

NKF Client News

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Revision of the Swiss Civil Procedure Code – Right to refuse to collaborate for in-house legal department

The Swiss Civil Procedure Code ("SCPC") has been partially revised and its new version will enter into force on 1st January 2025. Since its adoption in 2011, it is the first time that the SCPC has been amended. One of the purposes of this partial revision is to make specific adaptations to improve the applicability of the code. The amended SCPC will in particular contain a new provision granting a right of refusal to cooperate for a party and a third party with regard to the activities of their in-house legal department. Such right does not exist under the current version of the SCPC. The purpose of the present contribution is to set out the conditions of this right.

Context of the revision of the SCPC

Since the entry into force of the SCPC in 2011, the right of in-house counsels to refuse to collaborate in civil proceedings has been discussed on numerous occasions, without being enacted. In March 2015, a parliamentary initiative seeking the adoption of a provision protecting the professional secret of in-house counsels was filed. Its purpose was notably to eliminate the procedural disadvantage of Swiss companies and their in-house counsels in legal proceedings abroad caused by the fact that Swiss law does not provide legal privilege for in-house counsels. Indeed, in legal proceedings abroad and especially in the United States of America, Swiss companies have been ordered to disclose the correspondence of their in-house counsels which were employed by them in Switzerland because Swiss law does not provide legal privilege for in-house counsels, whereas US laws provide for such privilege.

On 2 March 2018, the Swiss Federal Council opened a consultation period regarding the revision of the SCPC and decided to include the parliamentary initiative by introducing a new provision in this respect. This provision triggered various reactions during the consultation phase and the Swiss Federal Council decided to keep it. On 17 March 2023, the Parliament adopted the revised SCPC, which will enter into force on 1st January 2025.

The right to refuse to collaborate for in-house legal department

The new right of refusal concerning the activities of a party's in-house legal department is set out in article 167a of the revised SCPC. Article 167a para. 1 of the revised SCPC provides that a party may refuse to collaborate and to produce documents relating to the activity of its in-house legal department if three conditions are met:

- The company is registered as a legal entity with the Swiss commercial register or an equivalent foreign register;
- The person in charge of the legal department holds a lawyer license or meets the professional requirements for practicing as a lawyer in his or her home country. According to the Swiss Federal Council, this condition is intended to guarantee that

the legal department has the required level of professional skills, and in particular to ensure that the specific nature of its activity is known and recognized;

- The activity in question of the legal department would be considered as specific to the practice of his profession if it were carried out by a lawyer, i.e. the activity in question would be deemed to be part of the typical activity of a lawyer. This condition mirrors the requirement for the protection of the attorney-client privilege under Swiss law, which applies only in the framework of the typical activity of a lawyer. According to the Swiss Federal Tribunal and Swiss scholars, the typical activity of a lawyer consists of representing parties before courts and providing legal advice. All other activities, such as private, political, social or commercial activities, are not understood as typical and thus do not meet this condition of article 167a SCPC.

Article 167a para. 2 new SCPC provides that a third party may also refuse to collaborate and produce documents relating to his or her activity within a company's in-house legal department, provided the same conditions are met.

Conclusion

Article 167a of the revised SCPC will guarantee an appropriate secrecy protection for in-house counsels in Swiss civil proceedings. It will also remove procedural disadvantages that Swiss companies have suffered in legal proceedings abroad due to the fact that Swiss law does not provide legal privilege for in-house counsels. Although this new provision will not cover all the activities of a legal department, but only those considered as being part of the typical activities of a lawyer, it will nevertheless ensure the protection of the professional secret of in-house counsels, which is not the case under current Swiss law.

The revised SCPC will enter into force on 1st January 2025 and article 167a SCPC will apply to all new civil proceedings but also to proceedings pending as of this date.

If you have further questions or comments on this topic, please reach out to your regular NKF contact.

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