BÄR & KARRER BRIEFING MARCH 2024

PROPOSED SWISS LAW AMENDMENT FACILITATES NAVIGATION OF BLOCKING STATUTES IN CROSS-BORDER CIVIL PROCEEDINGS

On 15 March 2024, the Swiss government proposed an amendment to the Swiss Declaration on the 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (Hague Evidence Convention), and to the Federal Act on Private International Law (PILA).[1]

The proposed amendment, if accepted by the Swiss parliament, will allow foreign authorities (or the litigating parties as court-appointed commissioners) to depose or interrogate witnesses or experts situated in Switzerland without prior authorisation.

At the same time, the draft amended PILA aims at codifying the well-established practice of permissible voluntary disclosure of documents in foreign civil proceedings as an important step towards reducing legal uncertainty for Swiss companies in view of article 271 of the Swiss Criminal Code (SCC).

During the consultation process, Bär & Karrer recommended, among other things (cf. Report on the results of the consultation process[2]**), that this safe harbour be confirmed, particularly as it has been the subject of controversy following the Federal Supreme Court's decision in the *Swisspartners* case.**

WITNESS INTERROGATION

Article 271 SCC typically applies where a person is interrogated in Switzerland for the purpose of foreign proceedings, even if such interrogation is carried out remotely by telephone, videoconference, or other means of communication. Therefore, foreign authorities and the representatives of the litigating parties in foreign proceedings run the risk of criminal prosecution under article 271 SCC if they formally interrogate or depose witnesses on Swiss territory.

Mutual legal assistance proceedings under Chapter I of the Hague Evidence Convention must be followed to exclude those risks. Alternatively, and provided that the Swiss witnesses/experts are willing to be interrogated, article 17 (Chapter II) of the Hague Evidence Convention provides for an efficient mechanism to take evidence on Swiss territory by foreign authorities or (private) persons (e.g., counsel of the litigating parties) as court-appointed commissioners.

Proceedings under article 17 of the Hague Evidence Convention are subject to prior authorisation by the Swiss Department of Justice.

Under the proposed amendment (article 11 para. 3 draft PILA), foreign authorities (or the litigating parties) will be allowed to interrogate a person in Switzerland by

[1] https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen/bundesrat.msg-id-100376.html

[2] https://www.newsd.admin.ch/newsd/message/attachments/86608.pdf

telephone or videoconference without prior authorisation. In the future, a simple notification to the Swiss authorities will be sufficient to exclude any risks under article 271 SCC if the foreign authority or the private person conducts the interrogation by telephone or by videoconference from abroad.

Pursuant to the amended declaration Nr. 5 to the Hague Evidence Convention (Draft Declaration), the notification shall be made to the Federal Department of Justice and the central authority of the Swiss canton where the evidence is to be taken. It can be made by email and will be considered as being within time if received by the Federal Department of Justice at least 14 days before the interrogation (Draft Declaration, para. 3 (a)). The draft Message of the Federal Council clarifies that, in urgent matters and depending on the circumstances, even a later notification can exclude risks under article 271 SCC.

While it is irrelevant who makes the notification (i.e., the foreign authority, the parties to the proceedings, their representatives or even the witnesses/experts themselves), the notification must comply with a number of requirements which are broadly in line with the current authorisation practice.

In particular, the order of the foreign court appointing commissioners (e.g., counsel of the litigating parties) as well as a written confirmation of the witnesses that they are willing to participate and be questioned of their own free will must be attached to the notification (Draft Declaration, para. 3 (c) and (f)).

Under the revised law (Draft Declaration, para. 3 (e)), the competent central authorities will have the opportunity (as under current law) to attend the interrogation if they wish to ensure that the taking of evidence is conducted in compliance with the requirements of the Hague Evidence Convention as well as the secrecy provisions under Swiss criminal law, e.g., article 273 SCC (Industrial Espionage), or article 47 of the Swiss Banking Act (Banking Secrecy).

As under current law, compliance with these secrecy provisions is expressly reserved (Draft Declaration, para. 5). In contrast, the Swiss Data Protection Act does not apply to proceedings under article 17 of the Hague Evidence Convention. At the suggestion of Bär & Karrer and other parties involved in the consultation process, a corresponding confirmation was included in the Federal Council's Message, again with the aim of increasing legal certainty.

The Federal Department of Justice or the central authorities can be requested to perform an informal assessment of whether the notification submitted meets the requirements of the Declaration. The authorities do not have the right to prohibit an intended interrogation of a person in Switzerland. However, they have the option of filing a criminal complaint for unlawful acts on behalf of a foreign state (article 271 SCC) if they were to conclude that, despite a prior warning, the requirements of the Draft Declaration, para. 3 have not been met.

Finally, Draft Declaration, para. 3 (k) implements the principle of speciality. It provides that evidence obtained may be used only for the purposes of the relevant foreign civil proceedings, and must not be used for any other purposes, such as foreign criminal proceedings.

VOLUNTARY DOCUMENT PRODUCTION

Article 11 para. 1 of the draft PILA states that official acts performed in Switzerland in the context of foreign civil proceedings, in particular the service of judicial and extrajudicial documents and the taking of evidence, must be carried out within the framework of mutual legal assistance.

In the consultation, Bär & Karrer requested clarification in the interests of legal certainty as to whether this new provision would affect the long-standing practice whereby Swiss companies are free to produce documents voluntarily in foreign civil proceedings (including during pre-trial discovery).

To address this concern, an additional paragraph has been added to article 11 of the draft PILA, which, in an unofficial English translation, reads as follows:

"*A litigating party located in Switzerland may be requested directly to submit written statements or evidence, provided that the request does not contain a threat of criminal sanctions in the event of non-compliance and that the request is served in accordance with the applicable mutual legal assistance procedure.*"

The draft Message of the Federal Council explicitly clarifies that the requested parties to the foreign civil proceedings located in Switzerland may lawfully comply with the direct request of the foreign authorities (or the representatives of the litigating parties in US pre-trial discovery proceedings) and directly provide the requested written submission or evidence, subject to compliance with other restrictions under Swiss law, such as Swiss secrecy rules (e.g., article 273 SCC or article 47 of the Banking Act).

Against this background, the draft revised PILA codifies a long-standing practice of the Federal Office of Justice (cf. Guidelines on International judicial assistance in civil matters, 3rd ed. 2003, last updated January 2013)) and contributes to legal certainty in view of article 271 SCC as the subject of ongoing controversy.

At the same time, the draft of the revised PILA confirms Bär & Karrer's assessment that Swiss companies have always been legally permitted to produce documents voluntarily in foreign civil proceedings. Even in light of the Federal Supreme Court decision dated 1 November 2021 (SFSC 148 IV 66) which raised concerns among some legal authors as to whether the criterion of voluntariness is still relevant for the exclusion of criminal

liability, Bär & Karrer supported the previous practice of the Federal Office of Justice.

First, the (voluntary) disclosure of documents in civil proceedings is a purely private act that does not require the involvement of a public authority, either in a domestic or an international context, and therefore does not constitute an official act within the meaning of article 271 SCC. Second, compliance with all other applicable Swiss legal restrictions, such as the secrecy provisions in articles 162 and 273 SCC, article 47 Banking Act, or data protection laws, ensures that the rights of affected third parties are adequately protected (for further details see ANDREAS D. LÄNZLINGER/MARTINA ATHANAS, Direktübermittlung von Unterlagen und Informationen im Rahmen von ausländischen Zivilverfahren, in: Schweizerische Juristen-Zeitung 2022, p. 790).

Finally, we note that article 11 para. 2 draft PILA deals only with requests addressed to the parties to the proceedings pending abroad. The extent to which third parties can cooperate voluntarily in foreign civil proceedings will be the subject of a separate follow-up briefing.

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