

International mutual legal assistance in Switzerland : The Hague evidence convention's chapter II route

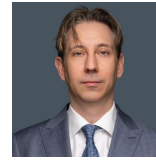
Using the lesser-known Chapter II route has advantages and may speed up the process of taking evidence from resident Swiss witnesses

- Switzerland hosts many corporations, organisations and financial institutions operating worldwide and serving international clients.^[1] So, when civil lawsuits are initiated in other jurisdictions, mutual legal assistance may involve the deposition of a witness domiciled in Switzerland (who may work for the entity or simply hold useful information to the resolution of the dispute).
- In Switzerland, international mutual assistance in civil matters is governed by the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the “**Hague Evidence Convention**”). This sets out two methods for co-operation between States’ parties for the taking of evidence abroad in civil matters, via:
 - letters of request (Chapter I); or
 - diplomatic or consular agents and/or commissioners (Chapter II).
- The Chapter II route is less used in practice, as it remains unknown to most practitioners and may at first appear more complicated. In fact, it offers much more procedural flexibility and has numerous advantages, provided that certain conditions are met.

A BRIEF COMPARAISON OF THE TWO ROUTES

- Under Chapter I, the letter of request must be sent by the competent foreign court to the competent local Swiss court – based on the witness’ Swiss domicile (Art. 2) – which carries out the execution in accordance with Art. 2 and 9 of the Swiss Code of Civil Procedure.^[2]
- In practice, this means that a Swiss judge will execute the letter of request and personally conduct the questioning of the witness.
- Interrogation under oath is allowed, but requires the consent of the witness.
- Cross examination by the parties is possible – on the understanding that the Swiss judge retains control over the questioning and intervenes as deemed necessary.^[3] In practice, Swiss judges are not familiar with witness cross-examination, so will usually only allow follow-up questions from the parties, rather than a common law-type cross-examination.
- Swiss state courts are generally overloaded and – in our experience – it typically takes 6-12 months from transmission of the letter of request to the transmission of the executed request back to the requesting foreign court (depending on the competent local Swiss court and the complexity of the case). Such a lengthy process is not always compatible with the procedural

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schedule of national proceedings for which the assistance is sought, which may result in parties giving up on possible relevant evidence for practical constraints.

- Under Chapter II, the foreign request for evidence is executed directly by the parties' representatives, acting either as diplomatic/consular agents or as court-appointed commissioners, without involving Swiss State courts (Art. 15-21).
- Local State courts must be informed by the parties of the date and place of the hearing and remain involved in the process of obtaining the necessary authorisation from the Swiss Federal Department of Justice and Police ("FDJP") (see *infra* 8).
- In practice, the Chapter II route is mainly relevant to witness testimony.
- Since state courts are not involved in a Chapter II hearing, it falls to the diplomatic/consular agents or court-appointed commissioners to ensure that the hearing complies with the procedural rules of both the requesting and the requested State.^[4]
- Swiss procedural rules must be read to the witness at the beginning of the hearing. These include the prohibition of false testimony (Art. 307, Swiss Criminal Code) and reasons for refusal to testify (Art. 165 and 166, Swiss Civil Procedure Code; these typically include testifying against family members, professional secrecy and the right not to self-incriminate.)
- In Switzerland, conducting a hearing under Chapter II requires formal authorisation from the FDJP (in accordance with the reservation made by Switzerland to Art. 15-17).
- Interrogation under oath and cross-examination by the parties is allowed, but this must have the witness' express consent.
- As there is no intervention from a state judge, there is more room to conduct a common law-type witness hearing, provided that the witness fully consents to it.
- Formally gaining authorisation from the FDJP usually takes a minimum of 2-6 weeks. This process can be summarised as follows:
 - The requesting party should prepare a request for evidence to be submitted to the foreign requesting court (which then formally issues this request).
 - The requesting party should then send a letter to the Swiss competent local court, (i.e. the court of the witness' Swiss domicile), requesting formal authorisation to conduct a Chapter II hearing, and annexing the request for evidence. A copy of the same letter should also be sent to the FDJP to accelerate the process.
 - The Swiss local court makes a first assessment of the request and verifies that it includes all relevant information. It then refers the matter to the FDJP for formal issuance of the authorisation.
 - The FDJP assesses the admissibility of the request and, if all the requirements are deemed met, issues the requested authorisation and notifies each parties' counsel by a formal letter. Where no Swiss counsel is appointed for a party, the FDJP will usually email the concerned party's foreign counsel. This authorisation is valid for six months.
- Upon delivery of the authorisation and once the precise date and place of the Chapter II hearing is known, the parties must inform the competent local state court of the same by a formal letter.

- The Chapter II route therefore offers noticeable advantages.
- It is faster (typically 2-6 weeks vs a minimum 6 months) and more cost-efficient.
- There is more scope for a common law-type of hearing (including cross-examination).
- It enables the Swiss and/or foreign lawyers to act as commissioners, agree on the list of questions and provide the documentary evidence on which the witness would be heard before the hearing. This gives greater control over the hearing and the chance to obtain better-quality testimony.
- In Chapter I, the Swiss judge will typically read the list of questions received from the foreign court and not ask follow-up questions, as he/she has no knowledge of the details of the dispute pending before the foreign court.
- It should be emphasised that Chapter II is subject to the continuous consent of the witness – so it is only a practical solution where the witness is co-operative, or is bound by obligations to co-operate (such as those arising from a contractual or settlement agreement). However, this may prove advantageous within the procedural framework, since the witness retains the right to decline questions posed by opposing parties and instead focus solely on inquiries from the party initiating the Chapter II hearing. In some instances, it can also convince a witness to testify where he/she is not willing to appear in person before a foreign court (due to logistical or personal reasons, or company policy (e. g. Swiss banks are usually reluctant to let employees testify in the US)).

CHAPTER II CHECKLIST

- We set out below some practical considerations identified from past experience with Chapter II hearings.
- **Prepare a comprehensive request for evidence for the foreign requesting court:** this should be as complete as possible to avoid the risk that it is remanded to the requesting court for completion:
 - Briefly describe the nature and subject matter of the proceedings;
 - Indicate the amount in dispute. This will decide the amount of the advance for procedural costs (which varies between CHF 100 and CHF 5,000^[5]), depending on the amount in dispute and the complexity of the case. Authorisation will not be granted until the advance on procedural costs is paid.
 - Identify the parties and their respective counsel, giving full contact details (including email).
 - Indicate the names and addresses of individuals who are to supervise the evidentiary proceedings (in their capacity as diplomatic/consular agents or court-appointed commissioners).
 - Propose a date for the intended taking of evidence. Such a request should, ideally, be filed two months before the proposed date. In practice, it is possible to obtain authorisation within two weeks if there is a particular procedural urgency in foreign proceedings to hear the witness. This should be explained in the request for evidence and/or in a covering letter.
 - Consider obtaining a written consent from the witness (this is not a formal requirement, but it can help speed up the authorisation).
- **Have a Swiss counsel on record:** for a smoother authorisation process and effective communication with Swiss authorities, it is advisable to involve at least one Swiss counsel in the process (it can be either party's counsel).

This is also useful when following up the authorisation process and contacting relevant Swiss authorities. The FDJP, in particular, can usually be easily reached and is generally willing to help facilitate a swift process.

- **Agree on the questions to be put to the witness as soon as possible:** since a Chapter-II hearing implies express consent from the witness to participate and answer the questions submitted, it is advisable to agree questions as soon as possible, with as much precision as possible (including any possible documents to be submitted to the witness) as well as modalities of the hearing (follow-up questions and/or cross-examination allowed or not). In international disputes, where a settlement is concluded with one of the defendants, it can be useful to include an obligation to co-operate in future or existing proceedings against the other defendants. Such a settlement agreement could include a precise list of questions (or at least topics), with an obligation to co-operate and testify.
- **Prepare hearing logistics and formalities:** these should be set up ahead of the hearing – for example, videoconferencing for foreign counsel; videorecording; and a stenographer for the minutes (they may attend by videoconference as well). Law firms will usually have appropriate infrastructure and experience in this area. As part of the logistics for the hearing, the FDJP authorisation must be formally notified to all participants (and their Swiss or foreign counsel), on the understanding that service by email is possible to speed up the process.
- **Get prepared to act as commissioners:** the parties' respective counsel are usually appointed to act as commissioners during the Chapter-II hearing. Since the hearing must be conducted in accordance with the procedural rules of the requesting State, as well as with Swiss procedural rules, it is advisable to have at least one foreign lawyer and one Swiss lawyer appointed as commissioners, to read witness rights under both applicable laws. On a practical level, it is useful to agree beforehand who will be responsible for reading such rights at the hearing.

FUTURE SIMPLIFICATION

- On 15 March 2024, the Swiss Federal Council published a draft proposing that, in future, witnesses and parties may be questioned or heard via teleconference or videoconference by a foreign authority or a commissioner, without prior authorisation of the FDJP (see *supra* 8).
- Chapter II of the Hague Evidence Convention will apply by analogy, including to proceedings before foreign states that have not ratified this Convention.
- The Swiss authorities must receive detailed communication of the teleconference or videoconference, allowing the local court to participate if it wishes. This communication will contain essentially the same information as a request for authorisation under current law.
- The persons concerned must consent to being questioned or heard. They will enjoy the same rights as currently available, including the right to be interviewed in their mother tongue.

This amendment will shorten the process but will not drastically change it.

References

[1] Statistics from the Swiss Federal Statistical Office, <https://www.bfs.admin.ch/bfs/en/home/statistics/industry-services/stagre.html> and <https://www.bfs.admin.ch/bfs/en/home/statistics/money-banks-insurance/swiss-banks.html>.

[2] List of cantonal central authorities for legal assistance in civil and commercial matters,
<https://www.rhf.admin.ch/rhf/fr/home/zivilrecht/behoerden/zentralbehoerden.html>

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[3] Swiss Federal Office of Justice Guidelines for International Judicial Assistance in Civil Matters, p. 29,
<https://www.rhf.admin.ch/rhf/de/home/zivilrecht/wegleitungen.html>.

[4] Swiss Federal Office of Justice, Conditions for a Commissioner or Diplomatic or Consular Official to Obtain Evidence in Switzerland,
<https://www.rhf.admin.ch/rhf/fr/home/zivilrecht/wegleitungen.html>.

[5] Articles 5 and 13 of the Swiss Federal Council Ordinance on costs and compensation in Administrative Proceedings,
https://www.fedlex.admin.ch/eli/cc/1969/760_780_777/fr.

*This article was also published on the IBA website on 4 April 2024.