

VISCHER

eDiscovery from Switzerland.

Update on Art. 271 Swiss Criminal Code

David Rosenthal, Partner, VISCHER Ltd.
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Federal Tribunal November 1, 2021 6B_216/2020

"1.4.2 ... The decisive factor is that the release of information and documents that can only be legally released in Switzerland on the basis of a sovereign order affects the legal interest protected by Art. 271 SCC (cf. HUSMANN, loc. cit., n. 40 on Art. 271 SCC; BAZZI, loc. cit., p. 188, para. 370). **In all constellations, only files and information that can be freely disposed of may be released.** Only the official or judicial assistance channel offers a procedural vessel in which secrecy and disclosure obligations can be set against each other and the principle of speciality can be guaranteed (GAUTHEY/ MARKUS, loc. cit., p. 396; HUSMANN, loc. cit., n. 45 on Art. 271 SCC; BAZZI, loc. cit., p. 189 f. para. 373). **Not freely disposable is identifying information about third parties that is not publicly accessible** (HUSMANN, op. cit., n. 45 on Art. 271 SCC; cf. the unpublished orders of the Federal Department of Finance [FDF] reproduced in GRAF, op. cit., p. 183; critically GRAF, op. cit., p. 183 ff.)."

How to produce out of Switzerland - I

- Option 1 – Voluntary direct production (e.g., pre-trial discovery)
 - Art. 271 SCC prohibits production of documents out of Switzerland (i) a party can't freely dispose of/disclose (current standard: ± no personal data, no 3rd party secrets; must be own documents) (ii) under threat of sanctions (e.g., court order) and (iii) by/of non-parties to a proceeding
 - Art. 271 SCC, data protection and secrecy obligations require broad redactions
 - Usual approach: US-style Protective Orders are expanded to also cover remaining personal data
 - Issue #1: When are non-public documents "freely disposable"?
 - Issue #2: Production of documents stored outside Switzerland?
 - Issue #3: Production of documents outsourced to Switzerland?
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How to produce out of Switzerland - II

- Option 2 – Commissioner (Art. 17 HCCH 1970)
 - Counsel appointed as "Commissioners" by US court; Swiss approval ± within two months; for depositions, cross exams, documents ± as per US rules; no compulsion
- Option 3 – Letter of Request (Art. 1 et seqq. HCCH 1970)
 - Swiss court requested by US court; usually takes months; Swiss court applies own rules (exceptions possible); often used for getting documents from 3rd parties

<https://www.hcch.net/en/instruments/conventions/specialised-sections/evidence>

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Thank you for your attention!

Questions: drosenthal@vischer.com

Zürich

Schützengasse 1
Postfach
8021 Zürich, Schweiz
T +41 58 211 34 00

www.vischer.com

Basel

Aeschenvorstadt 4
Postfach
4010 Basel, Schweiz
T +41 58 211 33 00

Genf

Rue du Cloître 2-4
Postfach
1211 Genf 3, Schweiz
T +41 58 211 35 00