

Letter from Switzerland: Recent Developments in Swiss International Law

1. Draft Codification of Conflict Rules

The most important recent development in Swiss international law is the publication, in October 1978, of a draft law containing a codification of the Swiss conflict rules. The draft law is the work of a commission of experts appointed by the Federal Department of Justice and Police. The commission's chairman was Prof. Dr. Frank Vischer, professor of civil law at the University of Basel; the report accompanying the law was written by Prof. Vischer and Dr. Paul Volken.

At present, part of the Swiss conflict rules are contained in a federal law which was enacted in 1891; the conflict rules applying to contracts have however been established by precedents only. The draft law would be a comprehensive codification of conflict rules: Its first title contains general provisions including rules concerning the recognition and execution of foreign judgments; the titles following deal with natural persons, matrimonial, family, inheritance, property law, contracts and torts, corporations, bankruptcy, international arbitration and certain procedural questions.

The draft has been submitted to interested organizations for comment; at present, the commission of experts is evaluating the comments and, after evaluation, the draft will be submitted to the Federal Parliament by the government. It is not expected that the respective federal law will come into force before 1983.

2. Treaty between the United States and Switzerland on Legal Assistance in Criminal Matters of May 25, 1973

The treaty entered into force on January 23, 1977, and was supplemented by a federal law adopted on October 3, 1975, which entered into force on the same date as the treaty itself.

- a. *Number and object of requests under the treaty:* As of November 2, 1979, 70 requests for assistance originating from the United States and

17 requests originating from Switzerland had been submitted. The subject matters of the 70 requests originating from the United States were: fraud (24 cases); embezzlement (12 cases); theft (7 cases); bribery (7 cases); blackmail, forgery, perjury, drug offenses, arms trading etc. (remaining cases).

- b. *Application of the treaty by the Swiss Federal Court:* Up to November 20, 1979, the Swiss Federal Court had to apply the treaty three times.

The first decision (rendered on March 30, 1979) concerned an account out of which illegal payments allegedly had been made by Boeing representatives to employees of Middle East Airlines in connection with the sale of three Boeing 747 jet planes. The Federal Court upheld the Federal Police Division's decision according to which the Swiss bank had to produce its documents concerning the mentioned account because fraud against the United States (the crime allegedly committed by the Boeing representatives) would, if committed in Switzerland, be punishable under article 14 of the Federal Criminal Law for Administrative Matters of March 22, 1974 (in force since January 1, 1975).

In the second decision (rendered on September 28, 1979) the Court confirmed that fraud against the United States is equivalent to administrative fraud according to art. 14 of the Law of March 22, 1974.

In the third case (decision of November 16, 1979), the United States request for assistance was based on allegedly false declarations given by a United States Corporation to the Export/Import Bank of the United States that it had neither granted nor promised illegal advantages to an Iranian purchaser of helicopters. Because, at the time of the illegal activities, corporations as such were not subject to criminal sanctions under Swiss law, the request had to be rejected. In the meantime, the Federal Law of March 22, 1974, which was the basis for the Federal Court's very first decision of March 30, 1979, provides criminal penalties for corporations.

- c. *Summary:* According to the Swiss authorities, application of the treaty so far has been smooth, and fears of abuses have proved unfounded. The general attitude of the concerned third parties (in particular Swiss banks) seems to be to submit basic questions of interpretation of the treaty to the Federal Court. In the first case decided by the Federal Court, fifteen and a half months elapsed from the date of the request to the court's decision.

3. Legal Assistance under the Convention between Switzerland and the United States for the Avoidance of Double Taxation with Respect to Taxes on Income

According to article XVI of the Convention, the competent authorities of the contracting states shall exchange such information (being information available under the respective taxation laws of the contracting states) as is

necessary for carrying out the provisions of the convention or for the prevention of fraud or the like in relation to the taxes which are the subject of the convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any person other than those concerned with the assessment and collection of the taxes which are the subject of the convention. No information shall be exchanged which would disclose any trade, business, industrial or professional secret or any trade process.

Article XVI was recently applied and interpreted by the Swiss Federal Court twice in connection with the same matter:

- a. In a decision rendered on December 23, 1970 (BGE 96 I 737), the Court held that the Swiss tax authorities were entitled to supply the Internal Revenue Service of the United States with an official report concerning transactions which an American citizen suspected of tax fraud allegedly had made through the intermediary of a Swiss bank. The decision was arrived at because, under the cantonal laws of Basel-City, Geneva and Zurich (the main banking centers), the bank would have had to make available the information in question if its customer had defrauded the Swiss tax authorities with regard to his income tax.
- b. In the second decision rendered on May 16, 1975 (BGE 101 Ib 160), the Court refused to interpret article XVI as granting the United States a right to general assistance; in particular, the Court held that the Swiss authorities were under no obligation to furnish, to secure and transmit to the United States tax authorities evidence in the manner and forms required by United States law.

4. Relationship between Legal Assistance under the Double Taxation Convention and the Treaty of 1973

In its decision of May 16, 1975 (mentioned under 3.b above), the Federal Court made clear the relationship between article XVI of the Double Taxation Convention and the Legal Assistance Treaty of 1973. It pointed out that, in article 38, subparagraph 4 of the Legal Assistance Treaty, the supplying of information concerning taxes subject to the Double Taxation Convention is governed exclusively by the provisions of the Convention, with the exception of cases subject to the special provisions concerning organized crime (Chapter II of the Legal Assistance Treaty). The Court held that an extensive interpretation of article XVI of the Double Taxation Convention would be in contradiction of the Legal Assistance Treaty which provides legal assistance in fiscal matters as an exception only, namely in cases involving organized crime.

The situation can be summarized as follows:

- a. In fiscal matters, the Swiss authorities will grant general legal assistance only in cases falling under Chapter II of the Legal Assistance Treaty of 1973 (organized crime). In the other cases, legal assistance will be

granted under article XVI of the Double Taxation Convention by supplying an official report provided the information requested is available according to Swiss taxation law.

- b. In nonfiscal matters, the Swiss authorities will grant general legal assistance according to the provisions of the Legal Assistance Treaty of 1973.

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