

Understanding and maximizing the protection of legal professional privilege

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Current Situation in Europe – Switzerland as an example

- In-house counsel have no legal privilege and (in the view of the Swiss Supreme Court) also no professional secrecy obligations
- Outside counsel who are admitted to the Swiss bar are bound by professional secrecy obligations. No privilege if documents with legal advice are collected in the offices of the client (e.g. the Legal Department of a Corporation)

Increasing Importance of the Legal Privilege for In-house Counsel

- Evolving Role of In-house Counsel
 - Increasing density of regulations
 - Society expects that companies fully understand and comply with the law
 - Companies expect guidance from In-house Counsel
 - In-house Counsel must be pro-active issue-spotters
- Avoid potential disadvantage for Swiss multinational corporations with its headquarters in Switzerland

Increasing Importance of the Legal Privilege for In-house Counsel II

- Communications per e-mail facilitate the fact finding of governmental authorities and discoveries of counterparties in U.S. litigations
- E – Discovery without legal privilege deprives in-house counsel of a „bug-proof“ room and may hinder the fulfillment of their tasks

Disadvantages due to inconsistent conflict of laws analysis by some U.S. Courts

- No protection under the Hague Evidence Convention for European companies as defendants in U.S. courts (→ U.S. law)
- Communications with European in-house counsel may not be protected (→ law of the place where the privileged relationship was entered into)

Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention)

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence –

- a)* under the law of the State of execution; **or**
- b)* **under the law of the State of origin**, and the privilege or duty has been specified in the Letter, or, [...]

Specific Relevance for European Corporations

- European corporations often lack a comprehensive document retention program (especially for e-mails)
- Inconsistent decisions in the U.S. with respect to legal advice of foreign In-house Counsel and patent agents (Saxholm AS v. Dynal Inc. (164 F.R.D. 331, 339, E.D.N.Y. 1996); Reified Corp. vs. Remy Martin (98 F.R.D. 442))
- U.S. courts apply the Hague Evidence Convention to independent third parties only (Aérospatiale, 482 U.S. 522)

Switzerland's Approach to amend the current situation

- Draft Code of Criminal Procedure shall include an Attorney Client Privilege
- Reasoning:
 - Encourage open, honest communication between in-house counsel and their corporate client
 - avoid that governmental authorities have easy access to relevant information in dawn raids
 - avoid that U.S. Courts refuse to award the attorney client privilege to European Inhouse Counsels



Thank You.