civil Procedure in Nigeria* 1990 512 n. 29.42 with reference to *Southwalk and Vauxhall Water Co v Quick* (1878) 3 QBD 315.

³⁹⁶ Boade OA 'Privilege' in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 171 *et seq.*; Adah CE *The Nigerian Law of Evidence* 2000 102 *et seq.* with reference to *Attorney General v Mulholland* [1963] 2 QB 477 at 489; Tobi N *Case Book on the Law of Evidence in Nigeria* 2002 209; Akaniro EG *Study Manual on Law of Evidence and Procedure II* 1997 104; Aguda TA *Law and Practice relating to Evidence in Nigeria* 1980 328 n. 24-17.

³⁹⁷ Boade OA 'Privilege' in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 171, 172.

³⁹⁸ See in this regard para. III.A.2 above.

³⁹⁹ Section 184 of the Evidence Act.

⁴⁰⁰ Section 185 of the Evidence Act. See in this regard also Aguda TA *The Law of Evidence* 1999 323 n. 169 with reference to *Reynolds v Godlee* (1858) 4 K & J 88 at 91. Aguda maintains that where a document was communicated to a person voluntarily, in confidence, and for a limited and restricted use, this individual cannot be compelled to divulge the document.

Finally, statements which parties made “without prejudice” with the *bona fide* intention to amicably settle a dispute do not have to be disclosed in civil proceedings.⁴⁰¹ A document which is merely marked “without prejudice”, but was not prepared in the course of a settlement of a dispute is not privileged.⁴⁰² The privilege also extends to third parties who, with the consent of the parties, acted as conciliator or mediator.⁴⁰³

3. Examination of Witnesses

Litigants and third parties, including experts, are generally examined *viva voce* before the court.⁴⁰⁴ In certain cases, however, the court may order witnesses to give evidence on commission, or by affidavit.

a) Oral Testimony before the Trial Court

The examination of witnesses at the trial is conducted by the parties. The witnesses are subject to examination-in-chief, cross-examination, and re-examination through the parties’ counsel.⁴⁰⁵ As a general principle, leading questions are not allowed in examination-in-chief and re-examination, but may be asked in cross-examination.⁴⁰⁶

⁴⁰¹ Section 196 of the Evidence Act. See also *Societe Commerciale de L'Ouest Africains v Olusoga and Another* (1936) 13 NLR 104; *NBA v Fawehinmi* [1986] 2 NWLR (Pt. 21) 224 at 246 *et seq.*; *Nwadike & Others v Ibekwe & Others* (1987) LNSCC 1219; *Jadesimi v Egbe* [2003] 10 NWLR (Pt. 827) at 25.

⁴⁰² *S.C.O.A. v Olusoga and Another* (1936) 13 NLR 104. See also Edeko SE *Introduction to the Law of Evidence* 2003 109; Boade OA ‘Privilege’ in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 174 *et seq.*; Akaniro EG *Study Manual on Law of Evidence and Procedure II* 1997 106; Aguda TA *Law and Practice relating to Evidence in Nigeria* 1980 332 n. 24-27.

⁴⁰³ *Akadiri v Tijani Atanda and Ors* [1986] 3 NWLR (Pt. 27) 113 at 124; *Chief Gani Fawehinmi v Nigerian Bar Association and Ors* [1989] 1 SCNJ (Pt. 1) 40. See also *Obayemi v Obayemi v* [1967] NMLR 212 at 215. For more on statements “without prejudice”, see Adah CE *The Nigerian Law of Evidence* 2000 103 *et seq.*; Aguda TA *Law and Practice relating to Evidence in Nigeria* 1980 331 n. 24-26 *et seq.*; Karibi-Whyte AG *The Federal High Court: Law and Practice* 1986 212.

⁴⁰⁴ Order 38(2) of the Rules of the High Court of the Federal Capital Territory.

⁴⁰⁵ Sections 214-215 of the Evidence Act read in conjunction with Orders 35 (12)-(13) and 38(20) of the Rules of the High Court of the Federal Capital Territory. With regard to the purpose of cross-examination, see, amongst others, *Ezewusim v Okoro* [1993] 5 NWLR (Pt. 294) 478 at 493; *Ita v Ekpenyong* [2001] 1 NWLR (Pt. 695) 587 at 614A-B; *Onwuka v Owolewa* [2001] 7 NWLR (Pt. 713) 695 at 713G-H; *Borishade v N.B.N. Ltd* [2007] NWLR (Pt. 1015) 237D-F. See also Adah CE *The Nigerian Law of Evidence* 2000 261 *et seq.*; Olanipekum W ‘Cross-examination Techniques’ 2003 *Nigerian Bar Journal* 471 *et seq.*; Chapter 2 para. IV.B.2.c).

⁴⁰⁶ Section 221 of the Evidence Act. For the definition of “leading questions”, see Section 221(1) of the said Act. *Cf.* Section 223 for questions that are lawful in cross-examination, as well as Order 35(25) of the Rules of the High Court of the Federal Capital Territory. See also Akaniro EG *Study Manual on Law of Evidence and Procedure II* 1997 152; Aguda TA *Law and Practice relating to Evidence in Nigeria* 1980 372 n. 27-27.

A witness has to testify from his memory, and is, as a general rule, not allowed to use documents when in the witness box. In certain cases, however, a witness may, while under examination and with leave of the court, refresh his memory by referring to documents.⁴⁰⁷

In order to clear up ambiguities or clarify points which have been left obscure in the evidence given by any witness, the court may ask any question it pleases of any witness about relevant or irrelevant facts.⁴⁰⁸ The judge's power to put questions to witnesses, however, is limited. In *Mohammed v The Nigerian Army*,⁴⁰⁹ it was held that the liberty given to the judge by Section 246 of the Evidence Act seems extensive, and is limited by the duty of fairness. The court emphasised that “*where the intervention of the judge discloses a real likelihood of bias and shows an unmistakable breach of the duty of fairness, the proceedings stand vitiated for lack of fairness*”, and that therefore the said Section “*should be used with circumspection and moderation and only where questions are necessary in the interest of justice*”. Having said this, it is recognised that the court can ask questions to clarify answers given by a witness, or points that have arisen *ex improviso*.⁴¹⁰ Without the consent of the parties, the court cannot call any witness.⁴¹¹ The judge, however, may recall witnesses without the litigants' consent.⁴¹²

As a general rule, oral evidence must be given on oath or affirmation.⁴¹³ A child below the age of 14 years is not to be sworn and gives evidence otherwise than on oath or affirmation, provided he is sufficiently intelligent to justify the reception of his evidence and comprehends the

⁴⁰⁷ Section 239 of the Evidence Act. Cf. also *Amoo & Ors v The Queen* (1959) 1 NSCC 91 at 92 *et seq.*; *Kada v State* [1991] 8 NWLR (Pt. 208) 124 at 154E-F. See furthermore *Akaniro EG Study Manual on Law of Evidence and Procedure II* 1997 153 *et seq.*; *Aguda TA Law and Practice relating to Evidence in Nigeria* 1980 385 n. 27-64 *et seq.*; Babalola A ‘Witnesses’ in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 424 *et seq.*

⁴⁰⁸ Section 246 of the Evidence Act. This provision also applies with regard to the production of any document or thing.

⁴⁰⁹ [1998] 7 NWLR (Pt. 557) 232 at 240A-C.

⁴¹⁰ *Grace Akinfe v The State* (1988) 7 SC (Pt. II) 131 at 139, 147 *et seq.* with reference to *Rex v Asuquo Edem & Ors* (1943) 9 WACA 25; *West v Police* (1952) 20 NLR 71; *Lawrence Agbaje v The Republic* [1964] 1 All NLR 295 at 297. See also *David Uso v Commissioner of Police* [1972] 1 All NLR (Pt. 2) 390 at 394 *et seq.* It goes without saying that a court cannot compel a witness to answer questions in relation to which the latter can invoke a privilege, Section 246(3) of the Evidence Act.

⁴¹¹ *Sunju Bell-Gam v Grace Bell Gam* [1965] NMLR 245 at 247; *Evoyoma & Ors v Daregba & Ors* [1968] NMLR 389; *Eric Ordor v James Nwosu* [1974] 1 All NR 478 at 484 *et seq.*; *Onibudo v Akibu* [1982] All NLR 207 at 219; *Hyacinth Anyanwa v Robert A. Mbara and Another* [1992] 6 SCNJ (Pt. 1) 22; *Michael Dan Udo v Chief Christopher Udom Ushiet* [1994] 8 NWLR (Pt. 363) 483 at 487; *Mambok Diyelpwan v Danbang Golok* [1996] 3 NWLR (Pt. 438) 599 at 601.

⁴¹² *Ogboodu v Odogha & Anor* [1967] 1 All NLR 173 at 176; *Eric Ordor v James Nwosu* (1974) 12 SC 104; *Omorogbee v Lawani* SC.89/1979 108 at 120 *et seq.* See also Babalola A ‘Witnesses’ in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 422, 447 *et seq.*, 457 *et seq.*; Aluko O *The Civil Procedure of the Superior Court in Nigeria* 1997 75; *Akaniro EG Study Manual on Law of Evidence and Procedure II* 1997 172; *Nwadialo F Civil Procedure in Nigeria* 1990 559 n. 30.33; *Karibi-Whyte AG The Federal High Court, Law and Practice* 1986 290 *et seq.*

⁴¹³ Section 205 of the Evidence Act.

duty of speaking the truth.⁴¹⁴ The evidence given *viva voce* before the court is recorded in a *verbatim* transcript.⁴¹⁵

The comments on communications between counsel and non-party witnesses prior to the trial made in relation to South African law apply *mutatis mutandis* to Nigerian law.⁴¹⁶

b) Evidence on Commission

By virtue of Order 38(11)(1) of the Rules of the High Court of the Federal Capital Territory, the court may, for the purpose of justice, make an order for the examination of a witness upon oath before an examiner. Since the nature of a commission *de bene* has already been outlined earlier, reference can be made to the relevant comments.⁴¹⁷ An order for evidence to be taken on commission will particularly be made where a witness resides in the jurisdiction of another Nigerian court, or is unable to attend court, for instance due to illness, old age, or similar infirmity.⁴¹⁸

The witness gives *viva voce* evidence in the presence of the examiner appointed by the court, the litigants and their legal advisers, and is subject to cross- and re-examination.⁴¹⁹ The examiner may put questions to the witness as to the meaning of any answer, or as to any matter arising in the course of the examination.⁴²⁰ The witness' testimony is to be taken down in writing, not ordinarily by question and answer, but so as to represent as nearly as may be, the statement of the witness.⁴²¹

c) Evidence on Affidavit

According to Order 38(3)(1) of the Rules of the High Court of the Federal Capital Territory, the court may order that any evidence shall be given by affidavit. The witness who testified by affidavit is generally not subject to cross-examination and does not need to attend the trial for

⁴¹⁴ Section 209(1) of the Evidence Act. *Cf.* also Section 208 of the Evidence Act for another exception to Section 205 of the said Act based on the religious belief of the witness.

⁴¹⁵ See also in this regard Section 78(1) of the High Court Act; Order 38(1) of the Rules of the High Court of the Federal Capital Territory.

⁴¹⁶ *Cf.* in this regard para. III.A.3.a) *in fine*.

⁴¹⁷ See Chapter 4 para. III.C.2.b).

⁴¹⁸ Aguda *TA Law and Practice relating to Evidence in Nigeria* 1980 488 n. 42.39 with reference to *SI Dabiri v VO Dabiri* (1957) NRNLR 121 and *Re Bradbrook* (1889) 23 QBD 226.

⁴¹⁹ Order 38(20) of the Rules of the High Court of the Federal Capital Territory.

⁴²⁰ Order 38(21)(3) *in fine* of the Rules of the High Court of the Federal Capital Territory.

⁴²¹ Order 38(21)(1) of the Rules of the High Court of the Federal Capital Territory. See also Order 38(21)(3) of the said Rules, which states, that in certain circumstances, the examiner may record any particular question or answer, provided there should appear any special reasons for doing so.

that purpose.⁴²² The opposing party, who received an affidavit, may file a counter affidavit.⁴²³ In *N.D.I.C. v Sheriff*,⁴²⁴ it was held that in civil proceedings, the court has the power to order that all or specified facts be proved by affidavit.⁴²⁵ It was furthermore stated that when determining applications for evidence by affidavits the court takes into account whether the credibility of the evidence depends on the opportunity of the court to evaluate the witness, and whether the evidence is such that it would be strongly contested. In *Uzondu v Uzondu*,⁴²⁶ it was held

“When a court is faced (...) with affidavits which are irreconcilably in conflict, it should first hear oral evidence from the deponents or such other witnesses as the parties may be advised to call. However, it is not only by calling oral evidence that such conflicts in affidavit evidence can be resolved. Such conflict can also be resolved by authentic documentary evidence which supports one of the affidavits in conflict where the court has enough documentary evidence at its disposal.”

Similarly, it was stated in *Nwosu v Imo State Environmental Sanitation Authority*,⁴²⁷ that evidence by affidavit is entitled to be given weight where there is no conflict, or where the conflict has been resolved from appropriate oral or documentary evidence.⁴²⁸

d) Expert Witnesses

In civil proceedings before the High Court of the Federal Capital Territory, expert witnesses are regarded as ordinary non-party witnesses. Accordingly, experts are appointed by the parties and subject to cross- and re-examination through the litigants' counsel.⁴²⁹ In *Adebajo v Adebajo*,⁴³⁰ it was held that experts, notwithstanding the fact that they are selected and paid by the parties, have to testify the truth and not mislead the court.

⁴²² Orders 38(3)(2) and 8(1) of the Rules of the High Court of the Federal Capital Territory. The use of affidavits in civil proceedings saves time and expense, Senlong CP 'Affidavit' in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 232.

⁴²³ Onalaja MO 'Documentary Evidence' in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 193; Senlong CP 'Affidavit' in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 238 *et seq.*

⁴²⁴ [2004] 1 NWLR (Pt. 855) at 591D-E.

⁴²⁵ Cf. also Section 107 of the Evidence Act. See furthermore Alimi LO *The 2004 Lagos State (Civil Procedure) Rules and the Nigerian Law of Evidence: Some Matters Arising* (undated) [http://www.alimiandco.com/publications/2004%20LAGOS%20STATE%20\(CIVIL%20PROCEDURE\)%20RULES%20AND%20THE%20LAW%20OF%20EVIDENCE.pdf](http://www.alimiandco.com/publications/2004%20LAGOS%20STATE%20(CIVIL%20PROCEDURE)%20RULES%20AND%20THE%20LAW%20OF%20EVIDENCE.pdf) 14 (date of use: 31 January 2013).

⁴²⁶ [1997] NWLR (Pt. 521) 466 at 481.

⁴²⁷ [1990] 2 NWLR (Pt. 135) 668 at 718.

⁴²⁸ Cf. also *Falobi v Falobi* (1976) 9 & 10 SC 1 at 14 *et seq.* with further references; *Kalu Mark & Anor v Chief Gabriel Eke* [1997] 11 NWLR (Pt. 529) 523 *et seq.* In addition, see Akaniro EG *Study Manual on Law of Evidence and Procedure I* 1997 200 *et seq.*; Nwadialo F *Civil Procedure in Nigeria* 1990 541 n. 30.04; Senlong CP 'Affidavit' in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 231 *et seq.*

⁴²⁹ Cf. *AG Federation & 2 Ors v Abubakar & 3 Ors* (2007) 4 SC (Pt. II) 247 at 247 *et seq.*

⁴³⁰ [1971] 2 All NLR 276 at 292 *et seq.* See also *Aluko O The Civil Procedure of the Superior Court in Nigeria* 1997 77; Boade OA 'Privilege' in Babalola A (ed) *Law and Practice of Evidence in Nigeria* 2001 160 *et seq.*; Ijaiyi H 'The Legal Rights and Obligations of Doctors in Nigeria' 2003 *Nigerian Bar Journal* 577 *et seq.*

At or before the trial, the court may direct that the number of medical or expert witnesses who may be called at the trial is limited.⁴³¹ In actions arising out of an accident on land due to a collision, the oral evidence of certain experts⁴³² is not receivable unless a copy of the report containing the substance of the expert evidence has been made available to all parties for inspection.⁴³³ Based on the wording of the relevant provision, it appears that only experts who are called to give evidence in the aforesaid actions and whose expertise relates to motor vehicles, have to provide a report in advance, but not other experts.⁴³⁴

B. Documentary Evidence

By virtue of Order 30(9)(1) of the Rules of the High Court of the Federal Capital Territory, a party may apply to the court for an order directing the opposing party to make discovery on oath of documents relating to any matter in issue, which are or have been in the opponent's possession or power.⁴³⁵ Order 30 of the said Rules does not specify a particular time when an application for discovery can be made. It is submitted that, as a general rule, such application can only be made after the close of pleadings, that is, once the issues tried between the litigants are defined.⁴³⁶

A litigant may only require discovery of documents from the opposing party, but not from a third party. Where a litigant requires documents in the possession or power of a third party, the issue of a *subpoena duces tecum* is required.⁴³⁷

A party can only apply for the discovery of documents “*relating to any matter in issue*”.⁴³⁸ Having said this, discovery is not only allowed with regard to documents directly admissible as evidence, that will prove or disprove a particular claim, but it extends to documents which may

⁴³¹ Order 38(5) of the Rules of the High Court of the Federal Capital Territory. For the question, whether such limitation is consistent with the Evidence Act, see Ojukwu E ‘A Critical Review of the New Lagos State Civil Procedure Rules’ 2003 *Nigerian Bar Journal* 548.

⁴³² Engineers to be called on account of their skills and knowledge with respect to motor vehicles.

⁴³³ Order 38(7) of the Rules of the High Court of the Federal Capital Territory.

⁴³⁴ According to Rule 38(9) of the Rules of the High Court of the Federal Capital Territory, Rule 38(7) of the aforesaid Rules applies to trial of issues, references, inquiries and assessments of damages as they apply to the trial of actions.

⁴³⁵ See also Order 30(14)(1) of the Rules of the High Court of the Federal Capital Territory. Based on this provision, a party may, at any time, require the opposing party, in whose pleadings or affidavits reference is made to any document, to produce such document for inspection.

⁴³⁶ This is also in line with Order 30(1) of the Rules of the High Court of the Federal Capital Territory, which allows the delivery of interrogatories once the parties have concluded their pleadings. See also Obi Okoye A *Essays on Civil Proceedings Volume One* 1986 304 n. 340.

⁴³⁷ See, amongst others, Nwadialo F *Civil Procedure in Nigeria* 1990 515 n. 29.46, 527 n. 29.62. Cf. also Section 218 of the Evidence Act and Order 38(29) of the High Court of the Federal Capital Territory.

⁴³⁸ Order 30(9)(1) *in fine* of the Rules of the High Court of the Federal Capital Territory.

enable the party to advance his case or damage that of his opponent.⁴³⁹ By contrast, fishing expeditions are not allowed under Nigerian law.⁴⁴⁰

The party who is required to make discovery has to make an affidavit which specifies the documents he has or has had in his possession or power, as well as the documents he objects to produce.⁴⁴¹ Discovery thus not only extends to documents which are or have been physically under the control of the party, but also to documents which are under the party's legal control and which the party is entitled to obtain from the person physically controlling the documents.⁴⁴² Where the party requiring discovery believes that the opponent did not tender all the material documents in his possession or power, he may apply for further discovery.⁴⁴³

Since discovery of documents only includes the production of a list of documents, but not their physical production,⁴⁴⁴ the party requesting discovery may apply for inspection of documents.⁴⁴⁵ Documents protected by a privilege have to be disclosed, but are not subject to production to the opposing party.⁴⁴⁶

Where a party fails to comply with an order for discovery or inspection of documents, he is liable to committal. While a plaintiff will have his action dismissed for want of prosecution, the defendant's defence will be struck out and he will be placed in the same position as if he had not defended.⁴⁴⁷

⁴³⁹ Ojukwu E and Ojukwu CN *Introduction to Civil Procedure* 2009 241; Nwadialo F *Civil Procedure in Nigeria* 1990 506 n. 29.35.

⁴⁴⁰ Karibi-Whyte AG *The Federal High Court: Law and Practice* 1986 207, 209.

⁴⁴¹ Order 30(11) of the Rules of the High Court of the Federal Capital Territory read in conjunction with Form 32 (para. 1-4) of the Appendix to the said Rules.

⁴⁴² Order 30(9)(1) of the Rules of the High Court of the Federal Capital Territory read in conjunction with Form 32 (para. 5) of the Appendix to the said Rules. Form 32 refers, *inter alia*, to documents in the possession, custody, or power of the legal practitioner or agent of the party, as well as any other person on the party's behalf. Furthermore, Form 32 (para. 5) not only mentions the original of a document, but also any copy thereof. See also Ojukwu E and Ojukwu CN *Introduction to Civil Procedure* 2009 241; Karibi-Whyte AG *The Federal High Court: Law and Practice* 1986 206, 208; Nwadialo F *Civil Procedure in Nigeria* 1990 507 n. 29.36.

⁴⁴³ Karibi-Whyte AG *The Federal High Court: Law and Practice* 1986 207.

⁴⁴⁴ Ojukwu E and Ojukwu CN *Introduction to Civil Procedure* 2009 253; Obi Okoye A *Essays on Civil Proceedings Volume One* 1986 306 n. 345.

⁴⁴⁵ Order 30(14)(1) of the Rules of the High Court of the Federal Capital Territory.

⁴⁴⁶ Karibi-Whyte AG *The Federal High Court: Law and Practice* 1986 209.

⁴⁴⁷ Order 30(20) of the Rules of the High Court of the Federal Capital Territory.

C. Real Evidence

With regard to the notion of “real evidence”, the comments made in relation to South African law apply *mutatis mutandis*.⁴⁴⁸

Section 127 of the Evidence Act empowers the court to conduct an inspection of immovable property and provides for two procedures for the inspection. In the first case, the court is adjourned to the place where the subject-matter of the inspection is located, and the proceedings continue at that place. Evidence is thus taken at the site of the inspection, and the witnesses give evidence like in a normal courtroom.⁴⁴⁹ In the second case, the court makes an inspection of the subject-matter only, while evidence of what transpired during the inspection is given in court afterwards.⁴⁵⁰

An inspection *in loco* has to be conducted in the presence of the parties and their counsel.⁴⁵¹ In *R v Albert Dogbe*,⁴⁵² it was held that at the inspection each of the witnesses needs to point out material places and things. Where the court merely conducts an inspection at the relevant location under Section 127(2)(b) of the Evidence Act, the witness should, on the re-assembly of the court, be put into the witness box and state on oath the observations he made during the inspection. The judge has not only to refrain from using his own observations made at the inspection and placing himself in the position of a witness, but also from arriving at conclusions of which there is no evidence upon the record.⁴⁵³ Finally, the court that conducts the view has to make a record of the inspection.⁴⁵⁴

⁴⁴⁸ See para. III.C above. Cf. also Adah CE *The Nigerian Law of Evidence* 2000 13 *et seq.*, 195 *et seq.*; Akaniro EG *Study Manual on Law of Evidence and Procedure I* 1997 39 *et seq.* With regard to the purpose of an inspection *in loco*, see *Obi v Mbionwu* (2002) 6 SC (Pt. II) 73 at 89, 90; *Agbafuna Ejidike and Others v Christopher Obiora* (1951) 13 WACA 270 at 273; *Enigwe v Akigwe* [1992] 2 NWLR (Pt. 225) 505 at 525 *et seq.*; *Igwe v Kalu* (2002) 2 SC (Pt. 1) 93 at 134.

⁴⁴⁹ Section 127(2)(a) of the Evidence Act.

⁴⁵⁰ Section 127(2)(b) of the Evidence Act. See also Adah CE *The Nigerian Law of Evidence* 2000 196.

⁴⁵¹ *Adekunle & Ors v Inspector-General of Police* [1955-1956] WRNLR 15; *Ayisatu Adunfe and Others v Inspector-General of Police* (1957) 2 FSC 21; *Igwe v Kalu* (2002) 2 SC (Pt. 1) 93 at 106, 115.

⁴⁵² (1947) 12 WACA 184.

⁴⁵³ *R v Albert Dogbe* (1947) 12 WACA 184 at 185. See also *Agbafuna Ejidike and Others v Christopher Obiora* (1951) 13 WACA 270 at 273 *et seq.*; *Yeku v Inspector-General of Police* (1959) LLR 138; *Seismograph Service Ltd v Benedict Onokpasa* [1972] 1 All NLR (Pt. 1) 343; *Awoyegbe and Another v Chief Ogbeide* [1988] 1 NWLR (Pt. 73) 695; *Briggs v Briggs* [1992] 3 NWLR (Pt. 228) 128 at 149 *et seq.*; *Enigwe v Akigwe* [1992] 2 NWLR (Pt. 225) 505 at 525 *et seq.*; *Igwe v Kalu* (2002) 2 SC (Pt. 1) 93 at 115 *et seq.*, 133 *et seq.*; *Obi v Mbionwu* (2002) 6 SC (Pt. II) 73 at 88; *Obi v Mbionwu* (2002) 6 SC (Pt. II) 73 at 89.

⁴⁵⁴ Adah CE *The Nigerian Law of Evidence* 2000 197 with reference to *Nwizuk v Enyok* [1953] 14 WACA 354. See also *Musa Maji v Mallam Shewu Shafi* [1965] NMLR 33; *Awoyegbe and Another v Chief Ogbeide* [1988] 1 NWLR (Pt. 73) 695 at 709 *et seq.*; *Enigwe v Akigwe* [1992] 2 NWLR (Pt. 225) 505 at 525 *et seq.*; *Shekse v Plankshak & 4 Ors* [2008] 7 S.C. 178 at 189 *et seq.* See also *Hyacinth Anyanwa v Robert A. Mbara and Another* [1992] 6 SCNJ (Pt. 1) 22 at 36.

D. Discovery of Facts

With regard to discovery, the Rules of the High Court of the Federal Capital Territory distinguish between discovery of facts,⁴⁵⁵ so-called “interrogatories”, and discovery of documents.⁴⁵⁶ While the latter relates to documents, which may be produced at the trial, interrogatories concern facts which may be given *viva voce* in evidence at the hearing.⁴⁵⁷

Order 30(1) of the Rules of the High Court of the Federal Capital Territory provides that after the close of pleadings, a party may, by leave of court, deliver interrogatories in writing for the examination of the opponent.⁴⁵⁸ Ojukwu and Ojukwu define an interrogatory as “*written cross-examination before trial*,”⁴⁵⁹ or, in the words of Karibi-Whyte, interrogatories are a series of questions drawn up by a party and served on the opponent requiring the latter to answer.⁴⁶⁰ Interrogatories enable a party to obtain facts from the opposing party where there are no material documents to be disclosed *via* discovery. They have a dual function: to enable the securing of admissions from the other party, which facilitates the proof at the trial, and to ascertain as much as possible the case of the opponent.⁴⁶¹

Only litigants, but not third parties, are subject to interrogatories under Order 30(1) of the Rules of the High Court of the Federal Capital Territory. Statements of facts by a third party can only be secured by summoning such person to appear in court to give evidence at the trial.⁴⁶²

The court allows the delivery of interrogatories if they relate to any matters in question and are necessary either for disposing fairly of the action or for saving costs.⁴⁶³ In *Onyiuke v The Voice of the People Ltd*,⁴⁶⁴ it was held that interrogatories extend to the admission of anything, which the plaintiff has to prove in relation to any issue raised between the parties. The facts that are sought *via* interrogatories do not have to be directly in issue, but may be facts that are relevant

⁴⁵⁵ Order 30(1)-(9) of the Rules of the High Court of the Federal Capital Territory.

⁴⁵⁶ Order 30(9)-(19) of the Rules of the High Court of the Federal Capital Territory.

⁴⁵⁷ Obi Okoye A *Essays on Civil Proceedings Volume One* 1986 304 n. 339.

⁴⁵⁸ For the form in which interrogatories have to be submitted to the court, see Form 30 of the Appendix to the Rules of the High Court of the Federal Capital Territory, Order 30(3) of the said Rules.

⁴⁵⁹ Ojukwu E and Ojukwu CN *Introduction to Civil Procedure* 2009 248.

⁴⁶⁰ Karibi-Whyte AG *The Federal High Court: Law and Practice* 1986 216.

⁴⁶¹ Karibi-Whyte AG *The Federal High Court: Law and Practice* 1986 201, 215, 216; Nwadialo F *Civil Procedure in Nigeria* 1990 496 n. 29.13.

⁴⁶² See Orders 30(1) and 38(29) of the Rules of the High Court of the Federal Capital Territory.

⁴⁶³ Orders 30(1), and 30(2)(2) of the Rules of the High Court of the Federal Capital Territory. See in this regard also Karibi-Whyte AG *The Federal High Court: Law and Practice* 1986 218 *et seq.*; Obi Okoye A *Essays on Civil Proceedings Volume One* 1986 307 n. 348.

⁴⁶⁴ 10 ENLR 187.

to the existence of other facts which are directly in issue.⁴⁶⁵ As a result, so-called “fishing interrogatories” are not allowed.⁴⁶⁶ Similarly, interrogatories aiming at evidence of the other party, as opposed to facts, are inadmissible.⁴⁶⁷

The party interrogated must answer by affidavit and is bound by his answers.⁴⁶⁸ In cases where the interrogating party considers the affidavit as insufficient, he may apply to the court for an order requiring adequate answers.⁴⁶⁹ Where a party fails to comply with an order to answer interrogatories, the relevant comments made in relation to the discovery of documents apply accordingly.⁴⁷⁰

VII. Uganda

A. Testimony of Witnesses

1. Competence and Compellability of Witnesses

By virtue of Section 117 of the Evidence Act,⁴⁷¹ all persons are competent to give evidence, unless the court considers them unable to comprehend the questions put to them or to give ra-

⁴⁶⁵ Ojukwu E and Ojukwu CN *Introduction to Civil Procedure* 2009 249 with reference to *Marriot v Chamberlain* (1886) 17 QBD 154. See also Nwadialo F *Civil Procedure in Nigeria* 1990 496 n. 29.14.

⁴⁶⁶ Nwadialo F *Civil Procedure in Nigeria* 1990 499 n. 29.19. In *Hennesey v Wright* (1888) 24 QBD 445 at 448, the rule against “fishing interrogations” was explained as follows: “*The moment it appears that questions are asked and answers insisted upon in order to enable the party to see if he can find a case, either complaint or defence of which at present he knows nothing, and which will be a different case from that which he now makes, the rule against ‘fishing’ interrogations applies.*”

⁴⁶⁷ Ojukwu E and Ojukwu CN *Introduction to Civil Procedure* 2009 249 with reference to *Hooton v Dalby* [1907] 2 KB 18. For more on inadmissible interrogatories, see Nwadialo F *Civil Procedure in Nigeria* 1990 497 n. 29.15 *et seq.*

⁴⁶⁸ Orders 30(5)(1) and 30(6) of the Rules of the High Court of the Federal Capital Territory. For the form of the affidavit, see Form 31 of the Appendix to the Rules of the High Court of the Federal Capital Territory. Needless to say, the answer to any interrogatory is subject to the privileges of the person interrogated. See also Order 30(7) of the said Rules, which forbids questions that are scandalous, irrelevant, without *bona fide*, or insufficiently material.

⁴⁶⁹ Order 30(8) of the Rules of the High Court of the Federal Capital Territory.

⁴⁷⁰ *Cf.* para. VII.B above.

⁴⁷¹ Of 1909 (Chapter 6).

tional answers due to tender years,⁴⁷² extreme old age, disease of body or mind,⁴⁷³ or any other cause of the same kind.⁴⁷⁴

By virtue of Section 121 of the Evidence Act, litigants and their spouses are competent witnesses.

2. Privileges of Witnesses

Judges and magistrates are not compellable witnesses with regard to questions as to their conduct in court, or anything which came to their knowledge in court in their official function. They, however, can be compelled to testify in relation to matters which occurred in their presence while they were so acting.⁴⁷⁵ Magistrates and police officers cannot be compelled to reveal the source of their information as to the commission of any offence.⁴⁷⁶

Section 122 of the Evidence Act prohibits the disclosure of unpublished official records relating to any affairs of state, except with the permission of the competent public officer. By virtue of Section 123 of the said Act, communications made to a public officer in the course of his duty are privileged, when he considers that the public interest would suffer by the disclosure.

Section 125 of the Evidence Act protects the professional communications of legal advisers. Without his client's consent, a legal practitioner cannot be forced to disclose any communication made to him in the course and for the purpose of his professional employment, or to state the contents or condition of any document, with which he was acquainted in the course of his employment, or to disclose any advice given by him to his client. No privilege, however, exists where such communication was made in furtherance of any illegal purpose, or relates to any fact showing that any crime or fraud has been committed since the commencement of the

⁴⁷² That is, generally, children below the age of 14. See in this regard *Andrea Isingoma v Uganda* [1989] KALR 24 at 32; *Susan Kigula Sserembe and Anor v Uganda* [2008] UGSC 15 (<http://www.ulii.org/ug/judgment/supreme-court/2008/15>; date of use: 31 January 2013) with reference to *Kibangeny v R* [1959] EA 92.

⁴⁷³ According to Section 117 of the Evidence Act, lunatics are competent to testify during lucid intervals. With regard to dumb witnesses, see Section 118 of the said Act. This provision is identical with Section 176 of the Nigerian Evidence Act. See in this regard para. VI.A.1 above.

⁴⁷⁴ The wording of Section 117 of the Ugandan Evidence Act is virtually identical with that of Section 175(1) of the Nigerian Evidence Act. With regard to the latter, *cf.* para. VI.A.1 above. For the difference between the competence, compellability, and privileges of witnesses, see para. II.B.2 above.

⁴⁷⁵ Section 119 of the Evidence Act.

⁴⁷⁶ Section 124 of the Evidence Act. The same holds true for revenue officers, Section 124 *in fine* of the Evidence Act.

counsel's employment.⁴⁷⁷ The above applies not only to legal advisers, but also to their interpreters, clerks, and servants.⁴⁷⁸

Based on Section 128 of the Evidence Act, it is not only the legal adviser who can decline the disclosure of confidential professional communication which has been passed between him and his client, but also the client.⁴⁷⁹ The privilege furthermore extends to communications the legal adviser and/or the client had with third parties, provided such communications were made with reference to an actual or anticipated litigation, or to enable the client to obtain or the counsel to give legal advice.⁴⁸⁰

Individuals other than legal practitioners who receive confidential information in the course of their profession, such as doctors or priests, do not enjoy a professional privilege.⁴⁸¹ With regard to journalists, mention has to be made of the Press and Journalist Act.⁴⁸² Rule 2 in the Fourth Schedule to the said Act provides that no journalist shall disclose the source of his information, unless in the event of an overriding consideration of public interest and within the framework of the law of Uganda. It appears that there is no reported case law dealing with the privilege of journalists and with the aforesaid provision in the Press and Journalist Act in particular.

A witness who is not a party to a suit is not compellable to produce his title deeds to any property or any documents in virtue of which he holds any property as pledgee or mortgagee. The same holds true for documents whose disclosure tends to incriminate him.⁴⁸³

By virtue of Section 130 of the Evidence Act, a person cannot be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce, if they were in his possession.⁴⁸⁴

Section 131 of the Evidence Act provides that a witness is not excused from answering any questions upon the ground that the answers may tend to incriminate him, or may tend to expose him to a penalty or forfeiture of any kind. The same holds true for answers which may tend to

⁴⁷⁷ Section 125 of the Ugandan Evidence Act is almost identical with Section 192 of the Nigerian Evidence Act. See in this regard para. VI.A.2 above.

⁴⁷⁸ Section 126 of the Evidence Act.

⁴⁷⁹ The wording of this provision is identical with that of Section 195 of the Nigerian Evidence Act. See in this regard para. VI.A.2 above.

⁴⁸⁰ Ssekaana M and Ssekaana SN *Civil Procedure and Practice in Uganda* 2010 242, 243.

⁴⁸¹ Brown D and Allen PAPJ *An Introduction to the Law of Uganda* 1968 71.

⁴⁸² Chapter 105.

⁴⁸³ Section 129 of the Evidence Act. Note that the wording of this provision is the same as Section 184 of the Nigerian Evidence Act. With regard to the latter, see para. VI.A.2 above.

⁴⁸⁴ This provision is identical with Section 185 of the Nigerian Evidence Act. Cf. in this regard para. VI.A.2 above.

establish that he owes a debt or is otherwise subject to a civil suit. No such answers, however, subject the witness to any arrest or prosecution, or are proved against him in any subsequent criminal proceedings, except a prosecution for giving false evidence by such answers.⁴⁸⁵

Finally, Section 22 of the Evidence Act provides that in civil cases, no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or in circumstances from which the court can infer that the parties agreed that evidence of it should not be given. In *Peter Kaggwa v New Vision Printing & Publishing Corporation and Others*,⁴⁸⁶ it was held that by heading an acceptance letter “without prejudice”, which was drafted in the course of negotiations to settle a dispute, the defendant made clear to the plaintiff that the acceptance had been made upon an express condition that evidence of acceptance was not to be given in the event of any future proceedings. As a result, the court qualified the acceptance letter as a privileged communication.

3. Examination of Witnesses

As a general rule, witnesses give evidence orally before the trial court.⁴⁸⁷ In addition, evidence of witnesses may also be taken on commission, or by affidavit.

a) Oral Testimony before the Trial Court

In civil proceedings before the High Court of Uganda, the examination of witnesses is conducted by the parties. The witnesses are subject to the examination-in-chief, cross-examination, and re-examination through the litigant’s counsel.⁴⁸⁸ Leading questions are not allowed in examination-in-chief and re-examination, but may be asked in cross-examination.⁴⁸⁹

As a general rule, witnesses are not allowed to use documents while testifying in court.⁴⁹⁰

In order to obtain proper proof of relevant facts, the court has the power to ask any question it pleases of any witness about any fact relevant or irrelevant. A witness, however, cannot be

⁴⁸⁵ See in this regard, however, Ssekaana M and Ssekaana SN *Civil Procedure and Practice in Uganda* 2010 243 *et seq.* who hold, with reference to the English case *Renworth Limited v Stephensen* [1996] 3 All ER 244, that a party has a right to refuse to answer questions or produce documents tending to show that he has been guilty of a criminal offence, or exposing him to any penalty, which is reasonably likely to be sought.

⁴⁸⁶ [2006] UGCommC 5 (<http://www.ulii.org/ug/judgment/commercial-court/2006/5>; date of use: 31 January 2013).

⁴⁸⁷ Order 18(4) of the Civil Procedure Rules.

⁴⁸⁸ Sections 136-137 of the Evidence Act. For more on examination-in-chief, cross-examination and re-examination, see para. III.A.3.a) above and Chapter 2 para. IV.B.2.c).

⁴⁸⁹ Sections 141-142 of the Evidence Act. For more on questions a party may put to a witness, see Sections 143-151 of the said Act.

⁴⁹⁰ See, however, the exceptions in Section 158(1)-(2) of the Evidence Act.

compelled to answer any questions for which he can invoke a privilege under Sections 119-130 of the Evidence Act.⁴⁹¹ By virtue of Order 18(13) of the Civil Procedure Rules, the court has the power to recall any witness, and to put such questions to him as it thinks fit. *E contrario*, the court cannot call a witness who has not already given evidence, except with the permission of the parties.⁴⁹²

Oral evidence is generally given on oath or affirmation. By reason of tender years, or for any other sufficient cause, the court may, however, allow a witness to give evidence without oath or affirmation.⁴⁹³ The testimony of each witness is recorded in writing. Such record does not have to be in the form of question and answer, but in that of a narrative.⁴⁹⁴ On the application of a party, however, the court may take down any particular question or answer, if there appears to be any special reason for so doing.⁴⁹⁵

The comments on the communications between counsel and non-party witnesses prior to the trial that were made in relation to South African law apply *mutatis mutandis* to Ugandan law.⁴⁹⁶

b) Evidence on Commission

By virtue of Order 28(1) and (4) of the Civil Procedure Rules, the court may issue a commission for the examination of a witness resident in Uganda if such witness is, *inter alia*, located in the jurisdiction of another Ugandan court, is about to leave the trial court's jurisdiction before the hearing, is unable to attend court due to sickness or infirmity, or is a civil or military officer of the Government who cannot, in the opinion of the court, attend without detriment to the public service.⁴⁹⁷ Since the nature of a commission *de bene esse* has already been explained earlier, it is not necessary to further elaborate in this regard.⁴⁹⁸

The relevant witness is questioned in the presence of the commissioner appointed by the court, as well as the litigants and their counsel. The witness is subject to examination-in-chief, cross-

⁴⁹¹ Section 164 of the Evidence Act. This provision is similar to Section 246 of the Nigerian Evidence Act. With regard to the latter provision, see para. VI.A.3.a) above.

⁴⁹² See also Ssekaana M and Ssekaana SN *Civil Procedure and Practice in Uganda* 2010 262.

⁴⁹³ Cf. Section 9 of the Oath Act (Chapter 19).

⁴⁹⁴ Order 18(5) of the Civil Procedure Rules.

⁴⁹⁵ Order 18(8) of the Civil Procedure Rules. For more on the recording of evidence, see Order 18(7) and (9)-(10) of the Civil Procedure Rules.

⁴⁹⁶ See in this regard para. III.A.3.a) above.

⁴⁹⁷ Order 28(4)(1), and (8) of the Civil Procedure Rules.

⁴⁹⁸ Cf. the relevant comments in Chapter 4 para. III.C.2.b).

examination, and re-examination.⁴⁹⁹ As indicated earlier,⁵⁰⁰ a commissioner is entrusted with wide powers and can, *inter alia*, not only examine the litigants and any witness whom they produce, but any other person whom the commissioner thinks proper to call upon to give evidence in the matter referred to him.⁵⁰¹ The same applies with regard to documents and other things relevant to the subject of the commissioner's inquiry. Moreover, the commissioner may apply to the trial court for the issue of any process which he may find necessary to issue to or against the witness.⁵⁰² The witness' testimony is recorded in the same way as evidence taken before the trial court.⁵⁰³

c) Evidence on Affidavit

According to Order 19(1) of the Civil Procedure Rules, the court may order that any particular fact may be proved by affidavit. No such order, however, is issued, if it appears to the court that either party desires *bona fide* the production of the particular witness for cross-examination.⁵⁰⁴ In order to test the credibility of evidence given in an affidavit, there should, as a general principle, be an affidavit in reply or a counter affidavit.⁵⁰⁵ In *Regal Pharmaceuticals Ltd v Maria Asumpta Pharmaceuticals Ltd*,⁵⁰⁶ it was held that it is a celebrated principle that where evidence is by affidavit, the matter in question should not be substantially in dispute by contrary affidavit evidence.⁵⁰⁷

d) Expert Witnesses

In civil proceedings pending before the High Court of Uganda, expert witnesses are regarded as ordinary (non-party) witnesses. Consequently, experts are appointed by the parties, and are subject to examination-in-chief, cross-examination, and re-examination by the litigants' counsel.

⁴⁹⁹ Order 28(17)(1) read in conjunction with Order 18(4) of the Civil Procedure Rules.

⁵⁰⁰ See Chapter 4 para. III.C.2.b).

⁵⁰¹ Order 28(16) of the Civil Procedure Rules. See also Order 28(9) of the said Rules, which provides that the trial court may appoint a commissioner to make local investigations.

⁵⁰² Order 28(17)(2) of the Civil Procedure Rules. This may, for instance, include the use of compulsion against a recalcitrant witness.

⁵⁰³ Order 28(17)(1) read in conjunction with Order 18(5) of the Civil Procedure Rules.

⁵⁰⁴ Order 19(1) of the Civil Procedure Rules.

⁵⁰⁵ Ssekaana M and Ssekaana SN *Civil Procedure and Practice in Uganda* 2010 264 with reference to *Karim Hirji v Pan African Insurance Company* [1990-1991] KALR 184 at 192. For more on affidavits, see Ssekaana M and Ssekaana SN *Civil Procedure and Practice in Uganda* 2010 264 *et seq.*

⁵⁰⁶ [2011] UGCommC 114 (<http://www.ulii.org/ug/judgment/commercial-court/2011/114>; date of use: 31 January 2013).

⁵⁰⁷ For more on affidavits, see also *Dr. Runumi Mwesigye v The Returning Officer & 2 Others* [2003] KALR 451 at 452 *et seq.*

In *Namaizi Grace v Kinyara Sugar Works Ltd*,⁵⁰⁸ the court rejected the report of an expert, because it was biased in favour of the party who called the expert. In this context, the court stated the following:

“There is a general feeling (...) that expert witnesses are selected to prove a case and are often close to being professional liars. It is often quite surprising to see with what facility, and to what an extent, their view can be made to correspond with the wishes or the interests of the parties who call them. They do not, indeed, wilfully misrepresent what they think, but their judgments become so warped by regarding the subject in one point of view, that, even when conscientiously disposed, they are incapable of forming an independent opinion.”

B. Documentary Evidence

By virtue of Order 10(12)(1) of the Civil Procedure Rules, a party may apply to the court for an order directing any other party to make discovery on oath of documents, which are or have been in his possession or power, relating to any matter in question. It is submitted that an application for discovery can only be made once the parties have concluded their pleadings.⁵⁰⁹

Discovery of documents can only be requested with regard to parties. Consequently, the issue of a *subpoena duces tecum* is necessary where a litigant wishes to obtain documents from a third party.⁵¹⁰

An application under Order 10(12) of the Civil Procedure Rules is only granted if the discovery relates to any matter in question,⁵¹¹ and is necessary either for disposing fairly of the suit or saving costs.⁵¹² Since the first requirement is determined based on the principles developed in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Company*,⁵¹³ reference can be made to the relevant comments under South African law.⁵¹⁴

The party requested to make discovery has to issue an affidavit wherein he specifies the documents that are or have been in his possession, custody, or power, as well as those which he objects to produce. Discovery thus also extends to documents which are or have been in the pos-

⁵⁰⁸ [2003] UGHC 78 (<http://www.ulii.org/ug/judgment/high-court/2003/78>; date of use: 31 January 2013). See also *Rtd. Col. Dr. Kizza Besigye v Electoral Commission, Yoweri Kaguta Museveni (Election Petition No. 1 of 2006)* [2007] UGSC 24 (<http://www.ulii.org/ug/judgment/constitutional-law-election-petitions/2007/24>; date of use: 31 January 2013).

⁵⁰⁹ Cf. also Order 10(20) of the Civil Procedure Rules on premature discovery.

⁵¹⁰ See Order 16(1) of the Civil Procedure Rules.

⁵¹¹ Order 10(12) (1) of the Civil Procedure Rules.

⁵¹² Order 10(12)(2) of the Civil Procedure Rules. See also Ssekaana M and Ssekaana SN *Civil Procedure and Practice in Uganda* 2010 241.

⁵¹³ (1882) 11 QBD 55 at 63. See Ssekaana M and Ssekaana SN *Civil Procedure and Practice in Uganda* 2010 241.

⁵¹⁴ Cf. para. III.B above.

session or power of an agent or advocate of a party, or any other person who acted on behalf of a party.⁵¹⁵ The party requiring discovery may apply for further discovery, if he believes that the opponent did not tender all the relevant documents.⁵¹⁶

The party who made discovery has to allow the other party to inspect the disclosed documents.⁵¹⁷ Documents, however, which are privileged are not subject to inspection.⁵¹⁸

Where a party fails to comply with any order for discovery or inspection of documents, the court may dismiss the plaintiff's suit for want of prosecution or strike out the defendant's defence.⁵¹⁹

C. Real Evidence

With regard to the notion of "real evidence", reference can be made to the relevant comments in relation to South African law.⁵²⁰

Order 18(14) of the Civil Procedure Rules empowers the court to inspect a property or thing concerning which any question may arise. An inspection *in loco* is to be held in the presence of the parties and their counsel. Where a litigant or third-party witness makes observations during the inspection, such observations are to be given on oath, and the witness has to be subject to cross-examination by the opposing party. Observations made by the court on site have to be recorded. Following the conduct of the inspection, the judge should refrain from constituting himself a witness in the case and substituting personal observations for evidence.⁵²¹

⁵¹⁵ See Order 10(13) of the Civil Procedure Rules in conjunction with Form 5 (para. 5) of Appendix B to the Civil Procedure Rules. Form 5 (para. 5) not only makes reference to the original of the documents, but also to a copy or extract thereof.

⁵¹⁶ *Cf.* also Ssekaana M and Ssekaana SN *Civil Procedure and Practice in Uganda* 2010 245. See in this regard Order 10(14) of the Civil Procedure Rules, which provides that the court may, *suo motu*, at any time during the pendency of a suit order the production of documents from a party.

⁵¹⁷ Order 10(15) of the Civil Procedure Rules. For more on the inspection of documents, *cf.* Order 10(16)-(19) of the said Rules.

⁵¹⁸ See also Ssekaana M and Ssekaana SN *Civil Procedure and Practice in Uganda* 2010 242. *Cf.* also Order 10(13) of the Civil Procedure Rules.

⁵¹⁹ Order 10(21) of the Civil Procedure Rules,

⁵²⁰ See para. III.C above. With regard to the purpose of an inspection *in loco*, see *Mukasa v Uganda* [1964] EA 698 at 700.

⁵²¹ *Mukasa v Uganda* [1964] EA 698 at 700. See also *Matsiko Edward v Uganda* [1999] UGCA 18 (<http://www.ulii.org/ug/judgment/court-appeal/1999/18>; date of use: 31 January 2013).

D. Discovery of Facts

The Civil Procedure Rules distinguish between the discovery of facts,⁵²² so-called “interrogatories”, and the discovery of documents.⁵²³ The nature of interrogatories has already been outlined in connection with Nigerian law, and reference can thus be made to the relevant comments in this regard.⁵²⁴

In terms of Order 10(1) of the Civil Procedure Rules, a party may apply to the court for leave to deliver interrogatories and discoveries in writing for the examination of the opposing party.⁵²⁵ It is submitted that such application can only be made after the close of pleadings, that is, once the points of dispute are ascertained and defined.⁵²⁶

An application for delivery of interrogatories can only be made with regard to a litigant, but not a third party. Where a litigant wishes to obtain statements regarding facts from a third party, he must obtain summons in order to secure the third party’s attendance at the trial.⁵²⁷

The court only allows delivery of interrogatories which relate to the matters in question.⁵²⁸ Interrogatories are not limited to facts directly in issue, but they include any facts whose existence or non-existence is relevant to the existence or non-existence of the facts directly in issue.⁵²⁹ Under Ugandan law, so-called “fishing interrogatories” are not allowed.⁵³⁰ In addition, interrogatories must be necessary either for disposing fairly of the suit or for saving costs.⁵³¹ This is, for instance, not the case where witnesses are likely to be called at the trial to give evidence on the same matters.⁵³²

⁵²² Order 10(1)-(11) of the Civil Procedure Rules. See also Ssekaana M and Ssekaana SN *Civil Procedure and Practice in Uganda* 2010 235.

⁵²³ Order 10(12)-(20) of the Civil Procedure Rules. Cf. also Ssekaana M and Ssekaana SN *Civil Procedure and Practice in Uganda* 2010 240.

⁵²⁴ See para. VI.D above.

⁵²⁵ Cf. also Order 10(2)(1) of the Civil Procedure Rules. For the form of interrogatories, see Form 2 of Appendix B to the said Rules.

⁵²⁶ Cf. also Ssekaana M and Ssekaana SN *Civil Procedure and Practice in Uganda* 2010 236.

⁵²⁷ See Order 16(1) of the Civil Procedure Rules.

⁵²⁸ Order 10(1)(b) of the Civil Procedure Rules.

⁵²⁹ Ssekaana M and Ssekaana SN *Civil Procedure and Practice in Uganda* 2010 236 with reference to *Marriott v Chamberlain* (1886) 17 QBD 154 at 163.

⁵³⁰ Ssekaana M and Ssekaana SN *Civil Procedure and Practice in Uganda* 2010 236 *et seq.*

⁵³¹ Order 10(2)(2) of the Civil Procedure Rules.

⁵³² Ssekaana M and Ssekaana SN *Civil Procedure and Practice in Uganda* 2010 237 with reference to *Griebart v Morris* [1920] 2 KB 659 at 666. See also Order 10(7) of the Civil Procedure Rules, which forbids unreasonable, vexatious, prolix, oppressive, unnecessary, or scandalous interrogatories.

Interrogatories are to be answered by affidavit.⁵³³ Needless to say, the party interrogated does not have to provide answers in relation to matters that are privileged.⁵³⁴ Where the party interrogated omits to answer questions or answers them insufficiently, the other party may apply to the court for an order requiring him to answer, or to answer further.⁵³⁵

Where a party fails to comply with any order to answer interrogatories, the relevant comments made in relation to the discovery of documents also apply here.⁵³⁶

VIII. Conclusion

When dealing with the means of proof and the procedure for the taking of evidence in civil proceedings in the countries dealt with in this thesis, one has to distinguish between Switzerland on the one hand, and South Africa, Botswana, Namibia, Nigeria, and Uganda on the other. Once again, this distinction stems from the fact that Switzerland shares the civil-law tradition, while South Africa, Botswana, Namibia,⁵³⁷ Nigeria, and Uganda follow the common-law system. It therefore comes as no surprise that the means of proof and the principles governing the procedure for the taking of evidence in civil proceedings in the said African countries are very similar. In order to avoid repetition, the following remarks thus give a summary of the means of proof and the relevant procedure in civil proceedings before the High Court of South Africa. Only where there are substantial differences between the relevant rules in South Africa and those in Botswana, Namibia, Nigeria, and Uganda, will reference be made to the latter rules.

In civil proceedings before the High Court of South Africa, evidence can be given by the testimony of a witness, the presentation of documentary evidence, and the presentation of real evidence. Testimonial evidence covers litigants, third parties, and experts. Every person is presumed to be competent to give evidence, provided he is able to comprehend the questions put to him, and to give reasonable answers. A competent witness may decline to give answers which may expose him to a criminal charge, penalty, or forfeiture. A spouse may refuse to divulge communications made to him by the other spouse during the marriage, or to answer questions regarding which the other spouse would be able to invoke a privilege. The disclosure

⁵³³ Order 10(8) of the Civil Procedure Rules. With regard to the form of the affidavit, see Form 3 of Appendix B to the said Rules.

⁵³⁴ See in this regard para. VII.A.2 above.

⁵³⁵ Order 10(11) of the Civil Procedure Rules.

⁵³⁶ Order 10(21) of the Civil Procedure Rules. See para. VII.B above.

⁵³⁷ Strictly speaking, South Africa, Botswana, and Namibia follow a hybrid system. The rules on civil procedure in the said countries are, however, derived from the English law. As a result, South Africa, Botswana, and Namibia share with regard to civil procedure the common-law tradition. See in this regard Chapter 2 para. IV.B.2.a).

of evidence can furthermore be declined based on the grounds of public policy, or public interest. The same holds true for “without prejudice” statements of the parties. Finally, communications between a legal adviser and his client, as well as communications between a counsel or his client and an agent or third party are privileged. As a general rule, witnesses are examined *viva voce* before the trial court. The examination is conducted by the parties, and witnesses are subject to the examination-in-chief, cross-examination, and re-examination by the litigants’ counsel. The court may put questions to witnesses in order to clarify ambiguous points. Witnesses are generally examined upon oath, and their testimony is recorded in a *verbatim* transcript. In certain cases, however, the court may deviate from the aforesaid general rule, and may allow a witness to give evidence on commission, based on interrogatories, or by affidavit. In the first case, the witness gives his oral testimony not in the presence of the trial court, but before a court-appointed commissioner in the presence of the parties, and their counsel. The witness is subject to the examination-in-chief, cross- and re-examination by the litigants’ counsel. The court may, however, order that evidence before the commissioner is given by interrogatories. In this case, the commissioner interrogates the witness based on a list of questions prepared by the litigants. Such examination is conducted in the absence of the parties and their counsel, and hence, no examination-in-chief, cross- or re-examination takes place. Furthermore, the court may allow a witness to give evidence on affidavit, that is, based on a written and sworn statement of evidence submitted by the witness that replaces the latter’s *viva voce* evidence. The aforesaid procedures also apply to the examination of experts. Although the latter are selected by the parties, they are not mere partisan experts, but owe allegiance to the court, and have to provide the judge with an objective and unbiased expert opinion. Where a litigant wishes to use documents as evidence which are not in his possession or power, two different procedures apply, depending on whether the documents are under the control of the opposing party or a third party. In the latter case, the litigant has to call the third party as a witness who is required to produce the relevant documents to the court at the trial. With regard to documents controlled by the opponent, the litigant may require the latter to make discovery of all documents relating to the action. Discovery extends to documents that contain information, which either directly or indirectly enable the party requiring discovery to advance his own case or to damage the adversary’s case. So-called “fishing expeditions” are excluded. The party required to make discovery has to specify the relevant documents that are or have been in his possession or power, and has, upon request of the other party, to make the documents available for inspection. Privileged documents have to be disclosed, but are not subject to inspection. Where the inspection of immovable property or a location by the court is necessary, the parties

and their counsel have the right to be present at such inspection. Any observations made on the spot by the court, the litigants, or non-party witnesses have to be recorded. As the witnesses are not under oath during the inspection, the judge should, following the inspection, recall the former to testify on their observations at the trial.

In addition to the privileges under South African law, a non-party witness in civil proceedings in Nigeria cannot be compelled to produce his title-deeds to any property, or documents the production of which might tend to incriminate him. Furthermore, no one can be compelled to produce documents in his possession which any other person would be entitled to refuse to produce if they were in his possession. Unlike the laws of South Africa, Botswana, and Namibia, the Rules of the High Court of the Federal Capital Territory of Nigeria do not provide for the examination of witnesses on commission based on interrogatories. The said Rules, however, distinguish between the discovery of documents and the discovery of facts. In the second case, a party may deliver so-called “interrogatories” to the opponent wherein the latter is asked to answer the questions drawn up by the other party. The interrogatories have to relate to any matters in questions, and so-called “fishing interrogatories” are not allowed. Interrogatories allow a litigant to obtain facts from the opposing party where there are no relevant documents to be disclosed through discovery.

The foregoing comments on privileges under Nigerian law apply *mutatis mutandis* to Ugandan law. In contrast to the laws of South Africa, Botswana, Namibia, and Nigeria, Ugandan law does not provide for a full-fledged privilege against self-incrimination. Under Ugandan law, a witness can be compelled to answer questions which may incriminate him, or tend to expose him to any penalty or forfeiture. No such answers, however, subject the witness to any arrest or prosecution, or are proved against him in any subsequent criminal proceedings. Like Nigerian law, Ugandan law does not recognise the taking of evidence on commission based on interrogatories, and distinguishes between the discovery of documents and the discovery of facts. The remarks on interrogatories under Nigerian law thus apply *mutatis mutandis* to civil proceedings pending before the High Court of Uganda.

Under the Swiss Civil Procedure Code, evidence may be given by witness testimony, documents, inspection, expert opinions, written information, party testimony, and testimony given under oath. Swiss law distinguishes between evidence given by litigants (party testimony and testimony given under oath), by third parties (witness testimony), and court-appointed experts (expert opinion). As a result, different rules apply to evidence, depending on whether it was

given by litigants, third parties, or experts. Any individual, who is physically and mentally fit to give evidence before court, is a competent witness. A non-party witness, who is married to a party, has children with a party, or is a direct relative or in-law of a party, cannot be compelled to give evidence. In addition, a third party may refuse to answer questions which may expose him, his spouse, the parent of his child, or a direct relative or in-law to the risk of penal investigation or civil liability. The same holds true for a third party who is subject to a statutorily protected secret, such as a doctor, dentist, pharmacist, clergyman, or legal adviser. Moreover, public officials, individuals acting as ombudsmen or mediators, as well as journalists may invoke a privilege. By contrast, a litigant may only decline to answer questions which may subject his spouse, the parent of his child, or a relative or in-law to penal investigation or civil liability. The same applies to a litigant who is privy to a statutorily protected secret. While experts may give evidence orally and/or in writing, litigants and third parties may only testify *viva voce*. The examination of litigants, non-party witnesses, and experts is conducted by the court. With the leave of the court, a party or his counsel may put questions to the opponent, a non-party witness, or an expert. Third parties and experts do not testify on oath; they are, however, exhorted to tell the truth. The same applies to litigants, unless the court orders them to make a testimony under oath. The evidence given by litigants, third parties and experts is recorded in a summary transcript. Experts are regarded as aides of the court. Hence, it is the court that appoints the expert, propounds to him the facts to be assumed and investigated, and formulates the questions he has to address. The expert owes allegiance to the court and has, in relation to the litigants, a strict obligation of neutrality. With the leave of the court, the expert can make its own investigations, but he has, at any time, to safeguard the litigants' right to be heard, and the principle of equality of the parties. By contrast, expert witnesses selected by the parties are considered as ordinary non-party witnesses. With regard to documentary evidence, litigants and third parties have a duty to produce documents, unless the latter are protected by a privilege. A litigant, who wishes to use documents which are under the control of the opponent or a third party as evidence has to sufficiently specify the documents in his pleadings. So-called "fishing expeditions" are not allowed. Once the parties have concluded their pleadings, the court may issue orders wherein the litigants and third parties are directed to submit the relevant documents to the court. The court has the power to inspect things or locations. The parties and their counsel have a right to be present at an inspection *in loco*. Where necessary, the court may interrogate litigants and non-party witnesses or experts, if any, at the inspection. The court has to make a record of the inspection. Finally, the court may request an authority to pro-

vide written information. The same applies with regard to a private individual, provided his oral examination seems unnecessary.

In the light of the above, the main differences between the means of proof and the procedure for the taking of evidence in civil proceedings in Switzerland and those in civil proceedings in South Africa, Botswana, Namibia, Nigeria, and Uganda are obvious. Unlike the laws of these African countries, Swiss law distinguishes between the evidence given by litigants, third parties, and court-appointed experts, and thus provides for different rules for the testimony of such persons. Compared to the laws of South Africa, Botswana, Namibia, Nigeria, and Uganda, the compellability of witnesses to give evidence is more limited under Swiss law. Certain third parties, such as the spouse or the direct relatives and in-laws of a party, have an unrestricted right to refuse to cooperate and cannot be compelled to give evidence. Moreover, under Swiss law, not only do legal advisers enjoy a professional privilege, but also other professionals such as doctors, clergymen, or journalists. In contrast to South Africa, Botswana, Namibia, Nigeria, and Uganda, a party in civil proceedings pending in Switzerland cannot invoke the privilege against self-incrimination for himself, but only in relation to certain third parties. Under the Swiss Civil Procedure Code, the examination of litigants, third-party witnesses, and experts is under the control of the court. Consequently, the examination-in-chief, cross-examination, and re-examination of witnesses and experts are unknown in Swiss law. The same applies with regard to the taking of evidence on commission (including interrogatories), or based on an affidavit. In addition, both the discovery of facts and the discovery of documents are unknown to Swiss law. In civil proceedings pending in Switzerland, a party has only to provide the opponent with documents which the latter sufficiently specified in his pleadings. In other words, a litigant is under no obligation to furnish the adversary with documents which may help the latter to advance his own case or to damage the case of his opponent, unless the opposing party identified such documents in his pleadings. Unlike in civil proceedings pending in South Africa, Botswana, Namibia, Nigeria, and Uganda, experts under the Swiss Civil Procedure Code, are regarded as aides of the courts, and are appointed and instructed by the judge.

Given the above, a litigant in civil proceedings pending in South Africa, Botswana, Namibia, Nigeria, and Uganda should particularly consider three factors when contemplating to obtain evidence located in Switzerland:⁵³⁸ the compellability and privileges of litigants and third parties, the principle of judicial control over the procurement of evidence, and the absence of pre-

⁵³⁸ Provided the taking of evidence is governed by Swiss law.

trial discovery. Insufficient investigations in this regard may result in limited probative value or even inadmissibility of the evidence obtained in Switzerland in the proceedings pending in the aforesaid African countries. Moreover, the party seeking evidence in Switzerland may not obtain the evidence he wishes for, as the particular witness, unlike under the laws of the said African countries, may not be compellable to give evidence at all, or may invoke a privilege with regard to specific questions which is unknown in such countries.⁵³⁹ The same may hold true due to the fact that under Swiss law, the litigant is not able to request discovery from the opposing party.

⁵³⁹ By contrast, a litigant in civil proceedings before a Swiss court seeking evidence in South Africa, Botswana, Namibia, Nigeria, or Uganda may be in a better position, as the privileges in these countries are more restricted than under Swiss law.

CHAPTER 6

REFLECTIONS ON THE DRAFTING OF A CONVENTION ON CROSS-BORDER TAKING OF EVIDENCE IN CIVIL AND COMMERCIAL MATTERS IN SOUTH AFRICA, BOTSWANA, NAMIBIA, NIGERIA, AND UGANDA

I. Introduction

The need for South Africa, Botswana, Namibia, Nigeria, and Uganda to change their current legal position regarding the cross-border taking of evidence in civil and commercial matters has already been outlined. It has also been mentioned that, in the long-term, the position can be improved by the drafting of a relevant convention between these countries.¹ This Chapter makes an attempt to develop the basic principles for such a convention. In doing so, existing international conventions on cross-border taking of evidence, such as the Hague Procedure Convention, the Hague Evidence Convention, the European Evidence Regulation, the Inter-American Evidence Convention, the Mercosur Protocol, and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000² (“European Convention in Criminal Matters”) are taken into account. A convention for South Africa, Botswana, Namibia, Nigeria, and Uganda, however, should not merely be a copy of an existing convention, but it should break new ground in order to overcome long-established concepts of sovereignty and to give consideration to the new communication technologies available for taking evidence. In this context, one has to keep in mind that existing conventions on cross-border taking of evidence in civil and commercial matters, for instance the Hague Evidence Convention or the European Evidence Regulation, were often drafted with civil-law and common-law countries in mind and thus constitute compromise solutions in order to accommodate the differences of the two legal systems.³ Such compromises, however, are not necessary with regard to a convention for South Africa, Botswana, Namibia, Nigeria, and Uganda, as all these countries follow the common-law tradition.⁴ A convention between the said countries

¹ See Chapter 4 para. VIII.

² For the text of this Convention, cf. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:197:0001:0023:EN:PDF> (date of use: 31 January 2013).

³ Cf. also in this regard Chapter 4 para. II.B.1. See furthermore Stadler A ‘Grenzüberschreitende Beweisaufnahmen in der Europäischen Union – die Zukunft der Rechtshilfe in Beweissachen’ in Schütze RA (ed) *Einheit und Vielfalt des Rechts: Festschrift für Reinhold Geimer zum 65. Geburtstag* 1282 *et seq.*

⁴ At least regarding civil procedure. With regard to the hybrid system adopted by South Africa, Botswana, and Namibia see Chapter 2 para. IV.B.2.a).

should aim at facilitating and expediting the cross-border taking of evidence to the greatest possible extent. Needless to say, the practical feasibility of such a convention, in particular in relation to the suggested methods to obtain foreign evidence, has to be taken into account.

In the light of the above, this Chapter first delineates the various vehicles of cross-border taking of evidence, which may be chosen when drafting a relevant convention for South Africa, Botswana, Namibia, Nigeria, and Uganda. Once the most preferable method is established, the Chapter discusses the main points to be included in such a convention.

II. Methods of Taking Evidence under the Convention

In the majority of cases, cross-border taking of evidence in civil and commercial matters is a cumbersome and time-consuming process. This holds true not only for evidence-taking based on *courtoisie internationale*, but also, albeit to a lesser extent, where foreign evidence is sought under a relevant convention. The arduous nature of judicial assistance in evidence-taking based on a convention and the delays associated with the process result mainly from the fact that, in addition to the trial court seeking foreign evidence, authorities of the requested state have to be involved. The latter examine whether the request for judicial assistance complies with the formal and substantive requirements stipulated in the relevant convention,⁵ and whether there is a valid ground to refuse judicial cooperation.⁶ Depending on whether the convention provides for active and/or passive judicial assistance, the authorities of the requested state execute the request for judicial assistance themselves,⁷ or they may merely carry out supervisory activities.⁸ The involvement of the authorities of the requested state in cross-border taking of evidence often stems from the concept of sovereignty. In addition, states are often eager to protect the interests of their nationals and the non-nationals resident in their jurisdiction against direct interference from other states. In the light of the above, it becomes clear that the process for cross-border taking of evidence in civil and commercial matters can only be simplified and accelerated if the states are willing to relinquish, at least partly, the present concepts of sovereignty and limit their involvement to the necessary minimum.

⁵ *Cf.*, for instance, Articles 2 and 5 of the Hague Evidence Convention; Articles 6-9 of the European Evidence Regulation.

⁶ See, amongst others, Article 12 of the Hague Evidence Convention; Article 11(3) of the Hague Procedure Convention; Article 16 of the Inter-American Evidence Convention; Article 14(2)(a)-(b) of the European Evidence Regulation.

⁷ *Cf.*, for instance, Articles 1(1) and 9 of the Hague Evidence Convention; Articles 8 and 14 of the Hague Procedure Convention; Article 10(2) of the European Evidence Regulation.

⁸ See, for example, Article 19 of the Hague Evidence Convention, where a representative of the requested state may be present at the taking of evidence through diplomatic officers, consular agents, or commissioners. See also Article 17(4)(2) of the European Evidence Regulation.

Since the 1970s, the Nordic countries⁹ have established a system of judicial assistance, which differs notably from the classical forms of cross-border taking of evidence as adopted by the Hague Procedure Convention, the Hague Evidence Convention, the European Evidence Regulation, the Inter-American Evidence Convention, and the Mercosur Protocol, respectively. Based on the relevant reciprocal legislation, residents of the said countries are under an obligation to appear in courts of any Nordic country to testify. Consequently, there is no need to have a foreign Nordic witness examined by his home court according to a letter of request, or to take evidence directly on foreign soil.¹⁰ The Nordic approach thus truly overcomes the aforesaid hurdles imposed by the sovereignty of states. According to Knöpfel, however, such a system could only be adopted because of the social and legal homogeneity the Nordic countries have shared over centuries. In this context, Knöpfel also emphasises the importance of the mutual trust these countries have in their respective judicial systems.¹¹ Similar efforts to improve the efficiency of cross-border taking of evidence in civil and commercial matters have taken place between Australia and New Zealand since the 1990s. Specific reciprocal legislation¹² stipulates, *inter alia*, that *subpoenas* issued by the competent authority in Australia may directly be served in New Zealand and *vice versa*, and that the subpoenaed individual may be required to give evidence either in Australia or New Zealand.¹³ Again, such cooperation is only possible because Australia and New Zealand are closely related in terms of proximity, culture, and history.¹⁴

It is doubtful whether amongst South Africa, Botswana, Namibia, Nigeria, and Uganda, the time is ripe for such a far-reaching cooperation on evidence-taking in civil and commercial matters as is the case between the Nordic countries, or Australia and New Zealand. Although

⁹ Denmark, Finland, Iceland, Norway, and Sweden.

¹⁰ See Knöpfel OL ‘Nordische Zeugnispflicht – Grenzüberschreitende Zivilrechtshilfe á la scandinavé’ 2010 *Praxis des Internationalen Privat- und Verfahrensrechts* 572.

¹¹ Knöpfel OL ‘Nordische Zeugnispflicht – Grenzüberschreitende Zivilrechtshilfe á la scandinavé’ 2010 *Praxis des Internationalen Privat- und Verfahrensrechts* 576.

¹² See, amongst others, Sections 150-181 of the New Zealand Evidence Act 69 of 2006, <http://www.legislation.govt.nz/act/public/2006/0069/latest/DLM393463.html> (date of use: 31 January 2013); New Zealand Trans-Tasman Proceedings Act 108 of 2010, <http://www.legislation.govt.nz/act/public/2010/0108/latest/DLM2576223.html> (date of use: 31 January 2013); Australian Trans-Tasman Proceedings Act 35 of 2010, <http://www.comlaw.gov.au/Details/C2010A00035> (date of use: 31 January 2013); Agreement between the Government of New Zealand and the Government of Australia on Trans-Tasman Court Proceedings and Regulatory Enforcement of 24 July 2008, Schedule 2 <http://www.legislation.govt.nz/act/public/2010/0108/latest/DLM2576223.html> (date of use: 31 January 2013).

¹³ For more in this regard, see Knöpfel OL ‘Internationales Zivilverfahrensrecht “Down Under” – Australisch-neuseeländisches Binnenmarktsprozessrecht’ 2009 *Recht der Internationalen Wirtschaft* 603 *et seq.*

¹⁴ Spiegelman JJ *Cross Border Issues for Commercial Courts: An Overview by the Honourable JJ Spiegelman AC, Second Judicial Seminar on Commercial Litigation, Hong Kong 13 January 2010* [http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/Spigelman130110.pdf/\\$file/Spigelman130110.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/Spigelman130110.pdf/$file/Spigelman130110.pdf) 29 (date of use: 31 January 2013).

South Africa, Botswana, Namibia, Nigeria, and Uganda are part of the same law tradition,¹⁵ these countries lack the aforementioned cultural, social, and legal homogeneity. Moreover, it is open to question whether the said African countries have the necessary confidence in each other's judicial systems to break away from long-established concepts of sovereignty. Having said this, it seems that the preparation of a convention on cross-border taking of evidence in civil and commercial matters in South Africa, Botswana, Namibia, Nigeria, and Uganda can only be successful, if it is based on a more classical system of judicial assistance than that adopted by the Nordic countries and by Australia and New Zealand, respectively.

As explained earlier,¹⁶ under the Hague Evidence Convention, evidence can either be taken based on a letter of request, through diplomatic officers or consular agents, or by commissioners. The first method of taking foreign evidence is also stipulated by the Hague Procedure Convention,¹⁷ the European Evidence Regulation,¹⁸ the Inter-American Evidence Convention,¹⁹ and the Mercosur Protocol.²⁰ With regard to the said forms of evidence-taking, it is recalled that letters of request are executed by the competent authority of the requested state, usually a court, which generally applies its national law. In contrast, a commissioner, who usually is not a member of the judiciary of the requested state, takes the evidence in accordance with the law of the requesting state. The latter also holds true where evidence is taken by a diplomatic officer or consular agent of the requesting state, who exercises his diplomatic or consular functions in the requested state. In addition to the taking of evidence by letter of request, the European Evidence Regulation provides for the “*direct taking of evidence by the requesting court*” in the requested state.²¹ Such evidence-taking is performed by a member of the trial court or any other person, including an expert, who is designated in accordance with the law of the requesting state.²² When taking the evidence, the relevant individual applies the law of the

¹⁵ See in this regard fn. 4 above.

¹⁶ Cf. Chapter 4 paras. II.B.3.a) and II.B.3.b).

¹⁷ See Chapter 4 para. II.C.2.

¹⁸ Article 10(2).

¹⁹ Article 5. Articles 9-13 of the Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad of 24 May 1984 provide for the taking of evidence through diplomatic or consular agents. For the text of this Protocol, see <http://www.oas.org/juridico/english/treaties/b-51.html> (date of use: 31 January 2013). With regard to the list of contracting states, cf. <http://www.oas.org/juridico/english/sigs/b-51.html> (date of use: 31 January 2013). For more on the Inter-American Evidence Convention, see amongst others, Low LA ‘International Judicial Assistance Among the American States – The Inter-American Conventions’ 1984 *International Lawyer* 711-714.

²⁰ Articles 8 and 12.

²¹ See the heading before Article 17 of the European Evidence Regulation.

²² Article 17(3) of the European Evidence Regulation.

requesting state.²³ The direct taking of evidence by the trial court on foreign territory is subject to the authorisation of the competent authority of the requested state, which may lay down conditions for the performance of the evidence-taking.²⁴ Finally, such evidence-taking can only take place, if it can be performed on a voluntary basis without the need for coercive measures.²⁵

The comments in Chapter 5 on the examination of witnesses in civil proceedings before the High Court of South Africa, Botswana, Namibia, Uganda, and of the Federal Capital Territory, Abuja, in Nigeria showed that witnesses generally give evidence *viva voce* before the trial court and that the questioning of the witnesses is conducted by the parties.²⁶ Where a witness is located abroad, the relevant court may allow the evidence of such witness to be taken on commission in the foreign state.²⁷ In cases where a trial court abroad is desirous to obtain evidence in South Africa, Botswana, Namibia, Uganda, or in the Federal Capital Territory, Abuja, a commissioner is appointed by the competent court of the said countries. The commissioner usually applies the law of the requested state when executing the relevant request.²⁸ Taking into account the existing rules on the examination of witnesses in the laws of the aforesaid countries, it would be logical for a convention on cross-border taking of evidence in these countries to provide for the examination of witnesses by commissioners. The adoption of such method, with which all the countries involved are familiar, would clearly ease the negotiation process.

By contrast, the abovementioned method, whereby a court of the requested state executes the request for obtaining evidence located in the said country, would not be suitable for a convention between South Africa, Botswana, Namibia, Nigeria, and Uganda. This form of evidence-

²³ Article 17(6) of the European Evidence Regulation. For more on Article 17 of the said Regulation, see, amongst others, Leipold D 'Neue Wege im Recht der internationalen Beweiserhebung – einige Bemerkungen zur Europäischen Beweisaufnahmeverordnung' in Schwenzer I and Hager G (eds) *Festschrift für Peter Schlechtriem zum 70. Geburtstag 2003 99 et seq.*; Berger C 'Die EG-Verordnung über die Zusammenarbeit der Gerichte auf dem Gebiet der Beweisaufnahme in Zivil- und Handelssachen (EuBVO)' 2001 *Praxis des Internationalen Privat- und Verfahrensrechts* 526.

²⁴ Article 17(1) and (4) of the European Evidence Regulation. The competent authority of the requested state may, amongst others, assign a member of a court of the requested state to take part in the performance of the taking of evidence.

²⁵ Article 17(2) of the European Evidence Regulation. See also Adolphsen J 'Die EG-Verordnung über die Zusammenarbeit auf dem Gebiet der Beweisaufnahme in Zivil- oder Handelssachen' in Maruhn T (ed) *Bausteine eines europäischen Beweisrechts* 2007 11; Heß B and Müller A 'Die Verordnung 1206/01/EG zur Beweisaufnahme im Ausland' 2001 *Zeitschrift für Zivilprozeß International* 160.

²⁶ See Chapter 5 paras. III.A.3.a), IV.A.3.a), V.A.3.a), VI.A.3.a), and VII.A.3.a).

²⁷ Cf. Chapter 4 paras. III.C.2, IV.B.2 V.B.2, VI.B.1, and VII.B.2.

²⁸ See in this regard Chapter 4 paras. III.C.1, IV.B.1, V.B.1, VI.B.1.b), and VII.B.1.

taking is tailored to the civil-law tradition where, in contrast to the common-law system, the taking of evidence is generally under the control of the trial court.²⁹

The taking of evidence by diplomatic officers or consular agents is similar to that through commissioners. As in the latter case, the evidence is not taken by a court of the requested state, but through a diplomatic officer or consular agent representing the requesting state in the requested state.³⁰ In comparison to this method, evidence-taking through commissioners appears to be more straightforward, as the embassies or consulates of the requesting states do not have to be involved. Moreover, it seems that commissioners, who are generally legal practitioners, are likely to be more suited to take evidence in the requested state than diplomatic officers and consular agents whose core activities lie elsewhere.

The convention could also allow a trial court to hold a part of the trial in the requested state. In this case, the examination of the witness is conducted in the foreign state in the presence of the trial court, the parties, and their counsel. From the perspective of the trial court, the advantage of this method is that the judge is able to observe the demeanour of the witness during his testimony. Moreover, the examination is conducted in accordance with the law of the requesting state.³¹ The main drawback, however, is the fact that not only the parties and their counsel have to travel to the requested state, but also the members of the trial court. Such a journey may not only be a time-consuming undertaking, but may also generate substantial costs, particularly where the foreign witness is not a resident of a neighbouring country of the state of the trial court and/or lives in a remote area. Having said this, the method at hand does not appear to be the most suitable option for a convention involving South Africa, Botswana, Namibia, Nigeria, and Uganda, particularly given the distances between South Africa, Botswana, and Namibia on the one hand, and Nigeria and Uganda on the other. In cases, however, where the trial court and the foreign witness are located in border areas,³² the examination of such a witness in the presence of the trial court may be a viable option. The same holds true where the trial court considers it crucial to conduct an inspection *in loco* regarding an immovable property or a location in the requested state.³³

The aforesaid form of cross-border taking of evidence is to be distinguished from the method where a member of the trial court is merely allowed to attend the examination of the witness

²⁹ For more in this regard, see Chapter 2 para. IV.B.3.

³⁰ See in this regard Chapter 4 para. III.B.3.b).

³¹ Cf. Article 17(6) of the European Evidence Regulation.

³² South Africa, Botswana, and Namibia share borders with each other.

³³ See also in this regard the comments in Chapter 5 para. II.E.

abroad. Here, the said court does not hold part of the trial in the requested state, but is simply permitted to be present at the examination of the foreign witness. It is thus the competent foreign authority that administers the witness examination, and conducts the latter generally in accordance with its own law.³⁴ By contrast, with regard to the method dealt with in the preceding paragraph, it is the trial court that is in control of the examination of the foreign witness and applies its own rules.³⁵

Another method of taking evidence is the examination *via* videolink, which allows the trial court, the parties, and their counsel to communicate with a foreign witness across national borders without having to be at the same place as the witness.³⁶ The nature of this method has already been discussed in detail in Chapter 3 and can be summarised as follows: the examination by videolink has the advantage that the members of the trial court, the parties, and their counsel do not have to travel to the requested state, but receive evidence with real-time audio and visual display at their location at the time of the examination. This not only saves on the costs and time generally associated with moving evidence from one jurisdiction to another, but also encourages the voluntary cooperation of foreign witnesses. The major disadvantage is that suitable audio- and video-equipment, as well as networks to transmit information have to be available at the location of the trial court and of the witness to be examined. Moreover, mention must be made of the fact that the examination by videoconference does not take place in the courtroom of the trial court, and the latter is only able to observe the witness' demeanour by videolink. Given the fact that the advantages of evidence-taking by videolink clearly outweigh its disadvantages, and that videoconferencing technologies have become more affordable, improved and simpler in recent years, it comes as no surprise that the laws of various countries, such as England,³⁷ Australia,³⁸ New Zealand,³⁹ or Singapore⁴⁰ provide for the examination of witnesses *via* videolink.⁴¹ Moreover, some international conventions on the cross-border taking

³⁴ Cf. Articles 12(1) and 10(2) of the European Evidence Regulation.

³⁵ See for instance, Article 17(1) and (3) of the European Evidence Regulation.

³⁶ For more on the nature of an examination by videolink, see Chapter 3 para. V.C.1.

³⁷ Part 32.3 of the Civil Procedure Rules 1998 (SI 1998/3132).

³⁸ Sections 24-37 of the Evidence and Procedure (New Zealand) Act 1994.

³⁹ Sections 168-180 of the Evidence Act 2006.

⁴⁰ Section 62A of the Evidence Act (Chapter 97).

⁴¹ See also *Owners of MV Stella Tingas v MV Atlantica and Another (Trantsnet Ltd t/a Portnet and Another, Third Parties)* 2002 (1) SA 647 (D) at 659H-J, where in civil proceedings pending in South Africa, the testimony of a witness located in Greece was taken *via* videoconference. In this context, Booysen J held the following: "*He [the witness] was visible on screen and audible to us and we, including counsel who examined and cross-examined him, were visible and audible to him. This procedure was adopted by agreement between the parties. It is a most sensible way of dealing with the evidence of witnesses who are not available to testify in Court. It is a procedure which should in my view be incorporated in the Rules of Court.*"

of evidence, for instance the European Evidence Regulation⁴² or the European Convention in Criminal Matters,⁴³ as well as bilateral agreements, stipulate the conduct of hearings by videoconference.⁴⁴ Under the European Convention in Criminal Matters, a trial court may request the evidence of a witness to be taken by videolink provided it is not desirable or possible for the witness to appear in the requesting state. The requested state has to agree to the hearing by videoconference, if the latter is not contrary to fundamental principles of its law, and on condition that it has the technological means to carry out the hearing.⁴⁵

The convention on cross-border taking of evidence in South Africa, Botswana, Namibia, Nigeria, and Uganda should also keep pace with the technological developments, and it should adopt rules for the taking of evidence by videolink. In this context, it should be recalled that the conduct of a hearing by videoconference only marginally interferes, if at all, with foreign sovereignty.⁴⁶ In comparison with the aforementioned regulation contained in the European Convention in Criminal Matters, the convention between South Africa, Botswana, Namibia, Nigeria, and Uganda should take an additional step forward by declaring the examination by videolink as the primary method of taking evidence and thus limiting the grounds, based on which the requested state may refuse a hearing by videoconference, to a minimum. It goes without saying that such regulation is only practically feasible, if South Africa, Botswana, Namibia, Nigeria, and Uganda have the technology in place that is required to facilitate a videoconference. To ensure the access to such technology, the convention should provide for the obligation of the said countries to put in place the required means. In other words, each country would have to establish several locations across its territory that are suitable for the conduct of hearings by videoconference.⁴⁷ The witness to be examined by videolink would have to travel to the closest location in his region that has access to the means of videoconferencing. The expense and time connected with such travelling are, however, marginal compared with those where the members of the trial court, the parties, and their counsel have to travel abroad to attend a witness examination. In this context, mention must be made of Article 10(4)(4) of the European Evidence Regulation, and Article 10(2) of the European Convention in Criminal

⁴² Articles 10(4) and 17(4)(3).

⁴³ Article 10.

⁴⁴ See, for instance, Article 19(2) of the Agreement on Judicial Assistance in Civil and Commercial Matters and Co-operation in Arbitration between the Kingdom of Thailand and Australia of 2 October 1997; Article 24 of the Treaty on Judicial Assistance in Civil and Commercial Matters between Australia and the Republic of Korea of 17 September 1999.

⁴⁵ Article 10(1)-(2).

⁴⁶ For more in this regard, see Chapter 3 para. V.C.2.

⁴⁷ For instance the courtroom of a high court or a magistrates' court could be equipped with the necessary technological means.

Matters, which stipulate that, if the requested state has no access to the technological means of videoconferencing, such means may be made available to it by the requesting state. How these provisions are implemented in practice remains unclear.

The advantages mentioned with regard to the hearing of a witness by videolink apply *mutatis mutandis* to the examination of a witness by telephone. The trial court, however, has no visual contact with the witness, and the judge's perception is therefore limited to what he hears over the telephone. This not only prevents him from being able to observe the witness' demeanour, but also requires specific measures to verify the witness' identity. Compared to hearings *via* videoconference, the evidence-taking by telephone has the advantage that it only requires a telephone line and a telephone, in other words equipment that is undoubtedly available in South Africa, Botswana, Namibia, Nigeria, and Uganda, with the exception of remote rural areas. Although the laws of several countries⁴⁸ and some conventions make reference to the taking of evidence by telephone,⁴⁹ it is submitted that the abovementioned disadvantages make teleconferencing a rather unsuitable method of examining witnesses.

In the light of the above, it becomes clear that with a view to making the examination of a foreign witness more efficient, the convention on cross-border taking of evidence in South Africa, Botswana, Namibia, Nigeria, and Uganda should adopt the examination *via* videolink as the primary method to obtain the testimony of a foreign witness. Compared to evidence-taking by a commissioner, the hearing of a witness by videoconference is to be preferred, as it enables the trial court to observe and hear the witness during his testimony. By contrast with the direct taking of evidence by the trial court on the territory of the requested state, the hearing by videoconference does not require the members of the said court, the parties, and their counsel to travel to the location of the foreign witness. As indicated above, the stipulation of videoconferencing as the primary form of evidence-taking in the said convention only makes sense if South Africa, Botswana, Namibia, Nigeria, and Uganda can ensure access to the necessary technical equipment at the time of the entry into force of the convention. Where such access cannot be guaranteed by the said countries, the convention has to provide for another method, namely the taking of evidence through commissioners. The two methods should be combined in such a way that foreign witnesses are generally examined *via* videolink. Where such a hearing is not possible, because at least one of the states involved does not have the technological

⁴⁸ Cf., amongst others, Sections 168(1), 171, and 173 of the New Zealand Evidence Act 2006; Sections 25(1), 27, and 30 of the Australian Evidence and Procedure (New Zealand) Act 1994.

⁴⁹ See, for instance, Article 10(4) of the European Evidence Regulation; Article 11 of the European Convention in Criminal Matters.

means for videoconferencing, the evidence is to be taken by a commissioner. In other words, where both the requesting state and the requested state have access to the necessary technical equipment, evidence is taken by videolink, and where such technology is only available in one of the two states, or in neither state, the witness gives evidence before a commissioner. Such a regulation allows not only states which have access to videoconferencing equipment to accede to the convention, but also other states in which those means are not yet available. In order to ensure that evidence-taking by videolink does not remain a mere dead letter, it is important that the aforesaid countries take the necessary measures for the installation of videoconferencing equipment across their territory. In addition to the taking of evidence by videolink and by commissioners, the convention between South Africa, Botswana, Namibia, Nigeria, and Uganda should also allow the trial court to hold a part of the trial in the requested state. Only this method will enable the trial court to conduct an inspection *in loco* on the territory of the requested state.

Having established the most preferable methods of taking evidence under the convention on cross-border taking of evidence in South Africa, Botswana, Namibia, Nigeria, and Uganda, the following subchapter outlines the main points to be considered when drafting such a convention.

III. Main Points to Be Considered in the Convention

Based on the preceding comments, the convention between South Africa, Botswana, Namibia, Nigeria, and Uganda follows the same approach as other conventions on the cross-border taking of evidence in civil and commercial matters. The requesting state sends a request for the taking of evidence to the requested state. Once the latter made sure that the request complies with the conditions laid down in the convention, it approves the request. Since the convention between the said countries provides for passive judicial assistance, it is the requesting state, either through the trial court or a commissioner that takes the evidence in the requested state.

A. Scope of the Convention

In order to avoid any disputes between South Africa, Botswana, Namibia, Nigeria, and Uganda regarding the scope of the convention, the latter should include an autonomous definition of “civil and commercial matters”. This definition should be formulated extensively in order to widen the scope of the convention as much as possible. Where no autonomous definition can be found, the convention should stipulate the law, that is, either the law of the requesting state

or that of the requested state according to which the term “civil and commercial matters” is to be interpreted. Considering the fact that the convention should be applicable in as many civil and commercial cases as possible, it should provide that the notion of “civil and commercial matters” is to be determined by the law of the requesting state. In other words, the requested state should not be allowed to refuse a request for taking evidence merely on the fact that its law interprets the term of “civil and commercial matters” more narrowly than the law of the requesting state.

The convention should also define what constitutes taking of evidence, in particular whether the convention extends to the preservation of evidence that may take place before proceedings are initiated.

Finally, it should also be stipulated whether or not the convention has mandatory character. In other words, whether a member state must have recourse to the convention on each occasion it wishes to obtain evidence located in another member state. Given the general need to facilitate the cross-border taking of evidence in civil and commercial matters, the convention between South Africa, Botswana, Namibia, Nigeria, and Uganda should provide the said countries with additional methods to obtain foreign evidence without excluding any other forms of evidence-taking existing outside the convention. Accordingly, the convention should not have an exclusive character.⁵⁰

B. Content of a Request

In order to facilitate and expedite not only the issue of requests for judicial assistance by the requesting state, but also their examination through the requested state, the convention should stipulate the mandatory use of a model form.⁵¹ A standardised form also reduces the risk of a request being refused by the requested state due to incorrect or incomplete provision of information.⁵²

The model form should include, *inter alia*, not only the details of the requesting and the requested authority and of the persons involved,⁵³ but also a brief description of the nature and

⁵⁰ See in this regard also Chapter 4 paras. II.B.2 and II.B.3.a).

⁵¹ *Cf.*, for instance, Article 4(1) of the European Evidence Regulation; Article 2 of the Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad of 24 May 1984. With regard to the Hague Evidence Convention, see Chapter 4 para. II.B.3.a).

⁵² See also Low LA ‘International Judicial Assistance Among the American States – The Inter-American Conventions’ 1984 *International Lawyer* 710.

⁵³ That is, parties, counsel, witnesses to be examined, and the commissioner.

subject matter of the claim pending before the trial court,⁵⁴ a description of the taking of evidence to be performed, as well as a date for the requested taking of evidence. Where the witness is examined *via* videolink, the information necessary to set up the videoconference has to be provided. In cases where evidence will be taken through a commissioner, a list of the questions to be put to the witness should be attached to the request.⁵⁵

In addition, the convention should provide that requests have to be issued by judicial authorities, and drafted in English.⁵⁶ While the first requirement promotes the authenticity of the request, the second requirement not only makes unnecessary the translation of requests, but also avoids translation errors.

The European Evidence Regulation stipulates that where a request for obtaining foreign evidence is incomplete, the requested court has to give the trial court the opportunity to rectify the request within 30 days of receipt of request before it can refuse the request.⁵⁷ This rule makes sense, as the trial court does not have to issue a new request if necessary information is missing from the initial request.⁵⁸ Having said this, the drafters of the convention on cross-border taking of evidence in South Africa, Botswana, Namibia, Nigeria, and Uganda should contemplate the adoption of a similar provision.

C. Transmission of a Request

Under the Hague Evidence Convention, a request to obtain foreign evidence has to be transmitted *via* the so-called “*Central Authority*” of the requested state, which, after examining whether the request fulfils the relevant formal and substantive requirements, forwards the request to the court competent to execute it.⁵⁹ By contrast, the European Evidence Regulation allows the direct transmission between the courts of the requesting state and of the requested state.⁶⁰ With a view to enhancing judicial assistance between South Africa, Botswana, Namibia, Nigeria,

⁵⁴ To determine, amongst others, whether the claim, in relation to which foreign evidence is sought, falls within the scope of the convention.

⁵⁵ See also in this regard Form A in the Annex to the European Evidence Regulation. For the ‘Model for Letters of Request Recommended for Use in Applying the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters’, *cf.* <http://www.hcch.net/upload/actform20e.pdf> (date of use: 31 January 2013).

⁵⁶ In South Africa, Botswana, Namibia, Nigeria, and Uganda, English is either the only official language or one of several official languages.

⁵⁷ Article 8(1).

⁵⁸ With regard to the time limit of 30 days, see the comments on the acknowledgment of receipt in para. III.C below.

⁵⁹ Articles 2 and 5 of the Hague Evidence Convention. *Cf.* also Chapter 4 para. II.B.3.a). See also Article 11 of the Inter-American Evidence Convention; Article 2 of the Mercosur Protocol.

⁶⁰ Article 2(1).

and Uganda, the convention between the said countries should avoid an excessively bureaucratic regime by creating central authorities for the receipt of requests for taking evidence, and instead it should allow the direct communication between the courts of the requesting state and those of the requested state.⁶¹ In order to make it easier for the courts of the requesting state to find the court in the requested state competent for the receipt of a request, the convention should include, as a schedule, a list of the relevant courts of each contracting state.⁶² In accordance with the existing rules in South Africa, Botswana, Namibia, Nigeria, and Uganda⁶³ on taking evidence for the benefit of foreign civil proceedings, the said countries should nominate the High Court, in whose jurisdiction the witness to be examined is resident, as the court competent to receive requests under the convention.

Once the request for judicial assistance has been granted by the competent court in the requested state, the question arises as to whether the trial court can communicate directly with the foreign witness, or whether such correspondence has to be transmitted *via* the requested court to the witness. Such communication may, for instance, be required where technicalities regarding a witness examination by videolink have to be clarified between the trial court and the witness.⁶⁴ With a view to accelerating the process of obtaining foreign evidence, the convention between South Africa, Botswana, Namibia, Nigeria, and Uganda should allow such direct communication without the involvement of the requested court. Needless to say, the trial court cannot use such direct correspondence to circumvent the provisions on the authorisation of a request for evidence-taking by the requested court. For the protection of the foreign witness, correspondence emanating from the trial court should be drafted in the same language as the request for judicial assistance. In addition, it should contain an explicit reference that the witness may obtain further information from the trial court or the requested court concerning the communication.⁶⁵ The direct correspondence between the trial court and the foreign witness, however, should not extend to the summons of the witness to give evidence. Rather, it should be the competent court in the requested state that summons the witness in accordance with its

⁶¹ See also in this regard Spigelman JJ *Cross Border Issues for Commercial Courts: An Overview by the Honourable JJ Spigelmann AC, Second Judicial Seminar on Commercial Litigation, Hong Kong 13 January 2010* [http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/Spigelman130110.pdf/\\$file/Spigelman130110.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/Spigelman130110.pdf/$file/Spigelman130110.pdf) 8 (date of use: 31 January 2013).

⁶² See, for instance, Article 2(2) of the European Evidence Regulation.

⁶³ Cf. Chapter 4 paras. III.C.1, IV.B.1, V.B.1, VI.B.1, and VII.B.1.

⁶⁴ See in this regard also Article 17(2)(2) of the European Evidence Regulation, which provides that in the case of the direct taking of evidence by the trial court in the requested state, the said court shall inform the foreign witness that the performance shall take place on a voluntary basis.

⁶⁵ Cf. Article 5(1), (3), and (4) of the European Convention in Criminal Matters, which provides a similar rule for the transmission of procedural documents.

own law.⁶⁶ Such procedure does not only avoid any sovereignty issues in the requested state, but it may also be more efficient. A *subpoena* issued by a court in the country where the witness is resident often has a greater impact on the witness than a summons from a court abroad.

Under the European Evidence Regulation, the requested court must, within seven days of receipt of the request, send an acknowledgement of receipt to the trial court using a particular form.⁶⁷ This rule serves to accelerate the execution of requests.⁶⁸ The same holds true for another provision of the European Evidence Regulation which directs an authority, which has received a request, but is not competent to execute it, to promptly transmit it to the competent authority of the requested state, and to inform the trial court accordingly.⁶⁹ Although the failure to meet the aforesaid time limits does not trigger any international sanctions, the stipulation of deadlines indicates the time frame within which the requested court is expected to act under the European Evidence Regulation. Having said this, the drafters of the convention on cross-border taking of evidence in South Africa, Botswana, Namibia, Nigeria, and Uganda should consider including similar provisions in the convention. In order to reduce the burden of the requested court, model forms for the acknowledgement of receipt and for the information on the transmission of the request to the competent court should be prepared.⁷⁰

However, the direct transmission of requests between the trial court and the competent court in the requested state is of limited use unless such transmission is made by the most rapid means.⁷¹ The swiftest possible means is a transmission that does not require the forwarding of a physical copy of a document, namely a transmission by email or fax.⁷² There is no reason why a request for cross-border taking of evidence cannot be transmitted by such means, provided the authenticity and legibility of the request are ensured. By allowing such request to be sent by email or fax, the transmission time is a matter of minutes, if not seconds, a considerable time saving compared to the transmission by post. In this context, it has also to be noted that an efficient transmission by post requires a reliable postal service in both the requesting state and

⁶⁶ See also Article 10(4) of the European Convention in Criminal Matters.

⁶⁷ Article 7(1).

⁶⁸ See, amongst others, Leipold D 'Neue Wege im Recht der internationalen Beweiserhebung – einige Bemerkungen zur Europäischen Beweisaufnahmeverordnung' in Schwenzer I and Hager G (eds) *Festschrift für Peter Schlechtriem zum 70. Geburtstag 2003* 95 *et seq.*

⁶⁹ Article 7(2). Cf. also Article 6 of the Hague Evidence Convention; Article 3(2) of the Inter-American Evidence Convention; Article 9(2) of the Mercosur Protocol.

⁷⁰ See in this regard Form A and Form B in the Annex to the European Evidence Regulation.

⁷¹ See in this regard Article 6 of the European Evidence Regulation, which provides that requests and communications under the Regulation shall be transmitted by the swiftest possible means, which the requested state has indicated it can accept.

⁷² As well as by telex. However, in practice, this form of transmission is no longer widely used.

the requested state. Having said this, the drafters of the convention on cross-border taking of evidence in South Africa, Botswana, Namibia, Nigeria, and Uganda, should contemplate the transmission of requests by email or fax. Such transmission merely requires a telephone line and a computer or fax machine, equipment that most courts in the said countries already have available. Alternatively, the transmission by private courier service should be considered, as such services are generally faster and more reliable than the normal postal service. The above holds true not only for the initial request of the trial court to obtain foreign evidence, but for all correspondence to be exchanged between the trial court and the competent court in the requested state.

D. Examination of a Request

Under the Hague Evidence Convention, it is, as has been explained earlier, the central authority of the requested state that examines whether a request complies with the formal and substantive requirements stipulated by the Convention. The same authority also decides on whether the sovereignty or security of the requested state would be prejudiced by the execution of the request.⁷³ Under the European Evidence Regulation, each member state has to designate a central body, which, amongst other things, supplies information to the requested courts and seeks solutions to any difficulties that may arise in respect of a request for taking evidence.⁷⁴ In contrast to the central authority under the Hague Evidence Convention, such central body has no approving authority regarding the request for judicial assistance, but merely exercises supporting functions. In other words, under the European Evidence Regulation, it is the requested court, in whose jurisdiction the witness to be examined is resident, which decides whether or not a request complies with the provisions of the Regulation.

It is obvious that the involvement of a central body in the requested state, that has more than just supporting functions, slows down the process of obtaining foreign evidence. Having said this, the convention on cross-border taking of evidence in South Africa, Botswana, Namibia, Nigeria, and Uganda should adopt an approach similar to that in the European Evidence Regulation. In this context, one could argue that the lack of an approving central body precludes a uniform practice in relation to the examination and authorisation of requests for evidence-taking within a member state, and that it is easier to centralise the necessary know-how in a central body. This argument, however, cannot be accepted, since the central body may issue

⁷³ Articles 5 and 12 of the Hague Evidence Convention.

⁷⁴ Article 3(1).

appropriate directives to the relevant courts, and may provide support, if the courts encounter any difficulties regarding a request. Moreover, the fact that the requesting courts have to use a model form⁷⁵ limits the scope the requested courts have with regard to the examination of a request. At this point, it has also to be noted that, from the perspective of the requested state, the designation of a central body with more than just supporting functions is often based on the aforesaid concepts of sovereignty,⁷⁶ that is, on the perception that a request for cross-border taking of evidence impinges upon the sovereignty of the requested state. Where the countries in question are not prepared to leave the examination of such requests solely in the hands of the relevant courts, provisions could be made so that the central body is informed of any request, without, however, constituting the approving authority in the aforesaid sense. Such a system would allow the central body to intercede if it considers the request to be in breach with the convention. In other words, requests for taking evidence abroad do not require the approval of the central body, but the latter is informed, however, of any request and may intervene if necessary.⁷⁷

It goes without saying that a requested state may refuse to grant a request for taking evidence, if it does not fall within the scope of the convention, or within the functions of the judiciary,⁷⁸ or if it does not fulfil the formal and substantive requirements.⁷⁹ Under the Hague Evidence Convention, the Hague Procedure Convention, the Inter-American Evidence Convention, and the Mercosur Protocol, execution may also be declined based on public policy (*ordre public*).⁸⁰ By contrast, the European Evidence Regulation does not contain a public policy exception.⁸¹ It is evident that in order to enhance judicial assistance in evidence-taking, it is necessary to restrict the possibility of refusing to execute requests for taking evidence to what is strictly nec-

⁷⁵ Cf. para. III.B above.

⁷⁶ See para. II. above.

⁷⁷ Cf. Spigelman JJ *Cross Border Issues for Commercial Courts: An Overview by the Honourable JJ Spigelman AC, Second Judicial Seminar on Commercial Litigation, Hong Kong 13 January 2010* [http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/Spigelman130110.pdf/\\$file/Spigelman130110.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/Spigelman130110.pdf/$file/Spigelman130110.pdf) 8 *et seq.* (date of use: 31 January 2013).

⁷⁸ See, for instance, Article 12(1)(a) of the Hague Evidence Convention; Article 11(3)(2) of the Hague Procedure Convention; Article 14(2)(a)-(b) of the European Evidence Regulation.

⁷⁹ Cf. Article 8(1) read in conjunction with Article 14(2)(c) of the European Evidence Regulation.

⁸⁰ See Article 12(1)(b) of the Hague Evidence Convention; Article 11(3)(3) of the Hague Procedure Convention; Article 16 of the Inter-American Evidence Convention; Article 8.

⁸¹ Cf., amongst others, Leipold D 'Neue Wege im Recht der internationalen Beweiserhebung – einige Bemerkungen zur Europäischen Beweisaufnahmeverordnung' in Schwenzer I and Hager G (eds) *Festschrift für Peter Schlechtriem zum 70. Geburtstag* 2003 96; Berger C 'Die EG-Verordnung über die Zusammenarbeit der Gerichte auf dem Gebiet der Beweisaufnahme in Zivil- und Handelssachen (EuBVO)' 2001 *Praxis des Internationalen Privat- und Verfahrensrechts* 524. See, however, Schütze RA *Rechtsverfolgung im Ausland: Prozessführung vor ausländischen Gerichten und Schiedsgerichten* 2009 135 n. 294, who maintains that under the European Evidence Regulation, the requested state may refuse the execution of requests for judicial assistance based on *ordre public*.

essary. Accordingly, under the convention between South Africa, Botswana, Namibia, Nigeria, and Uganda, the execution of the said requests should only be refused based on the abovementioned grounds, excluding public policy reasons. With regard to South Africa and Namibia, the exclusion of public policy reasons means that the execution of requests for evidence-taking in these two countries could no longer be declined based on Section 1 of the Protection of Businesses Act, and Section 2 of the Second General Law Amendment Act, respectively.⁸²

E. Execution of a Request

As explained above,⁸³ evidence-taking *via* videolink and, alternatively, through a commissioner, are the preferable methods for the cross-border taking of evidence in the convention between South Africa, Botswana, Namibia, Nigeria, and Uganda. The following subchapters thus discuss the main points to be addressed in the convention in relation to these two forms of evidence-taking. These main points include the involvement of the requested state in the execution of a request for taking foreign evidence, the applicable law, the privileges of witnesses, the use of compulsion, the consequences of perjury, and the costs.

1. Involvement of the Requested State

Where a foreign witness is interrogated by videolink or by a commissioner, it is the trial court or the commissioner, and not an authority of the requested state, that conducts the examination. The question thus arises of whether and, if so, to what extent the authorities of the requested state should carry out supervisory functions in the execution of a request for the taking of evidence by the trial court or by a commissioner. It has already been emphasised⁸⁴ that in order to make cross-border taking of evidence more efficient, the involvement of the requested state should be limited to an absolute minimum. From a practical point of view, no involvement of the requested state, let alone any supervisory activity, is necessary; the examination of the foreign witness *via* videolink or through a commissioner is possible without the assistance of the requested state. In this context, however, it has to be recalled that the involvement of the requested state, and in particular the conduct of supervisory functions, is often based on the said state's intention to protect its residents.⁸⁵ Both the Hague Evidence Convention and the European Evidence Regulation provide that where evidence is taken by a commissioner (Hague Ev-

⁸² See in this regard Chapter 4 paras. III.C.1.d) and V.B.2.

⁸³ *Cf.* para. II. above.

⁸⁴ See para. II. above.

⁸⁵ *Cf.* in this regard para. II. above.

idence Convention), or by the requesting court (European Evidence Regulation), the requested state may stipulate conditions with which the relevant individual or court must comply when taking evidence. Such conditions may, for instance, include the presence of an interpreter or the location where the examination has to take place. In addition, the requested state may assign an individual who is present at the examination and supervises the latter.⁸⁶ From the perspective of the requested state, these provisions provide a counterweight for allowing the requesting state to perform the taking of evidence on its territory. This counterweight appears all the more important where the contracting states lack mutual trust in their judicial systems.

Where the drafters of the convention between South Africa, Botswana, Namibia, Nigeria, and Uganda consider it necessary to allow the requested state to carry out supervisory functions, such functions should be limited to a minimum. In the case of a lack of the aforesaid mutual trust, it is doubtful whether, from the perspective of the requested state, the stipulation of conditions with which the trial court or a commissioner has to comply is sufficient. The requested state has no guarantee that the conditions will be observed, unless an individual assigned by it is present when the evidence is taken. Moreover, given the fact that the supervisory activity usually aims at the protection of the witness,⁸⁷ it could be considered to limit such activity to witnesses who intend to give evidence in absence of counsel. For witnesses, who are represented by a legal adviser during their examination, there is, however, no need for protection. Needless to say, the above comments also apply to cases where the trial court travels to the requested state to examine the foreign witness, or to conduct an inspection *in loco*.

With regard to the evidence-taking by a commissioner, the additional question arises as to who, the trial court or the requested court, appoints the individual who will act as commissioner. The commissioner should be appointed by the trial court, which then forwards the relevant court order together with the request for judicial assistance to the requested court. Compared to the requested court, the trial court is often in a better position to select an individual who is suitable to act as commissioner and who is, in particular, familiar with the laws of the requesting state. When granting the request for judicial assistance, the requested court should, based on

⁸⁶ Articles 17(1)(b) and 19 of the Hague Evidence Convention; Article 17(4) of the European Evidence Regulation.

⁸⁷ The protection of the sovereignty of the requested state is no longer the main concern, since the requested state allows the witness to be examined by the trial court or by a commissioner.

the aforesaid court order, confirm the commissioner's appointment. Only in very exceptional cases should the requested court be allowed to refuse an individual as commissioner.⁸⁸

2. Applicable Law

The difficulties that may arise if the taking of foreign evidence is governed by the law of the requested state, instead of the law of the requesting state, have been explained earlier.⁸⁹ Moreover, from a practical point of view, it should be avoided that the trial court has to take evidence in accordance with rules with which it is not entirely familiar. The examination of a witness by the trial court *via* videolink or by a commissioner should thus be conducted in accordance with the laws of the requested state.⁹⁰ The same holds true where the trial court travels to the requested state to take evidence.

3. Right to Refuse to Give Evidence

Under the Hague Evidence Convention, a witness, who is examined by a commissioner, may not only claim privileges under the law of the state of the trial court, but also those under the law of the requested state.⁹¹ Where a witness is examined by the trial court under the European Evidence Regulation,⁹² he may only invoke the privileges as stipulated by the law of the requesting state.⁹³ The same should apply where under the convention between South Africa, Botswana, Namibia, Nigeria, and Uganda, a witness is examined by videolink, by a commissioner, or by the trial court on the territory of the requested state. This approach also ensures that with respect to the privileges, the examination of the foreign witness is governed by one single law, namely that of the state of the trial court. Moreover, witnesses examined for the benefit of civil proceedings pending before the said court may invoke the same privileges, irrespective of whether they reside in the requesting state or in the requested state.⁹⁴

⁸⁸ For instance, where the individual is not allowed to travel to the requested state due to his criminal record.

⁸⁹ *Cf.* Chapter 2 para. V.D.4.

⁹⁰ See also in this regard Article 21(d) of the Hague Evidence Convention; Article 17(6) of the European Evidence Regulation.

⁹¹ Article 21(e) read in conjunction with Article 11(1). See also Article 10(5)(e) of the European Convention in Criminal Matters.

⁹² Article 17.

⁹³ *Cf.* Article 17(6), which provides that the witness is examined in accordance with the law of the requesting state. Where the witness is examined by the requested court, Article 14(1) stipulates that the witness may claim the privileges of the requested state and the requesting state. There is, however, no such provision for cases where the trial court examines the witness.

⁹⁴ This is not the case where a foreign witness may invoke not only the privileges of the requesting state, but also those of the requested state.

4. Use of Compulsion

As has already been explained earlier,⁹⁵ the performance of coercive measures by the trial court in the requested state is regarded as a violation of the latter's sovereignty. Accordingly, under the Hague Evidence Convention, a commissioner is not allowed to take any measures of compulsion on foreign territory, but may apply to the competent authority of the requested state for appropriate assistance, provided the said state permitted such application when ratifying the Convention.⁹⁶ Where under the European Evidence Regulation, the foreign evidence is taken by the trial court in the requested state, such evidence-taking can only take place if it can be performed on a voluntary basis without the need for coercive measures.⁹⁷ As a consequence, the trial court is not only prevented from taking any measures of compulsion on foreign territory, but it also cannot apply to the requested state for the use of coercive measures.

Where a foreign witness refuses to collaborate with a commissioner or the trial court, be it in a hearing conducted by the said court in the requested state or by videolink, the witness' testimony can only be obtained *via* the application of coercive measures. From the perspective of the trial court, it is thus crucial that the convention for cross-border taking of evidence in South Africa, Botswana, Namibia, Nigeria, and Uganda allows the said court to apply to the competent court in the requested state for coercive measures. This is all the more important since the said convention, unlike the Hague Evidence Convention and the European Evidence Regulation, does not provide for an alternative method of evidence-taking performed by the requested court.⁹⁸ The convention between South Africa, Botswana, Namibia, Nigeria, and Uganda should moreover place an obligation upon the requested court to deal with a request of the trial court or of a commissioner for measures of compulsion based on a certificate issued by such court or by the commissioner that the particular witness refused to cooperate. In this context, the convention should state a time limit within which the requested court should decide on the

⁹⁵ See Chapter 3 para. IV.C.3.

⁹⁶ Article 18. See also Amram PhW *Explanatory Report on the 1970 Hague Evidence Convention* <http://www.hcch.net/upload/expl20e.pdf> 21 (date of use: 31 January 2013). *Cf.* also Article 10(8) of the European Convention in Criminal Matters.

⁹⁷ Article 17(2).

⁹⁸ Under both the Hague Evidence Convention and the European Evidence Regulation, the trial court may request the evidence to be taken by the competent authority of the requested state, if the witness refuses to cooperate with the said court or a commissioner. In this case, the court of the requested state may apply coercive measures against the recalcitrant witness. With regard to the Hague Evidence Convention, see Article 22 read in conjunction with Article 10. Regarding the European Evidence Regulation, *cf.*, amongst others, Leipold D 'Neue Wege im Recht der internationalen Beweiserhebung – einige Bemerkungen zur Europäischen Beweisaufnahmeverordnung' in Schwenzer I and Hager G (eds) *Festschrift für Peter Schlechtriem zum 70. Geburtstag* 2003 100.

coercive measures.⁹⁹ Furthermore, the convention should also stipulate that the requested court applies its own law when deciding on the coercive measures. In other words, the requested state applies the measures of compulsion in the same way as if the witness examination takes place in a national procedure.

5. Perjury

Where a foreign witness lies when giving sworn testimony before a commissioner or in a hearing conducted by the trial court in the requested state or *via* videolink, the question arises as to which law applies with regard to perjury. In both cases, the witness tells a lie in the state where he gives evidence, that is, the requested state, but he also obstructs the judicial process in the country of the trial court. Whether giving false testimony constitutes a perjury in the requested state depends on whether telling a lie to the courts of a foreign country amounts to perjury. The same applies *mutatis mutandis* to the country in which the evidence is received. If a false testimony amounts to perjury in both states, that is, in the country where the witness is located and the state of the trial court, a further question arises, namely in which state the witness should be punished.¹⁰⁰

The convention on cross-border taking of evidence in South Africa, Botswana, Namibia, Nigeria, and Uganda could remove the aforesaid uncertainties by including either a criminal provision regarding perjury, or by stipulating that giving false testimony in a hearing conducted by the trial court or before a commissioner is regarded as perjury in the requested state. With regard to the latter, it has to be kept in mind that criminal sanctions taking effect in the state where the witness is resident, have a greater impact.¹⁰¹

6. Costs

In order not to create financial hurdles for the litigant or the trial court seeking foreign evidence, requested states should not impose any charges for the execution of a request for taking evidence abroad. This holds particularly true with regard to the convention between South Africa, Botswana, Namibia, Nigeria, and Uganda where the examination of foreign witnesses

⁹⁹ See also in this regard para. III.C above.

¹⁰⁰ Davies M 'Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation' 2007 *American Journal of Comparative Law* 221 *et seq.*

¹⁰¹ Davies M 'Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation' 2007 *American Journal of Comparative Law* 229.

should not be conducted by the requested court, but by the trial court or a commissioner.¹⁰² In other words, the requested court, let alone the central body, if any, should not be allowed to claim reimbursement of costs arising from the receipt and the examination of requests for judicial assistance, the conduct of supervisory activities, or from the use of coercive measures against recalcitrant witnesses. The same should apply for the costs of establishing and servicing the videolink in the requested state, provided the necessary equipment is available in such state. Where, however, an interpreter has to be appointed by the requested court, the relevant costs should be reimbursed by the requesting state. The convention on cross-border taking of evidence in South Africa, Botswana, Namibia, Nigeria, and Uganda should furthermore stipulate that the foreign witness required to give evidence before the trial court or a commissioner is entitled to payment for expenses and loss of time as may be determined by the trial court.

7. Further Remarks

The problems regarding discovery proceedings mentioned earlier in relation to the Hague Evidence Convention¹⁰³ do not arise under the convention on cross-border taking of evidence in South Africa, Botswana, Namibia, Nigeria, and Uganda. The laws of all of the aforesaid countries recognise discovery proceedings. Moreover, in all of these countries, discovery is limited to parties and to documents relating to any matter in question in the relevant action. Where a litigant fails to give discovery, the trial court may dismiss the claim or strike out the defence.¹⁰⁴ Since these consequences are generally sufficient to ensure the parties' cooperation in discovery proceedings, requests for judicial assistance regarding discovery are rare in practice. Consequently, there is no need for specific provisions in the convention in this regard.

Where a foreign witness is only required to produce a document, but not to testify, the convention between South Africa, Botswana, Namibia, Nigeria, and Uganda should allow the witness to submit the document not only to the trial court, but also to the requested court. In the latter case, the convention should provide that the requested court has to transmit the document to the trial court within a specified period of time.

¹⁰² See also in this regard the Hague Evidence Convention, which only stipulates the reimbursement of certain expenses by the requesting state relating to the execution of letters of request (Article 14), but not with regard to requests for taking evidence by diplomatic officers, consular agents, or commissioners. The same applies with respect to Article 18 of the European Evidence Regulation.

¹⁰³ Cf. Chapter 4 para. II.B.3.a).

¹⁰⁴ See, for instance, Chapter 5 para. III.B.

In order to avoid any misunderstandings, the convention should furthermore stipulate that the approval of a request for the taking of evidence does not imply ultimate recognition of the jurisdiction of the trial court issuing the request or a commitment to recognise the validity of the relevant judgment.¹⁰⁵

The convention on cross-border taking of evidence in South Africa, Botswana, Namibia, Nigeria, and Uganda, should remain open for accession by any other state. This should not only apply to common-law countries, but also to countries following the civil-law tradition, since the examination of foreign witnesses by videolink is suitable for both legal systems.

IV. Conclusion

The convention on cross-border taking of evidence in civil and commercial matters in South Africa, Botswana, Namibia, Nigeria, and Uganda should be drafted with the aim of facilitating and expediting the evidence-taking between these countries to the greatest possible extent which is still practically feasible. Accordingly, the convention should provide for the examination of foreign witnesses by the trial court *via* videolink as the primary method of taking evidence. This allows the trial court to observe the witness' demeanour during his examination without having to travel to the requested state. The same holds true for the parties and their counsel. Where a location or immovable property is situated in the requested state, the trial court may consider it necessary to conduct an inspection *in loco* abroad. Since such inspection cannot be carried out *via* videolink, the convention should allow the trial court to take evidence in the requested state. In other words, the trial court should be permitted to hold a part of the trial on foreign territory. This method may also make sense where the trial court and the foreign witness are situated in border areas. In other cases, however, particularly where the distance between the location of the trial court and that of the witness is long, the evidence-taking by the said court in the requested state appears not to be the most preferable method, as the members of such court have to travel abroad. Where the witness examination by videolink is not a realistic option, as the availability of videoconferencing equipment cannot be guaranteed in all the contracting states, the convention has to provide for an alternative method, namely the taking of evidence through a commissioner. Although the obtaining of evidence by a commissioner constitutes, like the other two aforesaid methods, passive judicial assistance, it has a considerable drawback: the trial court is not able to see and hear the foreign witness, but its perception of the witness' testimony is reduced to the relevant transcript.

¹⁰⁵ Cf. also Article 8 of the Inter-American Evidence Convention; Article 8(2) of the Mercosur Protocol.

In order to raise the efficiency of cross-border taking of evidence in South Africa, Botswana, Namibia, Nigeria, and Uganda, the convention should reduce the involvement of the requested state in relation to the execution of a relevant request to an absolute minimum. As a consequence, the transmission and examination of a request should merely involve the trial court and the court in the requested state in whose jurisdiction the foreign witness is resident, but no central body with approving authority. The communication between the trial court and the requested court should be as swift as possible, preferably by email or fax. The convention should moreover stipulate the mandatory use of a model form. Such form not only facilitates the issue of a request by the trial court and its examination by the requested court, but also limits the risk of a request being rejected due to formal or substantive defects. In order to maximise the effectiveness of the convention between South Africa, Botswana, Namibia, Nigeria, and Uganda, the reasons based on which the requested court is allowed to decline a request for the taking of evidence should be confined to what is strictly necessary. Consequently, a request should only be refused if it does not fall within the scope of the convention, or within the functions of the judiciary, or if it does not comply with the formal and substantive requirements as laid down in the convention. The requested court, however, should not be permitted to reject a request based on public policy reasons.

Since all the recommended methods of taking evidence constitute passive judicial assistance, it is the trial court, or a commissioner, and not the requested court that will be in charge of the examination of the witness. The requested court should, if at all, be allowed only to lay down conditions with which the trial court and the commissioner have to comply when taking the evidence, or to assign an individual who supervises the examination of the foreign witness. When taking the foreign evidence, the trial court and the commissioner should apply the law of the requesting state. This should hold particularly true for the privileges the witness may invoke. In case the witness refuses to give evidence, the convention between South Africa, Botswana, Namibia, Nigeria, and Uganda should allow the trial court and the commissioner to apply to the requested court for measures of compulsion. The requested court should be under the obligation to use the coercive measures in the same way as if the examination of the witness takes place in a domestic procedure.

The granting of a request to take foreign evidence emanating from the requesting state should generally not give rise to a claim for reimbursement of any charges of the requested state. This should hold particularly true for any costs associated with the receipt and examination of a re-

quest, the conduct of supervisory activities, or the use of measures of compulsion towards recalcitrant witnesses.

CHAPTER 7

CONCLUDING OBSERVATIONS

The outcome of any court case hinges largely on the extent to which the relevant material facts underlying the lawsuit can be proven. While from the perspective of the plaintiff, the ability to prove the respective facts determines the success or failure of his claim, the trial court is eager to obtain proof of all the said facts, in order to get at the truth of the claim and make a correct judgment. Where evidence, which is necessary to prove the relevant material facts, is located outside the state of the trial court, the process of taking evidence is, from the perspective of the said court, no longer a purely domestic matter, but has an international impact. This thesis investigates the extent to which cross-border taking of evidence in civil and commercial matters in relation to Switzerland, South Africa, Botswana, Namibia, Nigeria, and Uganda is allowed. The rules that have to be taken into account in this regard are threefold: first, public international law governing the relation between states; second, the law of the state where the civil proceedings, for which the foreign evidence is to be obtained, are pending; and third, the law of the state where the foreign evidence is located. This Chapter summarises the major conclusions reached in this thesis.

Based on the public international law concept of sovereignty, a state is not allowed to perform an act of state on the territory of another state, unless the latter gives its permission. The extent to which a trial court, litigants, their counsel, or any other individual are allowed to collect evidence in a state other than that of the said court therefore depends on whether the foreign state regards the evidence-taking as a judicial act or not. In civil litigation pending in civil-law countries, the taking of evidence is under the control of the court and thus is considered as an act of state, irrespective of whether it is performed by a member of the trial court, or by a private individual, and whether compulsion is applied or not. In Switzerland, a civil-law country, the taking of evidence on Swiss soil for the benefit of civil proceedings pending abroad constitutes a criminal offence. By contrast, in countries following the common-law tradition, such as South Africa, Botswana, Namibia,¹ Nigeria, and Uganda, the collection of evidence is entrusted to the parties. As a result, these countries regard the taking of evidence as a private act, provided no measures of compulsion are used.

¹ See in this regard Chapter 2 para. IV.B.2.a).

Where a state seeks means of proof located in a foreign state and the latter regards evidence-taking as interference with its sovereignty, the relevant evidence may be obtained through international judicial assistance. Such assistance is either granted based on an international treaty on cross-border taking of evidence, or based on “*courtoisie internationale*”. In the case of an international agreement, the requested state is under a public international law obligation to render judicial assistance, while in the second case, no such obligation exists.

The three classical methods for obtaining foreign evidence in civil and commercial matters by means of international judicial assistance are the taking of evidence by a letter of request, through a commissioner, and by a diplomatic officer or consular agent. The first method qualifies as active judicial assistance where the competent authority of the requested state takes the evidence based on its own rules and transmits the results to the requesting state. By contrast, the second and third method constitute passive judicial assistance. Here, it is a commissioner appointed by the trial court, or a diplomatic officer or consular agent representing the requesting state who takes the evidence on foreign territory in accordance with the rules of the requesting state. Trial courts usually prefer to obtain foreign evidence through a commissioner, as the taking of evidence is governed by their own rules and may not, as in the case of the collection of evidence by a diplomatic officer or consular agent, be limited to nationals of the requesting state. In comparison to the foreign authority, which may apply compulsion in its jurisdiction when executing a letter of request, a commissioner, diplomatic officer or consular agent is not allowed to use any coercive measures on foreign territory, as such compulsion would interfere with foreign sovereignty.

From the perspective of trial courts, the gathering of foreign evidence through international judicial assistance is often a burdensome and time-consuming process. The said courts are often eager to transfer the evidence originally located in a foreign state to their own jurisdiction. By this so-called “transfer of foreign evidence”, the evidence is no longer taken on foreign territory, but in the jurisdiction of the trial court. From the court’s viewpoint, the taking of the transferred evidence is thus a purely domestic matter and no longer requires the assistance of the foreign state. Compared to the collection of evidence by means of international judicial assistance, the advantages of a transfer of foreign evidence are, again from the trial court’s perspective, manifold: delays resulting from the involvement of foreign authorities can be avoided; the examination of evidence is governed by the rules of the trial court; and the evidence is not “filtered” by any foreign authority, commissioner, diplomatic officer, or consular agent.

Although the trial court does not in the course of a transfer of foreign evidence become physically active on foreign territory, the effects of a request of the trial court for such transfer go beyond the national boundaries of the state of the said court. The question therefore arises as to whether and, if so, to what extent, a request for a transfer of foreign evidence is allowed under public international law. This question is controversial. It is submitted that the aforesaid request does not interfere with foreign sovereignty where it is aimed at foreign litigants, provided the trial court only applies direct compulsion which is limited to the state where it is located or to procedural consequences. With regard to foreign third parties, a request for a transfer of foreign evidence is allowed where such witnesses have the same nationality as the trial court and the measures of compulsion are direct and merely take effect in the state of the said court. It is moreover submitted that a request, wherein the trial court asks a foreign witness for his voluntary cooperation, does not infringe the sovereignty of the state where the witness is resident.

Where a trial court wishes to bring foreign evidence into its jurisdiction without the assistance of the foreign state, it has several options: it may order a foreign witness to appear in court, to testify *via* videolink or telephone, to give evidence based on a questionnaire, or to submit documents or movable property. Where the specialised knowledge of an expert is required, a (civil-law) court may appoint a domestic expert to make investigations abroad which are necessary for the preparation of the expert opinion. With the exception of a summons of a foreign witness to attend court, it is controversial whether the aforesaid methods constitute a true transfer of foreign evidence, or whether they do not rather qualify as a judicial act performed by the trial court on foreign territory. It is submitted that all of the abovementioned options are to be regarded as transfers of foreign evidence that do not require the assistance of the foreign state. In all cases, the trial court does not (physically) perform a judicial act on foreign territory. The activities of the witness in the foreign state merely constitute a preparatory measure, while the evidence-taking ultimately occurs in the jurisdiction of the trial court, as the examination of evidence is only concluded once the court has reviewed it. It is furthermore submitted that an order, wherein a trial court instructs a litigant to obtain the evidence of a foreign third party for the benefit of the civil proceedings pending before it, constitutes a transfer of foreign evidence. Also, it is submitted that the aforesaid activities of a witness domiciled in Switzerland in response to a request for a transfer of foreign evidence of a court abroad constitute a criminal offence under Swiss law. A third party, however, who procures evidence based on a request of a litigant, who in turn was ordered to obtain evidence from such a witness, does not commit a criminal offence. Where a foreign witness voluntarily furnishes evidence without being re-

requested to do so by a trial court, foreign sovereignty is not infringed. This holds particularly true with regard to Swiss law, where a witness residing in Switzerland does not commit a criminal offence when voluntarily submitting evidence to a court abroad.

The question regarding the admissibility of a request for a transfer of foreign evidence under public international law is strictly to be separated from the question as to how such a request must be transmitted to the foreign witness. In countries sharing the civil-law tradition, the service of process is seen as a judicial act which is reserved to their own authorities. From the perspective of such countries, judicial documents addressed to witnesses domiciled within their territory and emanating from abroad thus have to be forwarded through channels of international judicial assistance. Whether the foregoing also applies to requests for a transfer of foreign evidence is controversial. While the traditional approach advocates the transmission of such a request *via* international judicial assistance, the author suggests that the trial court may directly send the request to the foreign witness by postal channels, provided such a request is, where necessary, accompanied by an official translation and the competent authority of the foreign state is notified about the transmission and the content of the request. Under Swiss law, the transmission of a request for a transfer of foreign evidence without the involvement of the competent Swiss authorities is regarded as a criminal offence, unless the respective judicial document has no legal effect on the witness domiciled in Switzerland.

From the countries dealt with in this thesis, only Switzerland and South Africa are members of an international convention on evidence-taking in civil and commercial matters. Switzerland is a party to the Hague Evidence Convention, and to the Hague Procedure Convention, whereas South Africa only acceded to the Hague Evidence Convention. While the Hague Procedure Convention merely provides for evidence-taking *via* a letter of request, the Hague Evidence Convention stipulates three methods, namely by letter of request, through a commissioner, and *via* a diplomatic officer or consular agent. Under the Hague Evidence Convention, South Africa declared, unlike Switzerland, that it would only execute letters of request and applications for evidence-taking by commissioners.

In relation to countries, which are not parties to the aforesaid conventions, Switzerland applies by analogy the provisions of the Hague Procedure Convention. Accordingly, Swiss authorities take evidence for the benefit of foreign civil proceedings based on a letter of request and in accordance with its own rules. Swiss law does not contain a specific rule on the conditions under which a litigant in civil proceedings pending in Switzerland may apply to the Swiss court for

obtaining evidence abroad. Once the Swiss court has given leave to a relevant application, it issues a letter of request to the foreign state which may then take the evidence based on its own rules.

Where a trial court wishes to obtain evidence in South Africa, Botswana, Namibia, Nigeria, and Uganda based on *courtoisie internationale*, the legal situation in the said countries is very similar. Judicial assistance is granted based on the Foreign Courts Evidence Act (South Africa, Namibia), the Foreign Tribunals Evidence Act (Botswana, Uganda), the Rules of the High Court of the Federal Capital Territory (Nigeria), the Supreme Court Act (South Africa), or the High Court Act (Namibia).² Under the said rules, the competent authorities of the aforesaid countries appoint a commissioner who takes the evidence in accordance with the rules of the court which nominated him. Under the South African Protection of Businesses Act and the Namibian Second General Law Amendment Act, the execution of a request for taking evidence in South Africa and Namibia emanating from a foreign state requires the authorisation of the relevant Minister. Where a litigant in civil proceedings pending before a high court of one of the aforesaid countries wishes to obtain evidence located abroad, he has to apply, based on the Rules of the High Court (South Africa, Botswana), the High Court Act (Namibia), the Rules of the High Court of the Federal Capital Territory (Nigeria), or the Civil Procedure Rules (Uganda), to the respective high court for a so-called “commission *de bene esse*”. When granting such an application, the high court issues a letter of request to the requested state which may then render judicial assistance in accordance with its own law.

The means of proof and the principles governing the procedure for the taking of evidence in civil proceedings before a high court of the African countries dealt with in this thesis are very similar. Evidence can be given by the testimony of a witness, and by the presentation of documentary evidence and real evidence. Every person is competent and compellable to give evidence, provided he is able to understand the questions put to him and to give reasonable answers, and he cannot invoke any privilege.³ As a general principle, witnesses give evidence *viva voce* on oath before the trial court. They are interrogated by the parties’ counsel and subject to the latter’s examination-in-chief, cross-examination, and re-examination. Where a litigant wishes to use documents as evidence, which are in the possession or control of the opposing party, he may require the latter to make discovery on oath of all relevant documents

² South African and Namibian law provide for two different procedures for obtaining evidence in South Africa and Namibia, respectively.

³ A witness may, amongst other things, refuse to answer questions which tend to incriminate him, or which refer to spousal communications or correspondence with a legal adviser.

relating to the matter in dispute. With regard to documents controlled by a third party, the litigant has to call him as witness. Nigerian and Ugandan law not only provide for the discovery of documents, but also for the discovery of facts. By way of so-called “interrogatories”, a party may request the opponent to answer questions relating to any matters in question prior to the hearing.

In civil proceedings pending in Switzerland, evidence may be given by witness testimony, documentary evidence, inspection, expert opinion, written information, party testimony, and testimony given under oath. Each person, who is mentally and physically fit to give evidence in court, is a competent witness. A third party may, however, decline to testify at all,⁴ or may merely refuse to answer specific questions.⁵ Unlike third parties, litigants cannot refuse to enter the witness box at all, but may refuse to answer specific questions.⁶ Litigants and third parties testify *viva voce* before the trial court. Their questioning is conducted by the court, while a litigant may only put questions to the opponent and non-party witnesses *via* the judge. As a general principle, witnesses do not testify under oath, but are exhorted to tell the truth. Experts are appointed by the judge and are regarded as aides of the court. It is also the judge who instructs the expert and formulates the questions he has to address. By contrast, experts selected by the litigants are regarded as ordinary non-party witnesses. Where parties offered sufficiently specified documents as evidence in their pleadings, the court issues orders wherein litigants and third parties are instructed to submit the relevant documents to the court where they can be inspected by the litigants.

Based on the above, the main differences between the means of proof and the procedure of taking evidence in civil proceedings in South Africa, Botswana, Namibia, Nigeria and Uganda, and those in Switzerland are evident. Swiss law distinguishes between the evidence given by litigants, third parties, and experts. Moreover, the reasons based on which a witness in proceedings before a Swiss judge may refuse to testify are less limited than in the aforesaid African countries. Under Swiss law, the procurement of evidence is under the control of the court, while in South Africa, Botswana, Namibia, Nigeria, and Uganda, such process is dominated by

⁴ This may, for instance, be the case, where the third party is married to a party, has children with a party, or is a direct relative or in-law of a party.

⁵ This may, amongst other things, be the case for questions which may expose the third party, his spouse, a direct relative or in-law to the risk of penal investigation or civil liability. The same holds true where the third party is privy to a statutorily protected secret, such as a lawyer, doctor, clergyman, journalist, or public official.

⁶ This may, for instance, apply to questions which may expose the litigant’s spouse or his direct relative or in-law to the risk of penal investigation or civil liability, or which may conflict with a statutorily protected secret. With regard to the latter, see fn. 5 above.

the parties. This holds particularly true with regard to the examination of witnesses. Accordingly, Swiss law does not recognise the examination-in-chief, cross-examination, and re-examination. The same holds true for pre-trial discovery. In civil proceedings pending in Switzerland, a litigant is under no obligation to furnish the opposing party with documents which may help the latter to advance his own case or damage the case of his adversary, unless the opponent proffered such documents as evidence in his pleadings.

Since Switzerland's neighbouring countries and its main trading partners, as well as the vast majority of the member states of the European Union, are either party to the Hague Evidence Convention or the Hague Procedure Convention, Switzerland is fairly well-positioned with regard to cross-border taking of evidence in civil and commercial matters. The same holds true, albeit to a lesser extent, for South Africa being a contracting state to the Hague Evidence Convention, as its neighbouring countries are not members of the said Convention. Not being a party to any international agreement on evidence-taking in civil and commercial matters, the situation is even less favourable for the remainder of the African countries, including Botswana, Namibia, Nigeria, and Uganda.⁷ These shortcomings could be overcome by either acceding to the Hague Evidence Convention and/or negotiating bilateral treaties. In this context, it has to be kept in mind that, on the one hand, the Hague Evidence Convention constitutes a compromise solution to accommodate the needs of the civil- and common-law systems regarding evidence-taking in civil and commercial matters, and that, on the other, bilateral treaties merely regulate the relation between the two states involved. By contrast, the draft of a new convention between South Africa, Botswana, Namibia, Nigeria, and Uganda can be tailored to the particular needs of the said countries and would create a uniform legal area in evidence-taking in civil and commercial matters between these countries.

Needless to say, the said convention between South Africa, Botswana, Namibia, Nigeria, and Uganda should be drafted with the aim of enhancing and expediting the cross-border taking of evidence in these countries to the greatest possible extent. The convention should thus limit the involvement of the requested state to the necessary minimum and should allow for direct communication between the trial court and the foreign court in whose jurisdiction the evidence is located. It should moreover provide for the correspondence between the said courts to be conducted by email or fax. The reasons based on which the requested state can decline to grant international judicial assistance should be limited to an absolute minimum and should, in par-

⁷ With the exception of the Seychelles, which acceded to the Hague Evidence Convention, and Egypt and Morocco which both are party to the Hague Procedure Convention.

ticular, exclude the refusal based on public policy reasons. The convention should stipulate the examination by videolink as a primary method for taking evidence which is conducted by the trial court in accordance with the rules of the requesting state. Where the foreign witness refuses to cooperate with the trial court, the latter should be allowed to apply to the competent foreign court for coercive measures and such court should be under the obligation to use compulsion in the same manner as in domestic proceedings.

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