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Inhouse Counsel – Changes to the Civil Procedure Order on Privilege

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On March 17, 2023, largely unnoticed by the general public, the Council of States (the legislative upper house of Switzerland) agreed to a change in the situation of inhouse counsel with regard to their privilege rights in civil proceedings, an issue that has been very contentious and hotly debated in the past.

These changes and the possible implications for clients are discussed below.

1. Current Situation

Currently, under the prevailing rules of the Swiss Criminal Code (SCC), and as in most countries, attorneys are not permitted to divulge confidential information that has been confided to them in their professional capacity or which has come to their knowledge in the practice of their profession. Transgressing this provision may lead to a custodial sentence not exceeding three years or to a monetary penalty.

The CPC has to date reflected this situation by granting attorneys a right of refusal to cooperate in the taking of evidence for civil proceedings (i.e. declining the production of records) if such cooperation could lead them to transgressing art. 321 SCC.

In contrast to other jurisdictions though, these privilege rights were not available to attorneys who found themselves in the employ of a "normal" company, compared to their colleagues working for a law firm.

2. Added complexity by jurisprudence of the Federal Tribunal

The role of inhouse counsel and the relationship with external law firms has given rise to difficult delineation issues in the jurisprudence of the Swiss Federal Tribunal with regard to the extent of which external law firms may claim confidentiality on behalf of their clients when they run an internal investigation. The Federal Tribunal has to date

been strict and limited the degree to which law firms could claim confidentiality when operating for companies in internal investigations.

Into this area of uncertainty and complexity the amendment of the Civil Procedural Code (CPC) will hopefully bring some clarity as regards the position of attorneys working inhouse when it comes to their rights and duties under civil proceedings.

3. Amendments to the Civil Procedure Code

The question whether inhouse counsel should be entitled to invoke client attorney privilege and legally decline cooperating with the court in civil proceedings has been debated in scholarly and political spheres for some time. The idea behind the introduction of such a rule was primarily to create a level playing field for Swiss inhouse attorneys with a view to their overseas colleagues. The new law should eliminate the disadvantages the inhouse counsel of companies in Switzerland encounter in comparison to their overseas colleagues.

Such situations arose frequently in contentious proceedings between Swiss and US companies, where the former were forced to disclose communication emanating from the inhouse counsel during discovery proceedings, whilst internal US attorneys of counterparties were permitted to invoke client-attorney privilege, thus leading to a sharp imbalance in the outcome of such disclosure proceedings.

Under the revised law, a new article 167a being introduced to the CPC (in translation) reads as follows:

¹ A party may refuse to cooperate and produce documents which are related to the activities of its inhouse legal department if:

- a. *it is registered as a legal entity in the Swiss Commercial Register or a comparable foreign register;*
- b. *the legal department is headed by a person who is in possession of a cantonal attorney's license or is qualified to perform the duties of an attorney pursuant to the rules of her/his state of origin; and*
- c. *the activity in question would be considered to be typical for the occupation as an attorney.*

² *A third party may refuse to cooperate or produce documents which are related to her/his activity for an internal legal department under the conditions of para. 1.*

³ *The parties and the third parties may contest the decision on their refusal to cooperate pursuant to para. 1 and para. 2 by way of objection.*

⁴ *The cost of litigious proceedings regarding the right of refusal pursuant to para. 1 and para. 2 shall be borne by the party or the third party invoking such right.*

The new provision of art. 167 para. 1 and para. 2 CPC thus require parties and external third parties to give testimony and / or produce physical records unless they can invoke the exception that such evidence and documents form part of the advice between it and an inhouse lawyer who is entitled to act as a professional representative, or with a patent attorney.

4. When may inhouse counsel invoke privilege under the new law?

The decisive criteria when assessing whether inhouse counsel can validly refuse to comply with a court's evidentiary orders is whether the activity in question, from which the evidence emanates (testimony or records), is to be considered typical of his or her

occupation as an attorney. The mere delegation of non-specific attorney work for fear of disclosure does not constitute a valid link to legal advice which forms the core of specific attorney work.

The delineation rule thus requires the same nexus to the attorney's work as would apply to attorneys who operate from own law firms and who are not employed by a company. Hence, work that is to be considered primarily business-oriented (such as asset management) or constitutes the taking over of statutory KYC obligations such as establishing facts would not benefit from the exemption.

A further requirement under the new law would be, that the attorneys at the inhouse legal desk must be led by a person who herself or himself is a licensed attorney in either a Swiss canton or in the state of origin. This is to ensure that the compliance section of the company in question entertains a minimum degree of professionalism as to legal issues thus justifying the legal privilege of non-cooperation with the requesting court.

The exception will extend to testimony of inhouse counsel as well as all attorney-specific communication of the inhouse counsel, both internally and externally and wherever such evidence is encountered.

5. New law a "blocking statute"?

A certain fear that goes along with the new provision is that other jurisdictions might consider the amendment to the CPC to constitute a "blocking statute", i.e. specific Swiss legislation to undermine the application of foreign law.

In view of the legislative development and the historical situation in countries outside of Switzerland, the introduction of the CPC amendment does not seem to purpose the sole and unilateral circumvention of foreign law, but rather aims to safeguard confidential

communication of lawyers and their clients as accepted to large degrees in other jurisdictions whilst it facilitates the equal treatment of both parties as a secondary effect.

6. Expectations

With the coming into force of the CPC amendment, which is expected to be at the beginning of 2025 (in the absence of a public referendum), Swiss inhouse attorneys working in internal legal desks can finally operate in an environment where they may feel safe in the knowledge that their attorney-specific advice will be privy only to their immediate addressees within the company they work for.

In addition to levelling the playing field internationally, one may expect that this layer of confidentiality will enable and embolden inhouse counsel to promote compliance more strongly and at an earlier stage than before since the threat of being forced to divulge internal legal advice has been restricted to a large extent.

A frank and critical discussion between management and the inhouse compliance department of companies can thereby be strengthened with operational teams being encouraged to engage with the legal desk at an early stage whenever complicated issues with significant risk factors are at stake (competition risks, tax and banking repercussions).

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