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Article 271 (1) of the Swiss Criminal Code: myth or reality?

A summary of the practical implications of this Swiss statutory provision in the context of civil proceedings pending outside of Switzerland

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When a Swiss individual or legal entity is involved in civil proceedings pending outside of Switzerland, the practical implications of Article 271 (1) of the Swiss Criminal Code (which precludes the conduct of so-called «public authority acts» on Swiss soil) are a frequent topic of interest. This contribution seeks (i) to provide an overview of the practice of the Swiss authorities as regards the scope of this Swiss statutory provision in the context of civil proceedings pending outside of Switzerland and (ii) to present our thoughts as regards the application of Article 271 (1) of the Swiss Criminal Code to specific fact patterns which may arise in the context of cross-border civil litigation.

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1. Introduction

[1] In its decision 6B_216/2020 (dated November 1, 2021, generally referred to as the *Swisspartners* case), the Swiss Supreme Court confirmed a criminal sanction imposed upon the

chairman of a Swiss asset management firm for carrying out activities on behalf of a foreign State on Swiss territory without lawful authority (Article 271 (1) of the Swiss Criminal Code, the «**SCC**»). The relevant individual had made 109 customer files available to the US Department of Justice in the context of the negotiation of a Non-Prosecution Agreement. Whilst it could be anticipated that the transmission of this information would trigger questions under the Swiss statutory confidentiality provisions, it was, at first glance at least, less obvious that these activities would be characterized as a «public authority act» within the meaning of Article 271 (1) SCC. This recent case law illustrates that Swiss courts take a rather expansive view of this criminal provision, which must therefore be carefully considered each time a Swiss individual or legal entity participates, in one form or another, in proceedings pending outside of Switzerland, regardless of their criminal, civil or administrative nature.

[2] This contribution seeks to present a practical approach to the implications of Article 271 (1) SCC and to highlight some of the pitfalls which Swiss-based persons – along with their advisers – should avoid in order to mitigate the risks deriving from this statutory provision in the context of civil proceedings pending outside of Switzerland. For this purpose, this contribution will start by recalling the origin of Article 271 (1) SCC. This overview is important to understand the legislative intent behind this statutory provision. We will then present the constitutive elements of Article 271 (1) SCC. The last section of this contribution is dedicated to a review, from the perspective of Article 271 (1) SCC, of a series of typical situations in which Swiss-based persons might be required to take part in civil proceedings pending outside of Switzerland.

2. In which context was Article 271 (1) SCC adopted?

2.1. The *Jacob-Wesemann* affair and the *Spitzelgesetz*

[3] Before 1935, Switzerland had not enacted any specific criminal law protection against breaches of Swiss territorial sovereignty. For example, the law at the time did not preclude foreign police informers and spies from being active on Swiss territory.[1] It was generally held that the legal regime in force at the time was too vague to protect the territorial sovereignty of Switzerland.[2] Moreover, with the widespread political unrest that broke out in Europe after the First World War, Switzerland was increasingly confronted with foreign agents and informers active on its soil.[3] For example, in 1935, Berthold Jacob, a German of Jewish faith, was lured into a trap by a Gestapo agent, Hans Wesemann, and abducted to Germany. This abduction prompted the Swiss Government to issue an emergency decree, the so-called *Spitzelgesetz*, with a view to preserving Switzerland's sovereignty in times of unrest.[4]

[4] The *Spitzelgesetz* precludes the conduct, on Swiss soil, of activities which are the responsibility of a public authority (such as arrest, seizure, or detention) by foreign officials.[5] The personal scope of this act is however not limited to foreign officials. Any person who carries out an activity on behalf of a foreign state on Swiss soil could be subject to criminal prosecution.[6] The wording of the first Article of the *Spitzelgesetz* was transposed into Article 271 (1) SCC at the time the SCC came into force in 1942.[7] The aim of Article 271 (1) SCC was thus to protect Swiss sovereignty against interventions by foreign officials[8]. The scope of Article 271 (1) SCC was expanded in 1950 to cover also activities for a foreign party or other organisations[9], so as to include within the scope of this criminal provision organisations that exercise *de facto* state power.[10]

2.2. Interpretation of Article 271 (1) SCC by the Swiss authorities

[5] The Swiss Supreme Court decision n° 114 IV 128 (rendered in 1988) constitutes the first landmark ruling in respect of Article 271 (1) SCC. A Zurich lawyer was convicted for a breach of Article 271 (1) SCC. This lawyer had conducted private investigations in Switzerland on behalf of his client who was involved in criminal proceedings in Australia. In particular, this lawyer had arranged interviews with employees of a bank to clarify the facts of the case by questioning them himself. The outcome of these interviews was filed in the Australian proceedings. In its decision, the Swiss Supreme Court held that private individuals acting on Swiss soil could also fall within the ambit of Article 271 (1) SCC. [11]

[6] In January 2013, the Swiss Federal Office of Justice (the «**FOJ**») issued the 3rd edition of its guidelines on international judicial assistance in civil matters. These guidelines also address the scope of Article 271 (1) SCC by presenting a series of situations in which a Swiss-based person does not have to follow the channels of international judicial assistance in civil matters without triggering the application of Article 271 (1) SCC. In this context, the FOJ distinguishes (i) the «service of documents» and (ii) the «obtaining of evidence».

- As a matter of principle, any document (judicial and extrajudicial) must be served through judicial assistance. [12] Any Swiss-based person serving documents emanating from another State will infringe Article 271 (1) SCC. Exceptions to the obligation of serving such documents through judicial assistance can apply if «the document in question has no legal effect or is not liable to have any legal effects on the addressee» [13]. In addition, the service of documents is allowed when diplomatic or consular agents address documents to an addressee of the same citizenship than the state of origin of the documents without using or threatening any coercive measures. [14]

- The gathering of evidence on Swiss territory by a Swiss-based person for non-Swiss proceedings generally falls within the scope of Article 271 (1) SCC and thus requires international judicial assistance, even if diplomatic officers or consular agents conduct the gathering of evidence. [15] However, when the concerned party is free to cooperate (or not) in such a gathering of evidence, which is in particular the case when the refusal of cooperating only leads to consequences of a procedural nature (*e.g.,* a factual claim of the other party is accepted as true or the loss of the right to prove the claim at a later stage), the channels of international judicial assistance do not necessarily have to be followed. [16] Consequently, for example, a simple invitation to a hearing outside of Switzerland does not presuppose the use of international judicial assistance as long as no coercive measures are mentioned in the invitation or may be implemented if the addressee refuses the invitation. [17]

[7] The most recent development as regards the interpretation of Article 271 (1) SCC is the *Swisspartners* decision mentioned at the outset of this contribution. In its decision n° 6B_216/2020 (dated November 1, 2021), the Swiss Supreme Court held that a Swiss-based person who had made certain information available to the US Department of Justice had infringed upon Article 271 (1) SCC because the relevant documents contained third party information and were thus not «at the free disposal» [18] of the disclosing party. Accordingly, the channels of international judicial assistance (in that case in criminal matters) should have been followed, and the direct production of this information to the US authorities amounted to a breach of Article 271 (1) SCC, *in addition* to the Swiss confidentiality provisions, which might have been breached as well.

[8] The broad interpretation of Article 271 (1) SCC by the Swiss Supreme Court has generated a certain level of legal uncertainty[19], in particular in respect of the possibility for a Swiss-based person to participate in judicial proceedings pending in common law jurisdictions, where the collection of evidence is generally a duty of the parties and not of the judicial authority.

3. Constitutive elements of Article 271 (1) SCC

[9] Article 271 (1) SCC protects Swiss judicial sovereignty by making it unlawful for any person or entity to take any action reserved to public authorities in Switzerland.

[10] This statutory provision reads as follows:

> *«Any person who carries out activities on behalf of a foreign State on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official, any person who carries out such activities for a foreign party or organisation, any person who encourages such activities, shall be liable to a custodial sentence not exceeding three years or to a monetary penalty, or in serious cases to a custodial sentence of not less than one year.»*

[11] Article 271 (1) SCC therefore precludes, under certain circumstances, the performance of a «public authority act» on Swiss soil on behalf of a foreign state. Pursuant to this criminal provision, anyone who performs or facilitates such a «public authority act» on Swiss soil, without having been authorized to do so by the relevant Swiss authority, might be subject to criminal prosecution.

[12] A breach of Article 271 (1) SCC may be punished by a monetary penalty and/or imprisonment sanction of up to three years. From a practical perspective, a breach of Article 271 (1) SCC carries a real risk of prosecution, potentially resulting in significant financial penalties and/or imprisonment. Between 1976 and 2017, 35 sanctions related to the infringement of Article 271 (1) SCC have been recorded.[20]

[13] In order to fall within the scope of Article 271 (1) SCC, an act must:

1. fall within the competence of a public authority from a Swiss legal perspective, or, in other words, be an act whose performance is reserved to Swiss authorities pursuant to Swiss law;
2. be made in favour of a foreign state, that is to say in the interest of a non-Swiss public authority, or in connection with proceedings conducted by or on behalf of such an authority (*e.g.*, a non-Swiss court, government body or public official);
3. occur on Swiss territory; and
4. be made without due authorisation by a competent Swiss authority, respectively without reliance on the channels of international judicial assistance.

[14] Prerequisite 4 means that, if the prerequisites 1 to 3 are fulfilled, an authorisation (within the meaning of Article 271 (1) SCC) is to be obtained, respectively the channels of international judicial assistance are to be followed. In practice, the analysis of whether or not prerequisites 2 and 3 are met does not generate significant difficulties. The key question is to analyse

prerequisite 1 in order to determine whether the contemplated activity may be characterized as a «public authority act» within the meaning of Article 271 (1) SCC.

[15] According to some Swiss scholars, substantial preparatory acts (such as telephone calls, emails or the like preparing the collation of documents/data or directing a third party – notably a non-Swiss entity from the same group of companies – to prepare the collation of the same) performed on Swiss territory could also fall within the ambit of Article 271 (1) SCC.[21] Conversely, according to the same scholars, merely planning a trip abroad for this purpose from Switzerland (*e.g.*, booking a flight or a hotel) would not constitute an activity which is material enough to qualify as an offence under Art. 271(1) SCC.[22]

[16] The following section will discuss, from the perspective of Article 271 (1) SCC, a series of situations occurring frequently in the context of cross-border civil litigation.

4. Specific scenarios

4.1. Notification and transmission of documents

[17] In common law jurisdictions, the notification and transmission of judicial documents is generally done by the parties to the proceedings and is thus not characterized as an official act.[23] By contrast, in Switzerland, these tasks are performed by the authority, typically a court in civil proceedings.[24]

[18] As indicated under section 3 above, the Swiss Supreme Court has taken the position that the assessment as to whether a certain activity falls within the ambit of Article 271 (1) SCC (or not) must be made from a Swiss perspective.[25] As a result, in Switzerland, the notification of official communications falls within the ambit of Article 271 (1) SCC, at least if the documents being notified have legal consequences for the recipient. Such notifications must therefore occur through the channels of international judicial assistance.[26]

[19] This scenario bears a significant practical relevance because recent criminal prosecutions for breaches of Article 271 (1) SCC have been triggered by situations in which a Swiss-based person (typically an attorney) received an official communication from a non-Swiss authority (*i.e.*, summonses to appear before foreign courts, foreign claims for payment and foreign bankruptcy decisions) and forwarded the same to another Swiss-based person.[27] Under the current interpretation of Article 271 (1) SCC, such activities could amount to a breach of this statutory provision.

[20] Two exceptions however apply in this context:

- As mentioned before, if the document being notified does not have any legal implication for the recipient (for example a notification made solely for information purposes), the FOJ accepts that the notification can be made directly, *i.e.*, outside the channels of international judicial assistance.[28]

- In certain areas of the law, international treaties entered into by Switzerland allow the direct notification of official documents, even if the latter have a legal consequence for the recipient.[29]

[21] In this context, it is important to point out that Article 27 (2) (a) of the Swiss Private International Law Act [30] provides that a foreign decision will not be recognized in Switzerland if a party «did not receive proper notice under either the law of its domicile or that of its habitual residence». As a result, if the defendant was entitled to avail himself or herself of the protection of the channels of international judicial assistance in civil matters and the procedure set forth in the relevant treaties (if applicable) was not complied with in the non-Swiss proceedings, the resulting judgement might not be recognized and enforced in Switzerland. This general principle has been re-affirmed in two decisions rendered by the Swiss Supreme Court. [31]

4.2. Collection of evidence

[22] In Switzerland, a civil litigation is typically divided into several phases. During the first phase, parties submit written briefs that set forth to the court the relevant facts, the legal theories involved and the evidence the parties want the court to admit. The taking of evidence, including the examination of documents that the parties have submitted and the hearing of witnesses, takes place after the initial phase is completed. In civil litigation, the taking of evidence is a function undertaken by the judiciary.

[23] The collection of evidence for purposes of judicial proceedings is therefore characterized as a «public authority act» from a Swiss legal perspective because it is generally performed by a public authority (typically a court in civil proceedings). [32]

[24] In other words, the conduct of evidence collection exercises on Swiss territory (such as the production of documents or the hearing of witnesses as part of non-Swiss proceedings) may fall within the ambit of Article 271 (1) SCC.

[25] As a preliminary comment, it is worth noting that if the Swiss-based person is *not a party to the proceedings pending outside of Switzerland*, the production of documents must be made through the channels of international judicial assistance, in particular the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (to the extent applicable).

[26] In turn, if the Swiss-based person is *a party to the proceedings pending outside of Switzerland*, the two main criteria (according to the published practice of the Swiss authorities) in order to determine whether or not the relevant activity (which includes the production of documents to be used in the non-Swiss proceedings) constitutes a «public authority act» within the meaning of Article 271 (1) SCC are:

- the coercive nature of the request for the requested person (see subsection 4.2.1 below); and
- whether or not the requested information is at the «free disposal» of the requested person (see subsection 4.2.2 below).

4.2.1. Is the request for disclosure of a «coercive» nature?

[27] If the failure to comply with the request of the non-Swiss authority triggers a sanction, the response to the court order would be characterized as an act falling within the ambit of Article 271 (1) SCC. To the contrary, in the absence of sanctions for non-compliance, the response

should not fall within the ambit of Article 271 (1) SCC (subject to the application of the second criterion which is addressed in subsection 4.2.2 below). As far as civil proceedings pending outside of Switzerland are concerned, the FOJ has considered that:

- The Swiss party is «free» to cooperate (and as such not subject to sanctions) when, following a request of a non-Swiss court to provide evidence in the context of non-Swiss proceedings, a refusal to cooperate leads only to «consequences of a procedural nature (*e.g.*, a factual claim of the other party is accepted as true or the loss of the right to prove the claim at a later stage)».[33] In this case, the Swiss party can produce the requested information directly (*i.e.*, outside the channels of international judicial assistance).

- To the contrary, where the non-compliance leads to sanctions that are not only of a procedural nature, such as a criminal offence of contempt of court (pursuant to the rules applicable in the foreign jurisdiction), then the response to the order of the non-Swiss court may fall within the ambit of Article 271 (1) SCC, unless the response is provided through the channels of international judicial assistance.

[28] A series of four decisions issued by the Swiss Federal Department of Justice and Police (the «**FDJP**») (the FOJ is a subdivision of the FDJP) and published in 2016[34] have confirmed the approach summarized above. In these decisions, the Swiss authorities held that the filing of documents by a Swiss party in proceedings pending outside of Switzerland does not constitute a «public authority act» within the meaning of Article 271 (1) SCC if no sanction applies in the event of non-compliance (the application of the second criterion, which is addressed in subsection 4.2.2 below, is reserved).

4.2.2. Is the information to be produced in evidence at the «free disposal» of the party requested to make the production?

[29] The second criterion (dealing with the question as to whether the information to be produced in evidence is at the «free disposal» of the party requested to make the production) has recently been emphasized by the Swiss Supreme Court in the *Swisspartners* case referred to above. The Swiss Supreme Court considered that only information that can be «freely disposed of» by the disclosing person may be made available to a non-Swiss authority without a prior authorisation[35] or outside of judicial assistance proceedings. By contrast, information concerning third parties, such as clients of the disclosing person[36], is not necessarily at the «free disposal» of the party requested to produce such information. Therefore, such information may only be produced through the channels of judicial assistance.[37]

[30] Even though the decision was rendered in the context of criminal proceedings pending in the US, the text of the Swiss Supreme Court decision is worded broadly and does not seem to be limited to the production of documents in *criminal* proceedings pending outside of Switzerland.

[31] As an aside, this criterion was already mentioned in the VPB Decision n° 2[38], which made a distinction between the information pertaining to the requested party itself, which can be freely disclosed, and the information pertaining to third parties that is not publicly accessible, which could not be made available to a non-Swiss authority without prior authorisation under Article 271 (1) SCC.

[32] The Swiss authority would probably not consider that this criterion is met if the third party information is of a «purely incidental nature» and if the disclosure of such information in the non-Swiss proceedings is unlikely to affect the rights of the third party. An example would be the situation in which a Swiss-based person who is a party to divorce proceedings pending outside of Switzerland would produce a pay slip (in order to establish his/her revenues) on which the name of the employer would appear.

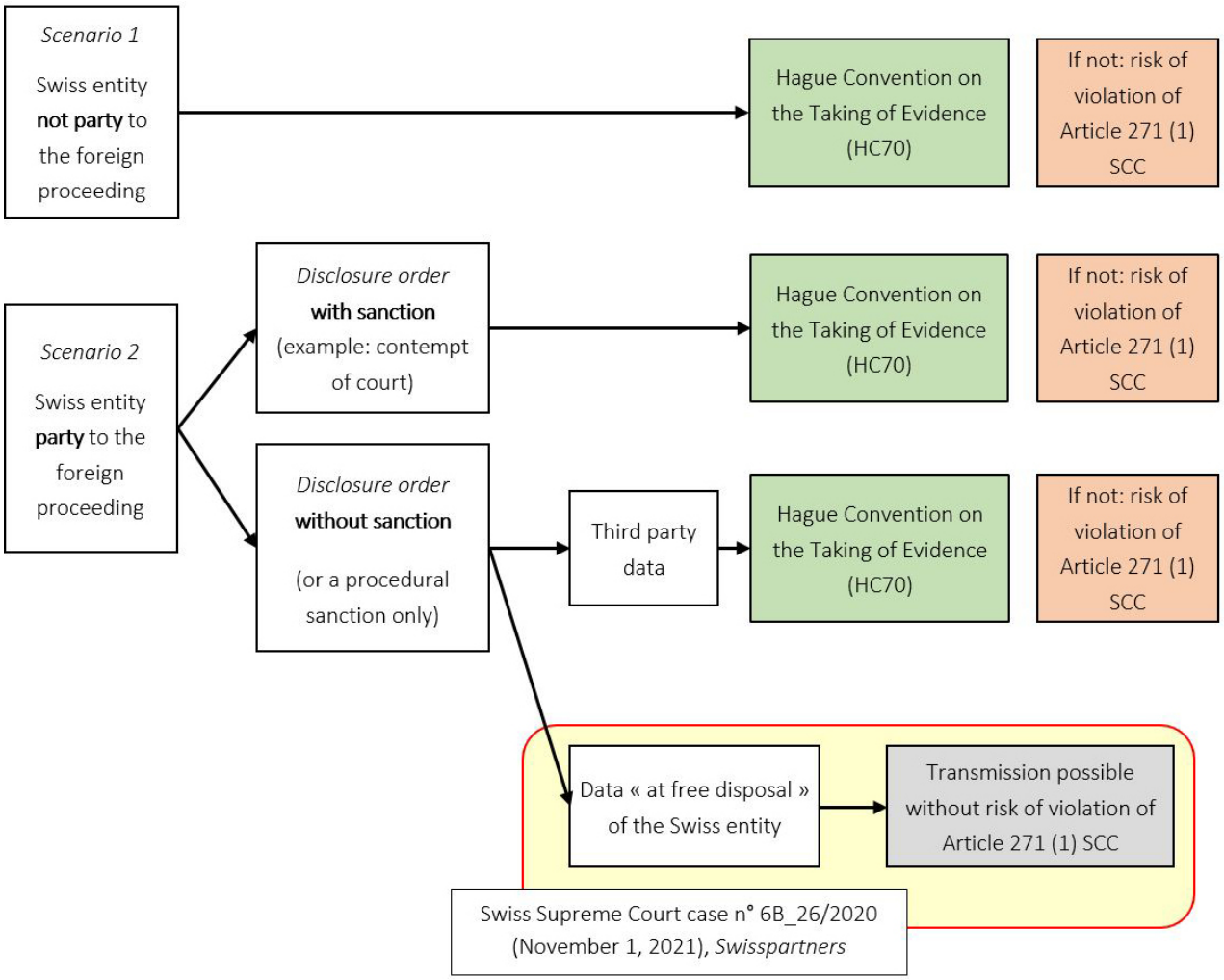
[33] In light of the above, the situation can thus be summarized as follows:

- It is well established that a party to foreign proceedings may voluntarily submit to the foreign court evidence that is already in the possession of said party in order to support its pleadings, provided that the relevant Swiss entity may freely disclose such information, which means in particular that the disclosure is not inconsistent with third party privacy rights and/or in violation of data protection laws. Should the documents be protected by the Swiss bank secrecy rules, business or trade secret rules and/or data protection rules, then production must be made through judicial assistance in civil matters, unless the data subject has validly waived his/her privacy rights and consented to the production of the relevant information or documents.

- In order to avoid criminal prosecution under Article 271 (1) SCC, Swiss parties to non-Swiss proceedings must review carefully the content of the information whose production is requested (*i.e.*, whether (or not) such information encompasses third party information).

- A unilateral attempt by a foreign court to compel the release of documents or information from Switzerland without the participation or consent of the Swiss authorities would be an infringement of Swiss sovereignty, even if the documents and information concerned are not covered by Swiss bank secrecy or data protection rules. Under Swiss law, to compel a party or a third-party custodian of records in Switzerland to produce information or documents, a foreign court must use the available proceedings for international legal and/or administrative assistance, thereby requesting the competent Swiss authorities to exercise their judicial power.

[34] The current situation can be summarized in the illustration below:



4.2.3. Obtaining documents from third parties

[35] A question has arisen as to whether a party to proceedings pending outside of Switzerland and requested to produce certain information in these non-Swiss proceedings may obtain such information from third parties, for example former employees or affiliated companies located in Switzerland. In its decision VPB Decision n° 1 (para. 9), the FOJ has held that such a collection of evidence would not be problematic from the perspective of Article 271 (1) SCC, provided the requesting Swiss party does not act «like a court» («wie ein Gericht auftritt») when requesting the information from the third parties.

4.3. Experts opinions and affidavits

[36] Swiss lawyers are often asked to provide expert opinions or affidavits on specific legal or factual issues to be presented as evidence in foreign proceedings. In most cases, the concerned practitioner is not appointed by the foreign court, but chosen by the parties to the foreign proceedings.

[37] Whilst statements made in expert opinions or affidavits could be understood as a sovereign act in a foreign court and thus amount to a taking of evidence, the FDJP has stated that as long as the expert's mandate is regulated by private law and does not originate from a court, the expert's opinion does not require authorisation and is therefore not affected by Article 271 (1) SCC.[39] This also applies if the expert opinion or affidavit is made before a notary.[40]

[38] The path of judicial assistance shall however in principle be followed where the relevant information for the expert opinion or affidavit is to be obtained from third parties.[41]

[39] Following the rendering of the expert opinion or affidavit, the expert may also be required to testify on the same, be it in person or via video conference. Travelling outside of Switzerland to appear at a trial abroad would obviously not fall within the ambit of Article 271 (1) SCC, given no action is taken on Swiss soil.[42] On the other hand – and this may seem contradictory in view of the foregoing – a foreign court may not hear the expert from abroad by video conference in Switzerland without following the path of judicial assistance, as this would be tantamount to the taking of evidence on Swiss soil.

4.4. Witness hearings and interrogatories

[40] As indicated above, in order to fall under Article 271 (1) SCC, the offender must act on behalf of or for the account – although not necessarily at the express request – of a foreign state. Acts bearing an official character include, in principle, hearings of witnesses, as they are the court's prerogative, at least from a Swiss perspective.[43]

[41] The path of judicial assistance should thus be followed where witnesses located in Switzerland are to be heard for the purpose of foreign proceedings. A further distinction must however be made based on the procedural position of the person or entity whose hearing is contemplated:

- Individuals or legal entities located in Switzerland standing as parties in the concerned foreign proceedings (*e.g.*, members of the board of directors of the legal entity which is party to the foreign proceedings) are allowed to provide evidence to the foreign authority on a voluntary basis absent any foreign injunction threatening of consequences which are not of a civil nature only in case of non-compliance;[44]

- Any collection of evidence from third parties to the foreign proceedings, *i.e.*, witnesses *stricto sensu* (*e.g.*, former employees of the legal entity which is party to the foreign proceedings) falls under the prohibition provided for under Article 271 (1) SCC. Some Swiss scholars however consider that a third party that would provide a statement voluntarily would not fall within the ambit of Article 271 (1) SCC provided that he/she is under no foreign order assorted with coercive measures or sanctions in case of non-compliance.[45]

[42] It derives from the above that judicial assistance proceedings shall be conducted where third parties are to be heard by a foreign Court by video conference or telephone. Where the concerned third party is required in person at trial abroad, Article 271 (1) SCC should not be triggered, as no action occurs on Swiss soil.

[43] The Swiss Supreme Court has not yet decided whether informal meetings with witnesses, for example aiming at gathering information on the factual background of a case, assessing the chances of success of judicial proceedings or preparing for a court hearing, would fall within the ambit of Article 271 (1) SCC. The question is currently being debated among legal scholars. As a matter of principle, informal contacts with possible witnesses should not be problematic from the perspective of Article 271 (1) SCC[46] (a different question is obviously to what extent such informal contacts are in line with the professional rules applicable to lawyers registered in

Switzerland). It is only when the activity, if performed in a purely Swiss domestic context, would be characterized as a criminal offence of «usurpation of official functions» (Article 287 SCC), that a criminal liability under Article 271 (1) SCC could be envisioned in an international context.[47] In other words, any act that would be allowed in domestic legal proceedings should also be permitted in cross-border proceedings.[48] That being said, given the current legal uncertainty (and in particular the strict position of the Swiss Supreme Court in the decision ATF 114 IV 128 mentioned under section 2.2 above), such informal interrogatories on Swiss soil could present a risk under Article 271 (1) SCC and caution is thus required.

5. Conclusion

[44] Even though Article 271 (1) SCC was enacted in the first half of the 20th century to preclude very specific activities on Swiss soil, the broad wording of this statutory provision and its rather expansive interpretation by Swiss courts and authorities have created a need to take this statutory provision into account each time a Swiss-based individual or legal entity is required to take part, in one form or another, in civil proceedings pending outside of Switzerland. In this context, we can note the following:

- As regards the production of documents, a review of the practice of Swiss authorities shows that the only fact pattern which clearly falls outside the scope of Article 271 (1) SCC is the situation in which a Swiss party to non-Swiss proceedings is to produce documents (i) without such production being preceded by an official order associated with coercive sanctions in case of non-compliance and (ii) provided the relevant documents can be freely disposed of by the Swiss party (meaning in particular that the disclosure is not likely to infringe upon the privacy rights of third parties or produce adverse consequences for such third party).

- The issuance of expert opinions or affidavits falls outside the scope of Article 271 (1) SCC provided the expert's mandate is governed by private law and does not originate from a judicial authority. In turn, the channels of international assistance in civil matters must, as a matter of principle, be followed where the relevant information for the expert opinion or affidavit is to be obtained from third parties.

[45] Outside these situations, it is highly advisable to mitigate the legal risks flowing from Article 271 (1) SCC by (i) approaching the Swiss authority to obtain either an authorisation within the meaning of this statutory provision (respectively a ruling confirming its non-application)[49] or (ii) using the channels of international judicial assistance in civil matters (for example, as regards the collection of evidence, the Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters), which constitute efficient tools for the Swiss-based individual or legal entity to obtain legal certainty before cooperating in non-Swiss civil proceedings.

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30 A similar provision is set forth in Article 27 para. 2 of the Lugano Convention. This provision only applies to judgments rendered in Lugano Convention Member States (see Article 25 of the Lugano Convention).

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32 Swiss Supreme Court decision (September 30, 1988) n° 114 IV 128, c. 2.

33 FOJ Guidelines (N. 12), p. 20.

34 Decision of the Swiss Federal Department of Justice and Police (dated April 10, 2014), published in VPB 1/2016 (January 26, 2016), n° 2016/3 («**VPB Decision n° 1**»), decision of the Swiss Federal Department of Justice and Police (dated February 12, 2014), published in VPB 1/2016 (January 26, 2016), n° 2016/4 («**VPB Decision n° 2**»), decision of the Swiss Federal Department of Justice and Police (dated April 11, 2016), published in VPB 2/2016 (June 30, 2016), n° 2016/7, decision of the Swiss Federal Department of Justice and Police (dated October 27, 2016), published in VPB 3/2016 (December 29, 2016), n° 2016/8.

35 Reference is made here to the «authorisation» (within the meaning of Article 271 (1) SCC) which can be obtained under certain circumstances from the Swiss authorities.

36 Swiss Supreme Court decision (November 1, 2021) n° 6B_216/2020, c. 1.4.2.

37 Swiss Supreme Court decision (November 1, 2021) n° 6B_216/2020, c. 1.4.2. : «In sämtlichen Konstellationen dürfen nur Akten und Informationen herausgegeben werden, über die frei verfügt werden kann. Nur der Amts- oder Rechtshilfeweg bietet ein prozessuales Gefäss, in welchem Geheimhaltungs- und Offenlegungspflichten einander gegenübergestellt und der Spezialitätsgrundsatz gewährleistet werden können […]. Nicht frei verfügt werden kann über nicht öffentlich zugängliche, identifizierende Informationen über Dritte. […]» (free English translation: «In all constellations, only files and information that can be freely disposed of may be produced. Only the administrative or judicial assistance channel offers a procedural vessel in which secrecy and disclosure obligations can be set against each other and the principle of speciality can be guaranteed [...]. It is not possible to freely dispose of identifying information about third parties that is not publicly accessible. [...]»).

38 VPB Decision n° 2 (N. 34), paras. 11–12.

39 Decision of the Swiss Federal Department of Justice and Police (dated October 27, 2016), published in VPB 3/2016 (December 29, 2016), n° 2016/8, para. 12.

40 Decision of the Swiss Federal Department of Justice and Police (dated April 11, 2016), published in VPB 2/2016 (June 30, 2016), n° 2016/7, para. 10.

41 Danielle Gauthey/ Alexander Markus: Zivile Rechtshilfe und Artikel 271 Strafgesetzbuch, in: ZSR/RDS, Vol. 134 (2015) I Book 4, pp. 359 et seq., p. 378.

42 Decision of the Swiss Federal Department of Justice and Police (dated October 27, 2016), published in VPB 3/2016 (December 29, 2016), n° 2016/8, para. 14.

43 Swiss Supreme Court decision (September 30, 1988) n° 114 IV 128, c. 2c.

44 Philipp Fischer/Alexandre Richa, in: Commentaire Romand Code penal II, Basel 2017 (quoted: CR SCC-Author), Art. 271 N. 25.

45 CR SCC-Fischer/Richa (45), Art. 271 N. 37; BSK SCC-Husmann (N. 20), Art. 271 N. 32.

46 Gauthey/Markus (N. 42), p. 376.

47 CR SCC-Fischer/Richa (N. 45), Art. 271 N. 37; BSK SCC-Husmann (N. 20), Art. 271 N. 17.

48 Delnon/Rüdy (N. 11), p. 332.

49 In practice, such requests are generally dealt with expeditiously by the Swiss authorities.

Aucun commentaire

Es gibt noch keine Kommentare

** Pflichtfelder*

Was ist Ihr Kommentar?

Thème:

Votre commentaire: *

Name: *

Rebecca Baumann

Senden

Votre commentaire est vérifié par un modérateur ou une modératrice et sera activé prochainement.