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Remote Hearing of Swiss Witnesses in International Civil Procedures – Changes on the Legislative Horizon

The global pandemic has firmly thrust the Swiss litigation scene into the 21st century. In future, if things go according to the government's plans, Swiss resident witnesses will soon be able to partake in international procedures by digital means.

1. Current Situation

Currently, if proceedings held in a jurisdiction outside of Switzerland require the hearing of a witness residing in Switzerland, the latter would have to travel to the locality of the foreign court presiding over the pending matter. Alternatively, two international treaties provide for the hearing of witnesses, which is considered a state competency, by means of formal legal assistance procedures (*Hague Convention on Civil Procedure 1954* and the *Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters 1970*).

Hitherto, if a foreign court wanted to interrogate a Swiss residing witness, it would be required to direct a request to the competent central authority of the canton in which the witness had its residency. This local authority would then liaise with the Federal Office of Justice which would issue a license for the foreign act on its territory.

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Not abiding by this (cumbersome) procedure could lead to the incurring of criminal penalties under art. 271 of the Swiss Criminal Code which penalizes acts for a foreign country, i.e. usurping authority that would otherwise be reserved to state bodies.

2. Background to new proposal

The Federal Civil Procedure Code, which came into force in 2011, is pending revision and one of the items that is heading for a make-over is the method for holding hearings. However, the revision is still in the parliamentary process.

At the same time, the Covid-pandemic energized digital progress in Switzerland and in October 2020 a parliamentary motion mandated the Federal Council (government) to investigate the possibility of making digital hearings of witnesses in international civil proceedings possible. Effectively, the motion required government to amend its reservation to the declaration no. 5 to the 1970 Hague Convention and, in effect, opt for the variant of para. 2 of art. 17 of the 1970 Hague Convention which provides that signatory states can do without this requirement.

If the proposal is finally passed, foreign requests for hearing Swiss witnesses would take on the simpler form of a mere notification to the central authority, no longer making it necessary to obtain prior approval.

Although the new law only amends the Swiss declaration no. 5 to certain articles of the 1970 Hague Convention, the aim is to grant the same liberties also to countries that are not party to this convention.

3. Perceived advantages

The proposal should improve the easier access to justice as it will make performing one's duties as a witness significantly simpler and more time efficient. Making oneself available to join in a telephone call or a visual confer-

ence should prove far less time consuming than travelling to a foreign country and being on trial there.

This ease should also promote the willingness of witnesses to take part in overseas proceedings. Further, the financial impact on the parties and the ecological influence on the environment should be lighter. Lastly, still within the framework of certain limitations to free movement, digital hearings will promote the health of vulnerable parties and avoid the unnecessary congregation of parties for mere procedural purposes.

According to Federal Office of Justice and Police's accompanying dispatch, from a Swiss administrative point of view, permitting the holding of digital hearings is seen as a very minimal interference with powers reserved to the state. Whether viewed as a foreign court digitally entering Swiss sovereign space to hear a Swiss witness or whether one conceives the hearing as a digital appearance of the Swiss resident in the overseas court procedure, either way the effect on Swiss sovereignty are limited.

4. Proposed amendments

The proposal would make it possible for an agent of the court to invite Swiss resident witnesses to take part in a telephonic interrogation or video exchange for trial purposes. Also, the court itself could hear parties in this manner. Note that no other evidence measures are included in the new law but the new ease only extends to witness hearings.

Note also, that the proposed change to legislation does not require the requesting party to extend the same benefits and ease of access to witness residing in its own territory.

The new law, which would take the form of an amendment to declaration no. 5 to art. 15 – 17 of the 1970 Hague Convention, would only require the requesting party or court to submit an advance notification to the cantonal central authority informing it about the proposed date and time of the digital hearing, including the information on the trial reference, the competent court, the names of the parties and their representatives as well as the party (witness) concerned. Furthermore, the notification needs to include the names and functions of any other persons taking part and also make clear what the topic of the hearing shall be.

In order to be valid, the notification must include the consent of the witness that is to be heard. This consent may be withdrawn by the witness at any point in time – the participation in the hearing by digital means remains fully voluntary.

Finally, the notification must be made in the official language of the canton where the central authority is located, or be accompanied by a translation into such language. The central authority is entitled to take part in the hearing, this in order to safeguard Swiss sovereignty and the rights of the witness according to the applicable convention.

Note that even if a notification is lodged and no intervention occurs by the cantonal authority, this does not automatically absolve the parties involved from the potential threat of art. 271 Criminal Code. The assessment of whether the criteria for a legitimate interrogation compliant with the requirements of declaration 5 have been upheld, remains the sole competency of the Swiss criminal courts.

5. Time-line

Cantons and interested parties may comment on the draft legislation until the beginning of March 2023. Thereafter, parliament will debate the draft. It is currently not certain when the new law would come into force, but given that the proposal is largely uncontroversial it may be expected to pass through parliament reasonably smoothly.

6. Conclusion

The draft law will significantly simplify international witness proceedings for parties with their residence in Switzerland.

Nevertheless, formulating the notification to the central authorities will still require diligence, as was and still is the case under the current application process.

Given that the effect of the digital interrogation will not be different from a in situ hearing, witnesses are well advised to give the same care and thought to their testimony when they are seated in front of a computer screen, as they would when confronted with a full bench of judges or a jury.

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