6. Implications of U.S. Liability for Swiss Companies

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In the past decades, US liability has become the nightmare of Swiss companies doing business in the US. The following three elements are the most alarming aspects of US liability:

- *Punitive damages*: Under US tort law, punitive damages are awarded to punish a company for its outrageous conduct and deter it from similar conduct in the future. Many wild and outrageous awards have been reported throughout the world, such as the famous Stella award: In 1992, Stella Liebeck, then 79, spilled a cup of McDonald's coffee onto her lap, burning herself. A New Mexico jury awarded her USD 2.9 million in damages (see www.stellaawards.com). More recently, US defendants experienced relief when the US Supreme Court issued its decisions in BMW vs. Gore (1996) and State Farm vs. Campbell (2003), which impose limits on punitive damages (4:1 punitive-to-compensatory ratio). But US defense lawyers still say that juries never know whether they should give "awards of thousands or millions" of dollars.
- *Class actions*: The complex procedural device called "class action" allows a limited number of plaintiffs to sue a Swiss company on behalf of all persons allegedly harmed. Class actions are used, in particular, in cases of mass tort (asbestos, tobacco), antitrust (price fixing), environmental (pollution and toxic tort), employment (discrimination, wrongful termination) and securities (false reporting, insider trading). The fact that there has been an explosive growth in class actions, many of which are settled for amounts in excess of USD 100 million, is frightening to Swiss companies having a business presence in the US.
- *Pre-trial discovery*: Liability cases in the US are investigated by the parties and their lawyers (not by the judge). Pre-trial discovery is a technique by which each side in a civil litigation seeks, prior to trial, to obtain from the other side information useful in establishing its position. US lawyers initiate discovery requests, particularly the production of documents, to Swiss companies, without the need for permission of the court. The discovery process is broad and wide-ranging: it may include "fishing expeditions", and requests may require the production of thousands of documents and electronic communication (e-mails). For Swiss companies that find themselves as defendants in US liability litigation, the discovery process is not only burdensome, but also extremely expensive.

10 traps and practical tips

1. Watch out for service of process

Directors and executives of Swiss companies doing business in the US should be aware that US lawsuits are sometimes initiated quite unexpectedly:

- *Process servers*: Under US rules of procedure, hand delivery of the summons to the defendant is usually carried out by private persons, so-called "process servers" (not by a court or marshal). In one unreported case, service of process was validly effected in the streets of New York by a process server who first asked the Swiss board member "*Are you Mr. XYZ?*" and who then hand delivered the summons when the latter confirmed his identity. In other cases, service was effected on board members who changed planes at the Miami International Airport, US vs. Field (1976), or was effected at the hotel room ("underneath the door").
- *Overseas service*: Under US rules of procedure, attorneys may choose to send the complaint to the Swiss company by postal service. Swiss companies should therefore adopt a policy of refusing mail from, and not opening the envelopes of, US law firms with whom the companies do not work.

2. Beware of US jurisdiction

US courts exercise jurisdiction not only over companies doing business in the US, but also over non-resident companies.

- *Minimum contacts*: In the International Shoe case (1945), the US Supreme Court held that US courts may exercise jurisdiction over foreign defendants if there is one minimum contact with the state whose court seeks to exercise jurisdiction over it. This is the case if a Swiss company delivers its products "into the stream of commerce" of the forum state.
- *Long-arm statutes*: The long-arm jurisdiction of US courts is a notorious pitfall for Swiss companies. Many US states have enacted long-arm statutes under which the courts may exercise jurisdiction over foreign companies that transact business or commit tortious acts in that state.
- *Websites*: Swiss companies conducting business transactions over the internet, allowing US customers to engage in online purchases, are subject to personal jurisdiction in the US. US jurisdiction is, however, improper where a Swiss company merely posts advertisements and informational material on its website. See e.g. Zippo Manufacturing vs. Zippo Dot Com (1997) and in re Ski Train Fire in Kaprun (2002).
- *Forum non conveniens*: In certain instances, there may be a better place to try the case even though the US court has personal jurisdiction over the Swiss company. This is the case, for example, if the incident giving rise to the liability claim occurs outside the US, or if the vast majority of evidence is located outside the US. In such case, the Swiss company can make an adequate showing of inconvenience, and the principle of *forum non conveniens* will allow the US court to decline to hear or to transfer the case (even though the US court has personal jurisdiction).

- *Arbitration clauses*: Swiss companies entering into contractual arrangements with US companies may, for example, request a jury trial waiver in the contract. Even more effective is an arbitration clause using language such as "*to the exclusion of any other court, be exclusively resolved by an arbitral tribunal*". US courts abstain from exercising jurisdiction if the parties agree to submit disputes exclusively to an arbitral tribunal.

3. Avoid perils of cross-border evidence gathering

The gathering of evidence in Switzerland for use in US proceedings is a "slippery slope". US authorities and attorneys trying to gather evidence in Switzerland, rather than resorting to the channels of judicial assistance, risk sanctions under the Swiss Penal Code (PC):

- *Art. 271 PC*: Indicate to the counterparty that, in Switzerland, the gathering of evidence for use in US proceedings is considered to be an official act within the meaning of art. 271 PC and may only be performed by Swiss authorities. Direct service of summons, subpoenas and other orders from the US by mail or fax also violates art. 271 PC.
- *Art. 273 PC*: The US court must be made aware of the fact that Swiss companies are very generally prohibited from disclosing customer-related information to foreign authorities if there is a sufficient *inland-nexus* of the information to Switzerland. This is the case if the customer has a Swiss domicile.

4. How to handle Swiss secrecy laws in US discovery proceedings

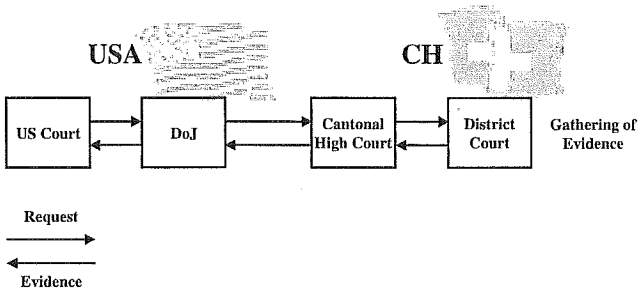
US discovery requests are often at odds with art. 273 PC and with Swiss banking secrecy, as set forth in art. 47 of the Swiss Banking Law (BL).

- *Interest balancing and sanctions*: Avoid sanctions by improperly invoking Swiss secrecy laws. In the Banca della Svizzera case (1981), the US court conducted a "balancing of the interests" and came to the conclusion that the interest of the US in enforcing its laws outweighed Switzerland's interest in its secrecy laws. The US court observed that the Swiss government, even though explicitly made aware of the litigation, did not intervene and seize the bank records, as was the case in Société Internationale vs. Rogers (1958). The US court imposed sanctions on the bank, including a fine of USD 50'000 per day.
- *Restatement*: Refer to the Restatement of Foreign Relations Law 3rd (1987). Section 442 of the Restatements states in general terms that US authorities should use the channels of judicial assistance before resorting to unilateral discovery requests and that US courts should not impose sanctions where disclosure of the information located abroad is prohibited under the law of the situs. Argue that violations of art. 273 PC and art. 47 BL trigger criminal sanctions.
- *Good faith efforts*: Numerous cases evidence that Swiss companies should not "blindly refuse" US production requests and use Swiss secrecy laws as a shield. Documents that can be produced without violation of Swiss law should be produced at once, and good reason, supported by an affidavit, should be given for any document that cannot be produced other than by way of judicial assistance (so-called "triage").

5. Show potential of judicial assistance

US courts may not be familiar with the channels and techniques of the 1970 Hague Evidence Convention.

- *Principle*: Explain to the judge that he may ask the Swiss authorities to collect the evidence located in Switzerland for use in the US proceedings. See, for example: bern.usembassy.gov/judicial_asst.html and travel3.his.com/law/info/judicial/judicial_668.html.



- *Channels*: Explain that the request must be channeled through the "central authorities" in the US and in Switzerland and that the evidence will be collected under Swiss rules of procedure and transmitted to the US court.
- *Exclusivity*: Note, however, that in the Aerospatiale case (1986), the US Supreme Court held that the Hague Evidence Convention is not exclusive and that US courts may unilaterally compel production of evidence located in another country.

6. Involve Swiss authorities

Swiss companies facing US proceedings should also consider informing the Swiss government, which may intervene as follows:

- *Amicus curiae brief*: The Swiss government has become increasingly interested in protecting its sovereignty and its laws by joining US court proceedings as *amicus curiae*. Swiss companies may ask the Swiss government to file an amicus curiae brief, as was the case in the Marc Rich case (1983) and in the Aerospatiale case (1986).
- *Government Decree*: Swiss companies may also inform the Swiss Federal Council which, under most extraordinary circumstances, can issue a decree blocking documents located in Switzerland. The Swiss Federal Council issued such decrees, which were followed by a seizure through the Swiss Federal Prosecutor, in Société Internationale vs. Rogers (1958) and the Marc Rich case (1983). In both cases, the US courts attributed great importance to such government seizure as it impaired any disclosure by the Swiss company *de facto*.
- *Injunction*: Customers of the Swiss company, particularly bank customers, who are concerned that customer-related information will be furnished to the US for use in court proceedings may ask for an injunction against the Swiss company in Switzerland. Injunctions have been granted in various jurisdictions in the Marc Rich case (1983), in the Deutsche Bank case (1982), in the Bank of Nova Scotia case (1985) and in the Cucci cases (1984). Such injunctions are generally more powerful than legal opinions on Swiss secrecy laws.

7. When a default judgment may be risked

In certain instances, Swiss companies (or individuals) having no business presence and no assets in the US may choose to "ignore" the US law suit and, later on, argue that the US default judgment is not enforceable in Switzerland. This strategy may be risky, and the following should be observed:

- *Domicile*: Generally, Swiss companies must be sued at their Swiss domicile. Foreign judgments against Swiss companies are not enforced in Switzerland.
- *Service of process*: If service of process was effected directly by overseas mail, rather than through the channels of judicial assistance, the US judgment will not be enforced in Switzerland.
- *Assets*: If the Swiss company holds assets in the US, the US court may seize such assets. In this case, the Swiss company must actively deal with the US court proceedings.
- *Special appearance*: The Swiss company should not plead on the merits in the US proceedings. However, it may make a special appearance to contest the jurisdiction of the US court.

8. How to shield a Swiss company from US liability (corporate veil)

Swiss parent companies with a US subsidiary risk that the US court will "pierce the corporate veil" and render a judgment not only against the US subsidiary, but also against the Swiss parent company. Swiss parent companies should be sensitive to the following issues to avoid being subject to US jurisdiction and US liability:

- *Directors*: It is important that a US subsidiary have directors who are separate from those of the parent company.
- *Instructions*: The directors and executives of the US subsidiary should not take their orders from the Swiss parent company in the parent's interest, but rather act independently in the interest of the US subsidiary.
- *Mere department*: Avoid commingling of funds or intertwined activities giving the impression that the US subsidiary is a mere department of the Swiss parent company.
- *Financial Transactions*: The financial separation of the US subsidiary from its Swiss parent company is of utmost importance. Inter-company transfers must be at arm's length and fully documented.
- *Capitalization and profitability*: The US subsidiary must be adequately capitalized and operate profitably on a long-term basis (occasional years of unprofitability will not be a problem).

9. Consider settlement options

Many US liability cases, particularly class actions, are settled. Swiss companies should consider the following:

- *Structured settlements*: The single lump sum payment has characterized traditional US liability practice. However, there is a trend towards employing so-called "structured settlements" that typically include an up-front lump sum (medical and legal expense) and, subsequently, annuities.
- *Ongoing task*: Settlement options must be regularly reviewed before, during and after discovery.
- *Insurers*: Be careful with respect to the willingness of insurers to settle cases.
- *Reputation*: Cases that have no factual or legal merits should not be settled; avoid the reputation of being an "easy settler".

11. Other defense tactics

Swiss companies should also consider a number of other factors when being involved in US court proceedings:

- *"Driver's seat"*: Success is more likely if the Swiss company behaves proactively and uses the particularities of the US legal system, such as pre-trial discovery.
- *Jury*: The panel of laypersons who determine liability and damages at trial is, to some extent, predictable. Swiss companies should identify jurors who will find against them and utilize technology to efficiently present complex information in the court room.
- *Media*: Swiss companies should avoid a "no-comment-strategy", as would be proper under Swiss trial tactics. Recent cases show that Swiss companies must communicate their arguments to the media. Win the sympathy of the media.

One last remark: The costs of defending a US liability case are substantial. It is advisable to obtain from the US counsel clear understanding at the outset with respect to fees and billing method (who will be handling the case: partners and associates). Further, Swiss companies should request a rough estimate of defense costs through the main stages of litigation, particularly discovery and trial, as well as regular progress reports from their US counsel.

Swiss-American Chamber of Commerce

Yearbook 2005/06

Publisher
Martin Naville, Chief Executive Officer
Swiss-American Chamber of Commerce

Editor-in-Chief
Marianne Vontobel

Editor Directories
Lucia Kälin

Editor Boards, Chapters and Committees
Bettina Moehr

Cover
Courtesy of Advico Young & Rubicam, Zurich-Gockhausen

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Printed in Switzerland by Zürichsee Druckereien AG, Stäfa