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eDiscovery & Disclosure

Switzerland: Trends & Developments
Niederer Kraft Frey

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Trends and Developments

Contributed by Niederer Kraft Frey

Niederer Kraft Frey's dispute resolution group has successfully litigated numerous leading cases before the Swiss Federal Supreme Court in the field of corporate and commercial law, and is regularly involved in high-stakes arbitration proceedings. The group has in-depth knowledge of civil procedure as well as corporate and commercial law, working closely with specialists from other departments (such as banking and finance, M&A and corporate) when additional expert knowledge is needed. In recent decades, Niederer Kraft & Frey has been heavily involved in a large number of major cross-border eDiscovery & disclosure matters, attracting worldwide media attention, including the FIFA corruption investigations; Petrobras, Brazil's biggest-ever corruption case; the FOREX and the LIBOR scandals; and the US-Swiss tax dispute concerning FATCA. The firm has a strong domestic and international client base in Switzerland, together with an established reputation for efficient collaboration with international law firms.

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Prologue

In Switzerland, eDiscovery is one of the fastest-growing fields of activity for company lawyers, outside counsel and accountants. In the Swiss legal community, eDiscovery is primarily associated with cross-border investigations, rather than civil litigation, as is the case in the US and the UK. Quite remarkably, the Swiss legislator has not followed the pace of recent industry developments by enacting specific procedural rules for eDiscovery, for example. Rather, general rules of evidence production apply to electronically stored information (ESI), mutatis mutandis.

In the US, Judge Scheindlin of the Southern District of New York determined some 15 years ago that the following ESI is accessible in eDiscovery:

- active online data;
- near-line data, such as CD Rom and DVD;
- offline storage and archives;
- back-up tapes; and
- erased, fragmented or damaged data.

More recently, ESI such as cloud storage, mobile devices and recordings of telephone conversations as required by law for some industries has become a primary target as well.

eDiscovery in Cross-border Investigations

In the past ten years, Swiss and Swiss-based multinationals have been the target of global investigations, particularly in the Zurich and Geneva-based banking industry and the primarily Basle-based pharma industry. Foreign law enforcement agencies, most notably the US Department of Justice (DOJ), as well as Swiss authorities, in particular the Office of the Attorney General of Switzerland (OAG), the Swiss Financial Market Supervisory Authority (FINMA) and the Swiss Competition Commission (ComCom), have extensive investigative powers to request ESI, either on their own behalf or for providing assistance to foreign proceedings. A few examples:

US Bank Program and FATCA

The US tax dispute launched by US authorities against 100+ Swiss banks (the so-called "US Bank Program") has kept

such Swiss banks busy over the last five years and entailed enormous costs in the tens if not hundreds of millions of dollars for every affected bank in connection with management absorption and external service-providers to gather terabytes of ESI requested by the US authorities, following which the US imposed its Foreign Account Tax Compliance Act (FATCA) regulation on financial intermediaries worldwide. While the gathering, preparation and delivery of ESI under the US Bank Program already resulted in highly excessive costs, the analysis, detection and remediation of bank accounts affected by FATCA again entailed internal and external costs of millions of dollars, and the exercise is still ongoing.

1MBD

An inquiry conducted by enforcement agencies in Singapore, Luxembourg, the US and Switzerland estimated that some USD4 billion was syphoned out of the Malaysian sovereign wealth fund "1MDB" into the pockets of corrupt officials. The investigation attracted enormous media attention due to the alleged involvement of the Malaysian prime minister and the financing of Leonardo DiCaprio's movie " *The Wolf of Wall Street* ". The ongoing global investigation into the 1MDB corruption case raises the question of whether corrupt officials and banks have cleaned up their acts, and eDiscovery requests have been imposed on Swiss banks by the OAG and FINMA, respectively.

Petrobras

In "Operation Carwash", Brazil's biggest-ever corruption case, the Swiss prosecutors received reports of about 340 suspicious banking relationships, opened about 60 inquiries targeting more than 1,000 bank accounts and froze more than USD1 billion. The OAG and FINMA overwhelmed 40 banks with eDiscovery & disclosure requests.

FIFA

The "FIFA corruption case" continues to attract worldwide media attention. Criminal investigations in many countries, including the US, Switzerland, many South American countries, South Africa and Germany, prompted eDiscovery at Zurich-based FIFA and at many national football associations around the globe. In Switzerland, the OAG reached out to FIFA and a number of Swiss-based banks, requesting them to produce substantial ESI and other information for use in Switzerland and abroad. In addition, FINMA doubled eDiscovery & disclosure at the banks involved by initiating its own investigation.

FOREX

In the "LIBOR Scandal", more than a dozen banks were investigated by authorities in Europe, Japan and the United States over suspected rigging of the London interbank offered rate, a key interest rate used in contracts worth trillions of dollars globally. More recently, in the "FOREX Probe", regulators in Asia, Switzerland, the UK and the US began to investigate banks in relation to the USD5.3 trillion-a-day foreign exchange market, inter aliafor rigging the foreign exchange benchmark. In both the LIBOR and FOREX matters, several Swiss banks were required to produce large-scale ESI to ComCom for use in Switzerland and abroad.

Four factors deserve particular observation:

- In many instances, ESI has been seized by way of dawn raids by the OAG, FINMA and ComCom. In this context, mirroring of all data for later analysis has become the most effective tool of eDiscovery used by Swiss authorities.
- Many of the above-mentioned global investigations are or were combined with internal investigations of the affected banks and other companies involved, as requested by the Swiss regulators, as they themselves lack the manpower to handle multiple global investigations and increasingly rely on law firms and accountant firms specialising in investigations.
- The information collected during the investigations is regularly shared with other domestic and foreign authorities in a way that is difficult to predict, and companies increasingly lose control over their ESI.
- The banks and other companies involved in global investigations increasingly realise that the gigantic volumes of ESI collected by Swiss authorities and often exchanged with foreign authorities may be used in civil litigation against the company under investigation, its officers or third parties (see further below "De FactoeDiscovery & Disclosure").

eDiscovery in International Arbitration and Litigation

Under pressure from foreign law enforcement agencies, Swiss global players are moving toward sophisticated ESI systems that, not surprisingly, become the object of desire in international arbitration and litigation.

Arbitration

There seems to be consensus between common law and civil law arbitration experts that US-style eDiscovery has no place in international arbitration. In particular, under the Swiss Rules of International Arbitration, the parties have no right to request the counterparty to produce documents; rather, they have to address a pertaining motion to the Arbitral Tribunal, which may, at its discretion and without obligation to do so, request the counterparty to produce documents that are relevant (Article 24 Swiss Rules). Notably, the Swiss Rules do not explicitly address eDiscovery & disclosure, but the rule applicable for document production requests applies, mutatis mutandis, to eDiscovery & disclosure. Quite differently, the IBA Rules on the Taking of Evidence in International Arbitration do address the production of ESI, in Rule 3.1(a) (ii), Rule 3.12(b) and the definition "Document". However, under the IBA Rules, the parties have no right to request directly that the counterparty produces ESI; rather,

they must apply to the Arbitral Tribunal and only the latter may request production from the counterparty. This notwithstanding, ESI stored on servers, computers, mobile devices and the cloud is an often preferred combat zone for requests for eDiscovery & disclosure in international arbitration.

Litigation

As is typical in Continental Europe, the Swiss legal system is not "discovery-based"; there is no US-style pre-trial discovery, and litigants (ie, parties to civil proceedings) have no duty to identify ESI or other information to the counterparty upon request. Parties file their briefs to the judge by relying on documents in their possession. Even though the litigants (and third parties) have, in principle, a broad duty to co-operate, including to produce documents (Article 160 of the Swiss Code of Civil Procedure – CCP), and litigants have the possibility to file motions for production of clearly specified ESI or other evidence, the judges in Switzerland are generally reluctant to order such production and, if at all, limit it to specific, clearly identified documents. Such documents or data, even if stored electronically, generally have to be submitted to the court in physical rather than electronic form. In addition, as a rule, non-compliance with a production request will not trigger draconic sanctions, as may be the case in the US (Rule 37 of the Federal Rules of Civil Procedure). Rather, the Swiss judge will take the "unjustified refusal" to co-operate without valid reason into account when appraising the evidence – ie, the judge might draw negative inferences from non-compliance with his or her request for the production of ESI (Article 164 CCP). Third parties may also be required to produce documents, but Swiss courts are even more reluctant to order them to produce information, in which case the third party is entitled to reasonable compensation (Article 160 CCP).

There are no procedural rules in civil litigation dealing with the preservation of ESI. In particular, no specific rule says that an obligation to preserve ESI is triggered when a party knows or should have known that evidence is relevant to pending or future litigation, as is the case in the US; see *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). However, once it comes to the attention of the judge, spoliation of ESI will trigger negative inferences for the party involved, and may also be tantamount to a number of criminal offences under the Swiss Criminal Code.

As Switzerland is not a common law but a civil law and therefore a "non-discovery country", there has been no obvious need to implement the Sedona Principles on Best Practices, Recommendations & Principles for Addressing Electronic Document Production (accessibility, proportionality, cost-shifting, preservation, spoliation), as was the case in the US Federal Rules of Civil Procedure (Rules 26 and 34) and the UK Procedural Rules (Part 31).

De Facto eDiscovery & Disclosure

Quite remarkably, another trend has recently arisen in Swiss practice: ESI accessed via global investigations by the OAG or FINMA, as in the matters identified at the outset of this survey, is increasingly used in civil litigation to the detriment of the company under investigation and its employees. Even though the files of FINMA proceedings are not per seaccessible to third parties that seek to substantiate claims based on civil law, in many instances FINMA files are shared with the OAG or other Swiss prosecutors, where potentially infringed parties have extensive rights to access the files. This development can be viewed and appreciated as de factoeDiscovery & disclosure. Consequently, potential claimants have a strong interest in government investigations being initiated, and regularly request authorities to do so. Therefore, eDiscovery & disclosure in criminal and supervisory proceedings may increasingly become an equivalent to US-style pretrial discovery.

Such de facto eDiscovery & disclosure can even go beyond what would be common in the US and the UK, in that the files of FINMA (or ComCom) proceedings may contain fateful ESI or other information, as the company and its employees have an obligation to co-operate fully in such supervisory proceedings. Privileges such as the privilege against self-incrimination and the attorney-client privilege are rarely invoked. If these files are passed on to potential claimants, the company and its employees may be deprived of their privileges. It is paramount to plan ahead for future civil and criminal litigation, and to develop a long-term strategy when sharing information with any administrative or supervisory authority.

Stumbling Blocks and Show Stoppers in eDiscovery

Any kind of evidence gathering in Switzerland for use in foreign proceedings and investigations, including eDiscovery & disclosure, is substantially restricted by stumbling blocks set forth in the Swiss Criminal Code (SCC) and the Swiss data protection legislation and, to some extent, by privileges under Swiss law.

Article 271 SCC prohibits Swiss companies and individuals from directly transmitting information, including ESI, to foreign authorities, courts and litigants. Under the Swiss legal system and practice, ESI and other information may only be collected by and produced to *Swiss* authorities, with a view to protecting Swiss territory and sovereignty. This severely limits the possibility of Swiss entities to co-operate with foreign authorities, even though they regularly wish to do so. This notwithstanding, a request for a so-called "271-exemption" may be lodged with the Federal Office of Justice (in criminal matters such as bribery investigations) or with the Federal Department of Finance (in banking, financial and tax matters). If the exemption is granted, which has become more the rule than the exception, co-operation with foreign authorities is permissible to the extent that Arti-

cle 273 SCC and data protection laws, among others, are observed. Notably, in international arbitration, ESI and other evidence may be collected in Switzerland and produced to the arbitral tribunal, wherever located, without infringement of Article 271 SCC.

Article 273 SCC protects secrets and confidentiality rather than Swiss territory and sovereignty, and prohibits Swiss companies and individuals from disclosing secrets – ie confidential information – to foreign authorities. The OAG has issued guidelines on the scope of Article 273 SCC ("273-guidelines"). Whenever ESI or other information includes names and other information about third parties, such information is considered a secret in the sense of Article 273 SCC and, as a rule, must not be disclosed to foreign authorities, courts and litigants. However, third parties may waive their right to confidentiality. In addition, Article 273 SCC only protects third-party information if that third party has a so-called *inland-nexus*, such as a Swiss domicile of the affected person or an employment contract with a Swiss company.

Data Protection

Cross-border transfer of ESI is further restricted by Swiss data protection legislation, in particular by Article 6 of the Swiss Data Protection Act (DPA). Similar to Article 273 SCC, this provision protects employees, customers and other third parties from involuntary transfer of their data abroad. In the past three years, Swiss courts have restricted the transfer of ESI and other information relating to bank employees to the DOJ, based on Swiss data protection legislation. Further, the analysis of the data itself during the internal investigation is limited by the DPA, even prior to its disclosure to third parties. In pertinent internal investigations, only business emails can be searched by the company (ie, the employer) – not private emails or other private information. Private telephone-tapping as sometimes conducted in internal investigations is illegal in principle, not only in the case of private mobiles but also in the case of business phone-tapping. Such tapping may only be performed by state attorneys if a serious felony is being investigated. The same is true for covert observation of employee email correspondence and telephone usage, at least as long as such activity is not disclosed to employees prior to such covert observation. Finally, Swiss multinationals may also have to comply with EU data protection laws when handling ESI relating to EU persons. Notably, the EU's General Data Protection Regulation (GDPR) entered into force in May 2018, imposing a set of much stricter rules and having a much broader scope compared to current EU regulation and, as a rule, is applicable to the vast majority of Swiss corporates.

Privileges

Further show-stoppers to eDiscovery are privileges available under Swiss procedural laws, most importantly the attorney-client privilege, a strong privilege that applies in civil, criminal and supervisory proceedings. However, there are limits to this crucial privilege: as in most countries around the globe, attorney-client privilege only applies if a lawyer gives legal advice, not if he or she gives business advice. In spring 2018, the Swiss Federal Supreme Court confirmed a decision rendered in 2016 that the report of law firms conducting an internal investigation with respect to anti-money laundering compliance is not privileged as the law firms performed a core task of the bank under investigation. The decisions are broadly discussed and highly disputed in Swiss legal doctrine. On top, the Swiss Federal Council almost simultaneously, in spring 2018, issued a message to the parliament further weakening attorney-client privilege in the context of establishing (shell) companies as a result of toughened anti-money laundering legislation. Notably, in-house counsels of Swiss-based companies have no privilege so far, but the Swiss Code of Civil Procedure is under revision to introduce an in-house counsel privilege (Article 160a CCP).

Triage in Switzerland

In a cross-border context, eDiscovery has to be conducted in Switzerland with a view to complying with Swiss laws and minimising the amount of data to be transferred abroad. In any event, a request for a 271-exemption should be filed with the competent authority in Berne. Additionally, waivers should be procured to the extent possible to avoid infringement of Swiss criminal and data protection legislation.

US counsel generally recommend that Swiss companies ship all discovery materials to their office in the US for review, triage and subsequent use in court proceedings. However, such ESI may not be protected by the attorney-client privilege, as a rule says that documents obtain no special protection just because they are stored at a law firm. Bringing documents to the US thus exposes the documents to US-style discovery. Quite remarkably, the District Court for the Southern District of New York recently held that Cravath Swaine & Moore could not be compelled to produce documents of its client Shell for use in (foreign) civil litigation – see *Kiobel v. Cravath, Swaine & Moore*, No. 17-424, 2018 WL 3352757 (2nd, Cir. July 10, 2018). This decision notwithstanding, it is recommended that discovery materials are reviewed in Switzerland, not in the US, particularly in cases where the US government seeks documents for use in criminal cases where the interests may be balanced differently than in civil litigation, as was the case in Kiobel.

eDiscovery, Mutual Assistance and Automatic Information Exchange

In the cross-border context, mostly US but also other foreign litigants and authorities request Swiss multinationals to produce ESI located in Switzerland based on subpoenas or similar instruments served in the US or otherwise outside of Switzerland. Whenever it is impossible to procure all required third-party waivers necessary under Article 273 SCC and Article 6 DPA, or if a 271-exemption is refused by

the Swiss federal government, it is necessary to collect ESI located in Switzerland through the channels of mutual or judicial assistance.

Mutual and Judicial Assistance

Switzerland generally places importance on information – more recently to the largest extent ESI – being gathered on Swiss territory only in line with Swiss evidence rules. Requests for eDiscovery & disclosure have to be addressed to the relevant Swiss central authorities under applicable treaties. In civil matters, requests may be made based on the Hague Evidence Convention, and have to be addressed to the central authority of the relevant Canton in Switzerland. Requests in criminal and supervisory matters can be lodged based on a Mutual Legal Assistance Treaty (MLAT), such as concluded by Switzerland with the US and the EU, and have to be addressed to the Swiss Federal Department of Justice. The competent Swiss central authority will then refer the request to the local court for execution. Evidence will subsequently be collected in accordance with Swiss procedural laws. As described above, the eDiscovery that is common in the US and the UK is not possible in Switzerland, but de factoeDiscovery has become common in the field of criminal and supervisory proceedings. Particularly in dawn raids, ESI is the primary target of Swiss prosecutors and of Swiss authorities such as FINMA and ComCom. In a case where terabytes and petabytes of ESI are seized in the mutual assistance context, the Swiss authorities face a difficult task: the Swiss Federal Supreme Court ruled some 15 years ago that Swiss authorities must ascertain relevance and suitability before transmitting information to foreign authorities. Given the amount of data in the case of ESI, it is unclear how such triage is to be conducted in order to live up to the Supreme Court's standard. The FOJ has voiced its concern that an e-triage by search terms may not meet the relevance test as required by the Supreme Court decision. With a view to the innovative software solutions developed more recently, electronic triage meeting the relevancy test should be available in the near future, if not today.

Automatic Information Exchange

On 1 January 2017, Switzerland started collecting bank and financial ESI that will be shared with the tax authorities of the EU member countries, Canada, Japan and Australia as of 1 January 2018. Under the agreement on the automatic exchange of information (AEOI), Swiss tax authorities are exchanging information including account numbers, account balance, interest and sales proceeds with the tax authorities of other countries introducing AEOI, on a yearly basis. As of 1 January 2018, some 41 additional countries exchange information with Switzerland on this basis, including Russia, Saudi Arabia and China. Notably, the US is not participating in AEOI but under FATCA the US Internal Revenue Service (IRS) receives comprehensive ESI with respect to US tax payers from Swiss-based financial institutions. No mutual assistance is needed under either AEOI or FATCA, as the Swiss-based financial institutions report directly to foreign tax authorities. Intertwined with the automatic information exchange, in tax matters Switzerland has strengthened the enforcement powers of its Federal Money Laundering Reporting Office (MROS) to request ESI from banks and other financial intermediaries under the Anti-Money Laundering Act, Article 11a AMLA. Since the beginning of 2016, MROS can pass ESI to foreign reporting offices, including details of account-holders, account numbers, account balances, beneficial owners and details of transactions, under Article 30 para. 2 AMLA.

Epilogue

Ironically, the case cited at the outset of this survey concerns an email of a US employee of UBS, Switzerland's biggest bank. In August 2001, a human resources specialist at UBS Warburg suggested that Laura Zubulake, a senior salesperson, be fired ASAP after her Equal Employment Opportunity Commission charge was filed, in part so that she would not be eligible for year-end bonuses. That email was the genesis of the aforementioned decision by Judge Scheindlin of the Southern District of New York (see *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003); 216 F.R.D. 280 (S.D.N.Y. 2003), one of the most cited cases relating to eDiscovery around the globe).

Another famous case involved a US employee of Credit Suisse, Switzerland's second largest bank: in December 2000, in the wake of a pending federal investigation into how the company allocated shares of an IPO, investment banker Frank Quattrone sent an email to hundreds of employees of Credit Suisse First Boston, stating: "We strongly suggest that before you leave for holidays, you should catch up on file cleaning". This case became famous in the context of retention, preservation and (criminal) spoliation of ESI.

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