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Anti-Corruption 2022

Switzerland: Trends & Developments

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Trends and Developments

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Case Law

Overview

The main decision of interest to mention from a case law perspective is a Federal Court ruling 6B_379/2020 of 1 June 2021 (in German) that addresses the issue of forfeiture in Switzerland of thew fees of an intermediary who entered into a plea-bargaining agreement in a foreign country.

In July 2015, the Office of the Attorney General of Switzerland begun an investigation into bribery of foreign public officials and money laundering following a suspicion report by a Swiss bank in the context of the Lava Jato investigation into bribery through a Brazilian intermediary and his companies regarding several contracts totalling USD1.8 billion between Petrobras and a US company regarding drilling vessels. The intermediary's gross fees had been of about USD37 million.

In August 2015, following a collaboration agreement, the Brazilian intermediary was convicted in Brazil to imprisonment of eight years and a penalty of BRL70 million.

Also in August 2015, Petrobras terminated the contract with the US company on grounds that it had been obtained through bribery. The US company challenged the termination through arbitration. In June 2018, the arbitral tribunal found that the termination was illegal, holding that the contracts did not contain elements contrary to Petrobras' interests. The arbitral award was confirmed by the US District Court for the Southern District of Texas in May 2019 and by the US Court of Appeals for the Fifth Circuit in July 2020.

On 12 February 2019, the Office of the Attorney General of Switzerland discontinued the criminal proceedings against the Brazilian intermediary on the basis of Article 8 of the Swiss Criminal Procedure Code in order to avoid duplication of proceedings and in the interests of international procedural coordination.

In the same decision, the Office of the Attorney General ordered the Brazilian individual to pay a replacement claim (equivalent of a disgorgement order) of USD9.98 million to deprive him from his unlawful gain.

The Brazilian intermediary filed an appeal against the replacement claim order with the Chamber of complaints of the Federal Criminal Court, who dismissed it, leading to an appeal to the Federal Court.

The Federal Court upheld the appeal and remanded the case to the Federal Criminal Court for a new decision, making the following findings:

Discontinuance was correct

The discontinuance of the Swiss criminal proceedings was correct, since both the custodial sentence and the penalty ordered by the Brazilian court exceeded the maximum under Swiss criminal law, and in the absence of a private claimant, there was no overriding interest that prevented the proceedings from being discontinued.

Net lawful gain in bribery cases

In bribery cases, contrary to what the lower court asserted, the net unlawful gain principle applies rather than the gross gain. However, since the

net gain exceeded USD10 million, this did not lead to any consequence.

Causation between criminal offence and unlawful gain

The Federal Court reminded that in issuing a forfeiture order or a replacement claim, the prosecution authorities must not only establish the existence of a criminal offence but also establish that the unlawful gain was caused by the offence. In bribery cases, the authorities must establish that the legal transaction would not have been concluded without the act of bribery. In forfeiture proceedings, the presumption of innocence does not apply since the forfeiture order or the replacement claim are not considered as penalties and may be issued irrespective of the guilt of the owner of the assets. The State must nevertheless prove all the conditions for confiscation.

However, anyone who alleges facts contrary to confiscation must reasonably co-operate in the gathering of evidence.

Proportionality

The appellant claimed that the decision breached the principle of proportionality. The Federal Court found that the entire circumstances of the specific case must be taken into account in the context of the proportionality test. In the case of forfeiture of the entire net proceeds, the bribing party is in effect required to provide its service to the state free of charge, which is disproportionate and not appropriate if legal contractual terms were agreed for the service, but the award of the contract was unjustifiably made dependent on a bribe by the persons acting for the state.

It is therefore necessary to examine in particular how the bribe payments came about and the purpose pursued with them, ie, whether the initiative for this came from the bribing party, who wanted to achieve a competitive advantage or more favourable contract conditions with it, or whether the payment was demanded by the bribed party as a precondition for consideration in the award of the contract. Since the appealed judgement did not examine those issues, the case must be remanded to the lower court.

Good faith

In Swiss criminal proceedings, the principle of good faith applies, which entitles a person to protection of legitimate expectations in an assurance, information or other conduct of an authority. The Federal Court assumed that the purpose of the penalty of BRL70 million issued by the Brazilian court was to absorb the unlawful gain. The Federal Criminal Court referred to the cooperation agreement concluded in Brazil but nevertheless ordered the appellant to pay a further USD9.98 million replacement claim.

The Federal Court indicated that it was is questionable whether such an approach was compatible with the obligation of good faith and indicated that in the event that the lower court upholds the claim for compensation in the context of the reassessment, it will therefore also have to deal with its compatibility with the cooperation agreement concluded in the Brazilian criminal proceedings as well as with the principle of good faith.

Forfeiture vs replacement claims and lifting of the corporate veil

The Federal Criminal Court had confirmed the validity of the replacement claim, indicating that it would be overly complicated to identify which assets were proceeds of crime and that therefore a replacement claim should be issued rather than a forfeiture order, and that such replacement claim could be issued against the Brazilian individual even though his companies had received the unlawful gain, as the corporate veil could be lifted. The Federal Court reminded that, according to case law, a replacement claim

against the sole shareholder of a legal entity is only permissible if there is no economic distinction between the shareholder and the company he owns, and the invocation of the legal independence of the legal entity therefore appears to be an abuse of right.

The Federal Court ruled that even the presumed commingling of the assets with funds of legal origin cannot justify a replacement claim for compensation against the shareholder personally. On the contrary, the proceeds of the offence are still forfeitable from the beneficiary company if they are not mixed with assets of legal origin. If they are, then the replacement claim should be issued against the company rather than its shareholder, as long as it is not established that the funds accrued to him personally.

The Federal Court therefore upheld the appeal and remanded the case to the Federal Criminal Court for a new decision. To date, this new decision has not been published.

Conclusion

This case thus stresses the complexity of issuing forfeiture orders or replacement claims when parallel proceedings have been concluded in a foreign country and the need for the Office of the Attorney General of Switzerland to at least attempt to fully complete the paper trail.

Legislative Changes and Other Developments

No amendment to the Swiss anti-bribery provisions took place in 2021. However, important changes to Switzerland's anti-money laundering provisions were adopted, that will impact anti-bribery investigations.

Changes to the Anti-Money Laundering Act

On 19 March 2021, the Swiss Parliament approved a revision of the Anti-Money Laundering Act (AMLA) (19 March 2021 amendment; 26 June 2019 Federal Council dispatch to the Parliament; Parliamentary debates). This includes the most important recommendations from the Financial Action Task Force's (FATF) mutual evaluation country report on Switzerland of 2016, but not all of them.

Amendments adopted by Parliament

Under new Article 4 AMLA, financial intermediaries will not only have to establish the beneficial owner's identity, but will be required to verify the identity of customers, record which services have been provided to them, and clarify their background and purpose.

The revised AMLA also provides that financial intermediaries will have to periodically update the client data (identification of the contracting party under Article 3 AMLA and of the beneficial owner under Article 4 AMLA, as well as the client's profile) rather than only in the event doubts arise as in the current AMLA.

Under the revised Article 9 AMLA, the "reasonable grounds to suspect" money laundering that entails the obligation to report suspicious activities are now defined as "at least one concrete sign or of several indications" of money laundering that further clarifications cannot dispel. It appears that a "mere suspicion", as under current case law, will no longer to be sufficient to create a duty to report but will trigger additional duties of clarification.

Under revised Article 9b AMLA, the current 20 working day term of the Money Laundering Reporting Office of Switzerland (MROS) to process a report and provide the financial intermediary to terminate the business relationship is extended to 40 working days.

Associations that collect or distribute funds abroad for charitable purposes – which could be exposed to an increased risk of terrorist financing and money laundering – will also be required

to register with Register of commerce, appoint a representative in Switzerland and keep a list of their members for five years that must be accessible from Switzerland.

Amendments rejected by Parliament

Two amendments that were included in the Federal Council's dispatch (an in FATF's recommendations) were rejected by the Parliament.

One was to include "advisors" within the scope of the AMLA, namely "physical or legal persons who are commercially active in connection with the incorporation, management or administration of domiciliary companies and trusts, as well as the organisation of raising funds in this context", including lawyers and notaries. The Parliament rejected this amendment, mainly in order to protect attorney-client privilege.

The second was to lower the threshold for cash payments in the trade of precious metals and gemstones to CHF15,000 from the current CHF100,000.

The new provisions should enter into force in the first half of 2022. The Federal Council is currently conducting consultations on the implementing ordinances of the amended Anti-Money Laundering Act.

Appointing a new Attorney General of Switzerland

Another development of interest is that on 29 September 2021, the Swiss Parliament appointed Mr Stefan Blättler as Attorney General of Switzerland, for a four-year term. It took three attempts and more than a year for Parliament to find a successor to Michael Lauber, the former Attorney General of Switzerland who was forced to resign in June 2020 over his handling of a probe into world football's governing body FIFA. Mr Blättler has been the Commander of the Police for the Canton of Bern since 2006. It is expected that he will focus on re-organising the Office of the Attorney General of Switzerland, as well as maybe reduce the size of its 250-strong staff and leave more white-collar crime investigations to the cantons. This would obviously impact the way anti-bribery and money laundering investigations are conducted.

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Monfrini Bitton Klein was founded in Geneva by Enrico Monfrini in 1978 and has become renowned in international business law, complex litigation and arbitration. The asset recovery practice of the firm started at the end of the 1990s with the representation of foreign governments in grand corruption asset recovery proceedings, companies, individuals and liquidators of bankruptcies, and victims of fraud and Ponzi schemes. In 2017, the firm changed its name to Monfrini Bitton Klein and became a litigation-only practice in order to offer conflict-free services to its clients, focusing on asset recovery, white-collar crime, anti-corruption, cross-border bankruptcy, and enforcement of foreign judgments and arbitral awards. Monfrini Bitton Klein is the representative for Switzerland of ICC FraudNet, the leading global network of fraud and asset recovery lawyers, and has access around the world to hundreds of specialised correspondent lawyers, private investigators, forensic accountants, insolvency practitioners and litigation funders.

AUTHOR

Yves Klein is a partner at Monfrini Bitton Klein and a world-leading asset recovery, anti-corruption and white-collar crime lawyer, who has been admitted to the Bars of Geneva and Switzerland since 1995. His main activities are litigating and co-ordinating transnational asset recovery and white-collar crime-related proceedings before civil, criminal and bankruptcy courts. He has published and presented at international conferences on those topics since the 1990s. From 2016 to 2018, he was Chair of the Asset Recovery Subcommittee of the International Bar Association's Anti-Corruption Committee. He is fluent in French, English, Portuguese and Spanish, and speaks some Italian and German.

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