

## Mutual assistance in civil matters

# Difficulties in opposing the execution of a letter rogatory

Par Claire Tistounet le 2 July 2024

The Geneva Court of Justice recently handed down a ruling on international mutual assistance in civil matters (ACJC/483/2024), in which it refused to consider a letter rogatory as abusive and/or likely to undermine Swiss sovereignty or security (art. 12 al. 1 let. b CLaH70).

Alice and Bernard are nationals of State F and have refugee status in Switzerland due to judicial and extra-judicial persecution by the authorities of F. In 2012, F requested mutual assistance in criminal matters from Switzerland in order to locate Alice and Bernard's assets. This request was refused because the foreign proceedings did not meet the requirements of Article 6 ECHR.

At the same time, the Geneva Public Prosecutor's Office (MP) opened criminal proceedings against Alice and Bernard for money laundering (Criminal Proceedings). City E, based in F, lodged a complaint and requested access to the case file. The Crown Prosecutor recognised E's status as plaintiff and granted it very limited access to the file due to its close link with F. The Criminal Proceedings were closed.

In 2018, a bank based in E filed a complaint against one of its founders and Bernard for money laundering. The complaint is dismissed by the MP.

E and the bank then filed a civil action in the United States against several third parties, claiming damages for theft and money laundering. In this context, a request for mutual assistance was sent to the Geneva Court of First Instance (CFI) to hear Alice and Bernard as witnesses.

Alice and Bernard objected to the execution of the request on the grounds that it was in fact for the benefit of F and was intended to obtain information that F could not obtain through mutual assistance in criminal matters. The request would therefore be abusive and its execution contrary to the fundamental principles of Swiss civil procedure. Alice and Bernard also invoked their right to refuse to testify at the risk of F using their answers to their detriment.

The CFI considers that Alice and Bernard can be heard because, inter alia (i) there is no concrete risk that information that would have been refused to F could be transmitted to it via mutual assistance, and (ii) Alice and Bernard can always refuse to answer questions that would be likely to harm them.

Alice and Bernard appealed to the Court of Justice, claiming in particular that there had been a

breach of Art. 12 para. 1 let. b CLaH70, according to which the execution of a letter rogatory may be refused if the requested State considers it likely to prejudice its sovereignty or security. Alice and Bernard argued, among other things, that by requesting their hearing through mutual assistance, E was trying to obtain information that had been refused in the Criminal Proceedings.

The Court of Justice began by recalling the reasoning of the Federal Court in ATF 149 III 235 (commented in : Tistounet, cdbf/1291). In that judgment, the Federal Court held that it is the actual execution of the request for mutual assistance, and not its purpose, that is decisive in assessing whether the request risks undermining the sovereignty or security of the requested State. Conversely, the court hearing such a request does not need to consider whether the evidence covered by the request is being used for other purposes. Furthermore, the concepts of interference with sovereignty or security must be assessed restrictively and are narrower in scope than the concept of incompatibility with the domestic public policy of the requested State. Such an infringement only exists – in connection with an infringement of the fundamental rights of the persons concerned or of the fundamental principles of Swiss civil procedure – when it is a question of violating fundamental procedural principles recognised by international public policy (e.g. the right of the persons concerned to be heard).

Consequently, according to the CLaH70, Alice and Bernard cannot be upheld when they invoke the abusive purpose of the request, which was allegedly intended to enable E and F to obtain information that had previously been denied to them, as this purpose criterion is irrelevant in assessing whether the request affects Switzerland's security or sovereignty.

The same applies when they argue that the request should be refused because it constitutes an abuse of rights. According to the Court of Justice

the Federal Court expressly left open the question of whether the prohibition of abuse of rights forms part of international public policy ;

even if it were, (a) the parties to the American proceedings and the Criminal Proceedings are not identical, and (b) the purpose of mutual assistance is to enable E and the bank to assert their rights in the American proceedings, whereas the purpose of the request for mutual assistance in criminal matters and the Criminal Proceedings was to gather evidence against Alice and Bernard. Consequently, the argument that executing the letter rogatory would be tantamount to circumventing the request for mutual assistance and the Criminal Procedure cannot be accepted ; and

in any event, only the execution of a letter rogatory, to the exclusion of its purpose, is relevant in assessing whether it undermines Switzerland's sovereignty or security. However, Alice and Bernard do not explain how their fundamental procedural rights would be violated by the letter rogatory, especially as, as witnesses, they may refuse to answer questions that could expose them (or their relatives) to criminal prosecution (art. 166 para. 1 let. a CPC).

This new cantonal case law is in line with recent Federal Court rulings and continues to restrict the interpretation of the grounds for refusal to execute a letter rogatory under art. 12 para. 1 let. b CLaH70.

However, the cantonal judgment has been referred to the Federal Court. To be continued...

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