3. Business Location Switzerland: Disadvantage for Legal Advice? Inside Counsel Also Need a Right to Refuse Testimony

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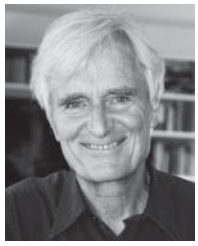
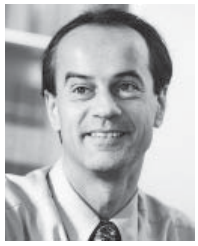


The authors note an increasing trend towards the organization and functioning of legal departments of major international corporations along the lines of external law firms. This permits in-house counsel to play a decisive role in helping corporations ensure that they operate in compliance with the law on a global basis. In Anglo-American countries, the right to refuse testimony (attorney-client privilege) - based on the principle that sound legal advice depends on full and frank communication between a client and his counsel - extends not only to an organization's external legal counsel, but also to its inside legal counsel. The authors recommend that a corresponding legal rule be adopted in Switzerland.

During the summer session of Swiss Parliament, it is currently anticipated that the National Council, as the second Council, will debate the draft Swiss Code of Criminal Procedure (CCrP), and that the Council of States, as the first Council, will debate the draft Swiss Code of Civil Procedure (CCP). This provides an opportunity to introduce into law an explicit right to refuse testimony for in-house counsel similar to that which has already long been conceded to external counsel. For "global players" with their international or European corporate headquarters in Switzerland, the current lack of a privilege for communications with internal lawyers represents an increasingly serious disadvantage for the business location Switzerland.

Global Environment…

In today's complex regulatory environment, the legal departments of international corporations are typically organized along the same lines as major law firms.[2)] Due to the broad spectrum of legal issues facing such companies worldwide, there is a need for in-house legal departments of major corporations to organize themselves globally (by analogy to large law firms) into areas of legal specialization, or "practice groups", to promote the rapid and efficient exchange of legal know-how and experience within the organization.[3)] These practice groups correspond to the legal areas that typically arise for major corporations - e.g., M&A, contract and company law, labor law, competition law, IT and intellectual property law, litigation and arbitration - as well as industry-specific legal areas.[4)] In-house legal advice may even be "pooled" so that group-wide legal advice for specific areas will be concentrated in one jurisdiction, e.g., transactions will be primarily handled out of the UK, competition law will be dealt with out of Brussels and intellectual property matters will be handled out of The Netherlands. The in-house lawyers within a major global corporation work together in the same fashion as the lawyers at a major, globally-linked law firm not only to ensure an efficient, professional coverage of the diverse legal issues confronting the corporation, but also to ensure that crucial legal information can be communicated quickly and efficiently to the members of the legal department worldwide. On the whole, the advice delivered by in-house counsel at a major global corporation, in terms of its manner of formulation and quality, is hardly distinguishable from that delivered by the major global law firms.

… and Tasks of In-House Counsel

Each corporation decides for itself which legal tasks are handled internally and which are handled by an external lawyer (outside counsel). On the one hand, in-house capacity and cost considerations often play a central role in this regard. Therefore, the question of whether work is handled by in-house counsel or an external lawyer (outside counsel) is often one of economic efficiency. On the other hand, however, many international corporations, particularly U.S. corporations, also tend to clarify legal issues in the first instance through in-house lawyers due to the latter's in-depth knowledge of the business activities, business processes and "inner workings" of the corporation. (For the same reason, the solution of complex problems by outside counsel in the absence of close cooperation with the corporation's in-house counsel would be unthinkable.) The coordination of legal requirements in the various jurisdictions, particularly in the regulatory and supervisory area, requires the – often daily – coordination of legal advice that is primarily given by in-house lawyers, who are familiar with the business activities of the company *à fonds*. In increasingly complex regulatory environments, the in-house lawyers bear primary responsibility for delivering legal advice on a day-to-day basis to ensure the corporation's *compliance with the law*. No supervisory or criminal prosecution authority will ever have at its disposal the same means and resources to ensure a company's compliance with the law as those available to the company's legal department.

Attorney Confidentiality: Stronghold?

The board of directors and management of a corporation must be able to make decisions on the structure of external transactions and internal business processes in complete reliance on the open and clear advice of its in-house counsel.

A lawyer is able to formulate sound legal advice to ensure his client's compliance with the law, however, only if the client has wholehearted confidence in his lawyer and discloses to him all pertinent facts. The client will, by nature, confide in his lawyer and engage in full and frank communications only if the client can be assured that the information revealed will not be disclosed without the client's consent, i.e., if there is a right to refuse testimony and to refuse the production of documents in this regard. This situation applies regardless of whether the legal advice is obtained in-house or externally. In light of this, it is difficult to understand why, under current Swiss law, only a client's communications with outside counsel, and not those with in-house counsel, are protected.

Among Swiss lawyers, a – rather fervid – discussion has erupted over the question of whether or not in-house legal advisers are covered by professional confidentiality pursuant to Article 321 of the Swiss Penal Code.[5)] The authors will refrain from contributing to this discussion, since they are concerned about something different: the introduction into the Swiss codes of procedure (CCrP, CCP) of an explicit right for in-house counsel to refuse testimony.

Under Threat of U.S. Discovery…

An explicit inclusion in Swiss law of a right on the part of in-house counsel to refuse testimony is of special importance to Swiss corporations with *"U.S. exposure"*. This would result in a benefit (or, put more accurately, eliminate disadvantages) for Swiss companies being sued in the United States on an *"extra-territorial*" basis. Within the scope of the U.S. discovery proceedings, Swiss corporations must basically produce to opposing attorneys and/or judges everything that is not "bolted or nailed down", including documents from Swiss corporate headquarters that might somehow be of relevance, however remotely, to the subject matter of the proceedings. U.S. discovery proceedings definitively became every Swiss corporation's nightmare once internal company email correspondence - often inappropriate and poorly-worded - became the focus of attention, the so-called "*e-discovery"*. The Enron and Worldcom scandals demonstrated in vivid fashion just how fatal email correspondence can be. Swiss corporations have not been spared in this regard. [6] Nor can those who fall into the "grinds" of U.S. discovery necessarily rely on the argument that the transnational collection of evidence must take place via legal assistance channels in accordance with the Hague Evidence Convention of 1970 ("Convention"). The U.S. Supreme Court, in the leading case *Aerospatiale*, held over 20 years ago that the Convention's legal assistance channels are non-exclusive and that U.S. judges *may, but are not required*, to follow these channels for gathering evidence aboard.[7] The U.S. judge is therefore free to directly compel the (Swiss) litigant to produce Swiss in-house counsel documents in U.S. litigation proceedings. Alternatively, even the Convention does not permit Switzerland to withhold documents in the possession of Swiss in-house counsel that are demanded by a U.S. judge in legal assistance proceedings since no Swiss in-house counsel privilege exists under the laws of the requested State (Switzerland) or the laws of the requesting State (as explained below, the attorney-client privilege in the U.S. only applies to foreign lawyers to the extent equivalent protection exists under foreign law).

The need for an explicit privilege for Swiss in-house counsel in light of the above-mentioned dangers in the context of U.S. litigation is also of essential importance to the increasing number of major U.S. corporations that choose to locate their European or regional headquarters in Switzerland.

… "Naked" and with No Protection

In the United States, the extremely broad discovery proceedings are limited, among other things, by the most important, and oldest, form of the refusal of testimony, the *attorney-client privilege*. This privilege protects the communications between the client and the lawyer and applies without distinction to lawyers who are outside legal counsel as well as lawyers who are inside legal counsel for an organization. In the leading case *Upjohn*, the U.S. Supreme Court confirmed over 25 years ago that in-house counsel is able to provide sound legal advice only if the communications between in-house counsel and the corporate employees are covered by the attorney-client privilege.[8] The company (client) cannot be forced to produce communications that are protected by the privilege. In the context of inside legal counsel, who are expected to "know the business" of the organization and in many cases participate in business decisions, it should be stressed that the privilege only applies to communications that are "predominantly for the purpose of obtaining or providing legal advice for the organization", [9] i.e., applies only to communications with in-house counsel while he is wearing his "lawyer" hat, and only when the communications relate to the legal "consult". It does not prevent anyone in litigation from discovering all of the facts necessary to make the case, whatever that may be, directly from the corporate employees: it simply requires the government or civil litigants to do their own work to prove their case instead of relying on communications with in-house counsel, so as not to deprive the client of its ability to communicate openly with its counsel.

According to the prevailing U.S. case law – and, in particular, the case law of the influential U.S. District Court for the Southern District of New York – foreign attorneys are not entitled to automatically rely on the attorney-client privilege under U.S. law. Instead, it must be demonstrated that an equivalent right to refuse testimony and refuse to produce documents exists in the foreign jurisdiction.[10] Currently, Swiss corporations that are sued in the United States are unable to assert any right to refuse testimony for (Swiss) in-house counsel, which mean that communications in this regard are required to be produced.[11] In addition, there is also the fact that, according to the "*Sun International*" doctrine of the Swiss Federal Tribunal,[12] even correspondence with external counsel is subject to seizure if this correspondence is located on company premises. As a consequence of this extremely restrictive interpretation of the attorney's right to refuse testimony and produce documents, Swiss corporations are essentially *exposed* to discovery in the United States *with no protection*. This may in certain cases give rise to actual discrimination against Swiss corporations - for instance, if documents from the legal department in Switzerland are required to be produced in U.S. antitrust proceedings, whilst American competitors are permitted to withhold documents from their legal departments.

The current unavailability of a right to refuse testimony and the possibility that legal documents can be seized in Switzerland also means that foreign subsidiaries are deterred from reporting in comprehensive fashion to the Swiss parent company. Conversely, the lack of a privilege in Switzerland creates a marked incentive for so-called "*fishing expeditions"* to be launched in Switzerland by U.S. plaintiff attorneys who know "*where the good stuff is to be found."*

In addition, in the United States, all documents that are prepared with a view to pending litigation are protected under the so-called *work-product doctrine*. No corresponding protection exists in Switzerland, which means that another considerable disadvantage exists for Swiss companies in U.S. discovery proceedings.

Rules in Other Jurisdictions

Today, the professional confidentiality of in-house counsel is *protected in the majority of jurisdictions*, particularly in English-language countries (United States, Canada, England, Scotland, Ireland, Australia, South Africa) as well as in Spanish- and Portuguese-language countries (Spain, Portugal, Central and South America).

On the other hand, up until 2003, the European Court of Justice rejected a right to refuse testimony on the part of in-house counsel. In the widely-publicized 2003 case *Akzo Nobel*, however, relating to the ordering of injunctive measures, the Court referred to a possible privilege.[13] The decision on the merits of the case is still pending.

How Now?

Switzerland needs a legally-stipulated right to refuse testimony for in-house counsel for a number of reasons: to prevent Switzerland from being the "odd one out" as compared with the rest of the world, to permit the legal departments of Swiss corporations to effectively fulfill their task of providing sound legal advice and, last but not least, to eliminate existing disadvantages for Swiss corporations in U.S. discovery proceedings.

Now, it is up to Parliament to seize the opportunity and extend an explicit right to refuse testimony to Swiss in-house counsel. This measure makes sense, creates the basis for the effective formulation of legal advice and increases the attractiveness of the business location Switzerland for global and European corporate headquarters.

1) Peter Forstmoser is Chairman of the Board of Directors of Swiss Re, Peter Honegger is Chairman of the Legal Committee of the Swiss American Chamber of Commerce (SACC); both authors are partners at Niederer Kraft & Frey, Attorneys-at-Law, Zurich. Rebecca Brunner-Peters is Director, U.S. Legal Matters, at Credit Suisse, Zurich, as well as a member of the SACC Legal Committee.

2) See generally Urs Rohner / Romeo Cerutti, Legal und Compliance im globalen (Finanz-)Unternehmen [Legal and Compliance in the Global (Financial) Company], in: GesKR 1/2007, Counsel's Page, pp. 1 - 5

3) Id.

4) For example, banking, securities and financial markets law (in the case of financial institutions), or aviation law and airplane leasing (in the case of corporations in the airline industry).

5) Cf. in this regard Felix W. Egli, Der Markt der Anwälte ist in Bewegung – Wer untersteht dem strafrechtlich geschützten Geheimnis? [The Market of the Attorneys in a State of Flux - Who is Subject to Confidentiality that is Protected under Criminal Law?], NZZ no. 295 of December 19, 2006, p. 29.

6) Cf. e.g., the five groundbreaking U.S. district court opinions during 2003 and 2004 in the case of *Zubulake v. UBS*, the first definitive case on a wide range of e-discovery issues.

7) *Société Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522 (1987).

8) *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

9) RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 73, comment i (2000).

10) Cf. *Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc.*, 1998 U.S. Dist. LEXIS 4213 (S.D.N.Y. 1998); 1999 U.S. Dist. LEXIS 5950 (S.D.N.Y. 1999), 188 F.R.D. 189 (S.D.N.Y. 1999).

11) Cf., e.g., *In re Rivastigimine Patent Litigation*, No. 05 MD 1661, 2006 U.S. Dist. LEXIS 84737 (S.D.N.Y. Nov. 22, 2006); In re Riv astigimine Litig. 237 F.R.D 69 (S.D.N.Y. 2006).

12) *Sun International Ltd*, Decisions of the Swiss Federal Tribunal 114 III 105 (1988).

13) *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission of the European Communities*, Joined Cases T-125/03 R and T-253/03 R (Court of First Instance, October 30, 2003).

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