Outsourcing Legal Services: Impact on National Law Practices

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Introduction

Outsourcing legal services generally refers to sending legal work that is traditionally handled inside a company or firm to an outside legal service provider. Except for law firms, the provision of legal services hardly ever forms part of the core business of a company, and the company is therefore faced with the question of whether to "make or buy" the legal services it requires.[1] Should the task of performing legal services be referred to internal experts or should the company retain external counsel? A company or firm may have a number of reasons for outsourcing, but the most common are:

(1) Specialist know-how and expertise;
(2) Objectivity;
(3) Independence;
(4) Legal privilege;
(5) Lobbying capacities and capabilities;
(6) Innovation;
(7) Second opinions;
(8) Additional resources;
(9) Availability;
(10) Speed/promptness of service;
(11) Infrastructure;
(12) Forensic work; and
(13) Costs/cost-benefit analysis/budgeting.

Other considerations to take into account are:

(1) Knowledge of the company;
(2) Knowledge of the markets;
(3) Communication (formal and informal);
(4) Corporate culture;
(5) Networking;

1 Staub, *Legal Management* (2006), at pp. 177 *et seq.*

(6) Avoidance of impediments in seeking legal advice; and
(7) Building up know-how.

The "make or buy" question hardly ever results in a definitive answer, as in "yes, always" or "no, never". Only in rare cases is the entire range of possible legal services outsourced to an external legal service provider. The question therefore is generally more about "which parts" and "to what extent" legal services should be referred to external resources.

This chapter first provides an overview on the legal framework governing the outsourcing of legal services in Switzerland. The discussion focuses on the outsourcing of legal services from a company (the principal) to an outside contractor (the legal service provider) and also to the outsourcing of legal work by a legal service provider to a subcontractor.

It also provides some insights into the results and findings of a survey conducted by the authors in August 2011 regarding the reasons for, the extent of, and the discernable trends in the outsourcing of legal services in Switzerland in today's legal environment.

Outsourcing to a Legal Service Provider

Legal Basis and Sources

Swiss law does not contain any specific rules governing the outsourcing of legal services. Certain aspects of outsourcing of legal services are governed by different legal provisions such as the Code of Obligations (CO), which includes, among other matters, the law on mandate agreements,[2] the Federal Act on the Freedom of Attorneys (the Attorney Act),[3] and the cantonal rules governing attorneys and their professional standards.

While the rules of the CO generally apply to mandate agreements, the Attorney Act applies only to attorneys who are admitted to the bar and who are representing clients before courts and judicial authorities in areas that are reserved for attorneys.[4]

In addition, there are rules and guidelines on corporate governance that are relevant in connection with the outsourcing of legal services. These rules can be found in the company law of the CO (for example,

2 Code of Obligations, Articles 394 *et seq*.
3 SR 935.61.
4 Attorney Act, Article 2(1).

Code of Obligations, Articles 620 *et seq*, for stock corporations, and the Swiss Code of Best Practice for Corporate Governance (Swiss Code of Best Practice),[5] which is a private set of recommendations establishing guidelines (primarily for listed companies) on good corporate governance.

Establishing the Outsourcing Arrangement

Mandate Agreement

There are no formal requirements for the establishment of an outsourcing arrangement. Essentially, the principal and the legal service provider enter into a mandate agreement according to Article 394 of the CO. Such an agreement can be made orally or in writing and does not require disclosure, legalization, registration, or any other formality.

Given the significance of an outsourcing arrangement in case of the full outsourcing of a principal's entire legal workload, drawing up a written mandate agreement is highly recommended. Key issues to cover in the agreement between the principal and the legal service provider are:

(1) Scope of the work to be done;
(2) Communication and instructions;
(3) Reporting;
(4) Authority of the legal service provider to represent the principal;
(5) Mandating of subcontractors;
(6) Fees arrangement;
(7) Retention of records;
(8) Use of the principal's name for marketing purposes;
(9) Release from the client-attorney privilege in the case of proceedings for claiming fees; and
(10) Confidentiality.

Corporate Organization and Approval

There is, however, more to establishing an outsourcing arrangement than simply entering into a mandate agreement with a legal service provider. The effective management of legal issues forms an important part of a corporate organization. As such, it is ultimately the board of directors' responsibility to determine the appropriate organization[6]

5 Published by *Economiesuisse*, the Swiss business federation.
6 Code of Obligations, Article 716a(2).

and to define the respective authorization levels. Furthermore, the effective management of legal services plays an important role in ensuring the company's compliance with laws and internal regulations, which is another key responsibility of the board of directors.[7]

In light of the significance of the role of legal services in a corporate organization, it is recommended that in case of the full outsourcing of the entire legal service, the outsourcing arrangement with its key terms (such as the organizational aspects, scope, and reporting) are presented to the company's board, and the decision whether to fully outsource or otherwise organize the legal services is ultimately left to the board. The directors are well advised to consider the advantages and disadvantages of outsourcing the legal services and to satisfy themselves that the outsourcing arrangement presented to them fits in their corporate organization and allows them to meet their obligations in terms of monitoring compliance with laws, rules, and regulations.[8]

Certain Aspects of Outsourcing Arrangements

Independence/Conflict of Interests

The outsourcing agreement should generally require the legal service provider to act in the interests of the principal. A company seeking to retain a legal service provider to outsource the legal services to should therefore verify whether the legal service provider can perform the services without being in a permanent conflict of interest. On the other hand, the legal service provider would have to decline the mandate if it puts him in a permanent conflict situation. For example, it may be problematic if the legal service provider were to assume the role of a fully outsourced legal service of two or more competitors or if he were to be otherwise associated with a competitor, such as through a board membership.[9]

Within the scope of applicability of the Attorney Act (i.e., with respect to the professional representation of a client before a court of law or judicial authority), attorneys are required to perform their job independently.[10] They are specifically obliged to avoid any conflict between the interests of their clients and the interests of persons with whom they have either a private or a professional relationship.[11]

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7 Code of Obligations, Article 716a(5).
8 Swiss Code of Best Practice, Recommendation 20.
9 Swiss Code of Best Practice, Recommendation 16.
10 Attorney Act, Article 12(b).
11 Attorney Act, Article 12(c).

Instructions

The legal service provider is required to follow the instructions of the principal. He is liable to the principal for the loyal and careful performance of the mandate, pursuant to the principal's instructions.[12]

Authority

Instruction and authority are not identical. However, Article 396(2) of the CO provides that a principal's relevant instructions also include the authority to execute the legal actions that are required for the performance of the mandate according to those same instructions.

This general statutory authorization does not, however, include the authority to take legal action in a lawsuit, to enter into a settlement agreement, to appoint an arbitral tribunal, to sell or charge real property, or to grant an endowment.[13] A specific power of attorney is required for these legal actions.

Confidentiality and Legal Privilege

The legal service provider's duty of loyalty and care includes an obligation to keep the information that he is entrusted with confidential. The obligation to maintain confidentiality ties in with the professional confidentiality obligations of attorneys and their auxiliary persons,[14] and violation of this obligation is a criminal offense.[15]

Swiss law as currently in effect does not grant the attorney-client privilege to in-house counsels, even if the individuals concerned are admitted to the bar. This issue has been (and still is) the subject of controversial debate in the legal community. However, the Federal Council has concluded that it will not further proceed with a lawmaking initiative to grant the attorney-client privilege to in-house counsels.

In connection with dawn raids in antitrust matters, the Swiss Competition Commission has taken the approach that only correspondence with an external defense attorney may not be seized in a dawn raid.[16] The Federal Supreme Court has not yet taken a final position on whether the legal privilege also would be available to in-house counsels, but

12 Code of Obligations, Article 398(2); further discussed in the subsection "Duty of Care, Liability, and Insurance", below.
13 Code of Obligations, Article 396(3).
14 Attorney Act, Article 13.
15 Criminal Code, Article 321.
16 Guidelines of the Competition Commission on Dawn Raids of 6 April 2011.

has clarified that only those documents that are actually in possession of an external or internal attorney may be protected by the legal privilege.[17] A new provision in the Federal Rules on Criminal Procedure that came in force on 1 January 2011 has now clarified that attorney-client correspondence with an external attorney may not be seized, irrespective of where it is and when it was created.[18]

Fees

The parties to the mandate agreement are free to determine their fee arrangement. However, within the scope of applicability of the Attorney Act (i.e., with respect to the professional representation of a client before a court of law or judicial authority), attorneys are required to adequately inform the client about the way the fees are determined and about the costs to expect, as well as to periodically communicate to the client the fees accrued.[19]

The Attorney Act does not, however, provide how the fee of the attorney is supposed to be calculated. Some cantonal rules may apply in connection with judicial proceedings, but fees are generally determined based on the mandate agreement or, in the absence of a specific agreement, based on the hours spent.[20]

Furthermore, attorneys are forbidden to agree with their client on a contingency fee that is dependent on the outcome of a lawsuit before the lawsuit has been terminated. This means that attorneys are not allowed to agree on a share of the proceeds from the legal proceeding in advance, nor may they waive their fees in advance in case of a negative outcome of the proceeding.[21]

Duty of Care, Liability, and Insurance

The legal service provider owes the principal a duty of loyalty and care.[22] The law sets the standard of care equal to that required of an employee and refers to the employment law for this purpose.[23] However, in practice, the standard of the duty of care that an external legal

17 Federal Supreme Court, 1B_101/2008 of 28 October 2008.
18 Federal Criminal Procedure Rules, Article 264(1).
19 Attorney Act, Article 12(i).
20 Administrative Court of Zurich, 2C_247/210 of 16 February 2011.
21 Attorney Act, Article 12(e).
22 Code of Obligations, Article 398(2).
23 Code of Obligations, Article 398(1) with reference to Article 321(e).

service provider has to observe is higher than the standard required of an employee.

In particular, the legal service provider is responsible for ensuring the necessary professional expertise that the mandate requires. In effect, the legal service provider always has to ensure that the mandate is performed with the level of care it requires. If he does not possess the necessary skills, expertise, and experience, he may not accept the task. At the end of the day, the liability of the legal service provider always depends on the actual circumstances of the case in hand, judging whether the legal service provider conducted the mandate with the necessary care.[24]

The Attorney Act requires attorneys to maintain adequate insurance coverage for their work. Attorneys are required to carry professional indemnity insurance of at least CHF 1,000,000.[25]

Reporting and Record Retention

At the request of the principal, the legal service provider has to report on and account for the performance of the mandate. Furthermore, he has to turn over to the principal everything he attained from the principal or from a third party in the course of performing the mandate.[26]

If the principal does not request the return or handover of records, the legal service provider must retain the records for at least the statutory retention period of ten years.[27]

Termination

Article 404(1) of the CO provides for the right of both parties to a mandate agreement to terminate it at any time. Accordingly, the termination of the mandate agreement does not require a specific cause nor does a notice period have to be observed. Because of the trust and confidence that is placed in the other party to a mandate agreement, Swiss courts have qualified the provision of Article 404(1) of the CO as a mandatory provision of Swiss law, which the parties cannot derogate from by agreement.[28]

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24 Federal Supreme Court, 91 II 439, 106 II 173, 117 II 563, 127 III 357, and 134 III 534.
25 Attorney Act, Article 12(f).
26 Code of Obligations, Article 400(1).
27 Code of Obligations, Article 962.
28 Federal Supreme Court, 98 II 308, 103 II 130, 110 II 383, and 115 II 464.

According to prevailing case law and in light of the relationship of trust and confidence between the agent and the principal, the mandate agreement can be terminated at any time. As a result, courts also have ruled that contractual penalties that were agreed on for early termination of a mandate agreement are not enforceable.[29] The same principle applies to a contractual clause which provides that the full fee will be payable in case of early termination.

The court's approach of granting both parties the mandatory right to terminate the mandate agreement at any time has been heavily criticized in legal doctrine. The courts apply Article 404(2) of the CO to rule on the financial consequences of early termination of a mandate agreement.[30]

While the termination generally has immediate effect and stops the obligation to pay a fee from that point in time, Article 404(2) provides that the party terminating the mandate will be liable to the other party for the damage caused by an untimely termination. The notion of untimely termination is broadly construed, which allows remedial measures for some of the rather drastic consequences of the right to terminate at any time.

Outsourcing by a Legal Service Provider

Requirement to Perform the Legal Services Personally

According to Article 68 of the CO, a contracting party is only required to personally fulfill its obligations under a contract if the performance depends on the person concerned. If, on the other hand, performance is not dependent on the person of the contracting party, there is a legal presumption that the debtor is not obliged to perform the obligation personally.

However, a mandate agreement is usually characterized by the confidence and trust that the principal places in the agent. This holds particularly true in an attorney-client relationship. In an attorney's mandate, the person performing the service is usually relevant, being the person in whom the client is placing his trust, and cannot be randomly exchanged. In accordance with these principles, Article 398(3) of the CO provides that for any form of a mandate agreement, an agent will be obliged to perform the services personally unless authorized or forced

29 Federal Supreme Court, 104 II 111 and 110 II 383.
30 Federal Supreme Court, 110 II 380.

under the circumstances to transfer them to a third party, or if substitution is usually considered acceptable in the ordinary course of business.

The obligation to perform the services personally under statutory law does not usually exclude the general notion that third parties may be retained for the performance of the services in question. Tasks of a subordinate nature may be transferred to an auxiliary person, as long as the substantive main tasks of the service remain with the agent originally appointed. The retention of an auxiliary person may therefore only be in support of the agent's own performance. Furthermore, the auxiliary person has to perform his tasks under the agent's direction, supervision, and control.

Generally, these rules also apply to attorneys' mandates. An attorney may therefore delegate subordinate tasks to auxiliary persons in the course of the performance of his services. Such subordinate tasks may comprise the assistance of the secretarial staff, or legal research, or the preparation of drafts by members of the legal staff. However, all these tasks need to be done under the direction and control of the attorney entrusted with the mandate, and the main part of the service needs to remain with him.

The recent trend in the Swiss legal market, where an increasing number of law firms are organized in the form of a corporation, has added a new aspect to the issue of delegating subordinate tasks. In these structures, the client enters into an agreement with the corporation, and the individual legal counsels are acting as auxiliary persons of the corporation. However, the Federal Supreme Court has yet to rule on the admissibility of the organization of a law firm in the form of a corporation, although most cantons have already approved this legal form.

Substitution

Terminology

In the context of legal outsourcing, the term "substitution" generally refers to subcontracting. In particular, it refers to the appointment of an independent third party by the agent to perform the services, without the agent managing and controlling that third party. Although the distinction from an auxiliary person is not entirely clear, the primary difference is that a "substitute" or subcontractor performs the services independently, while an auxiliary person merely provides support to the agent performing the services. It goes without saying that the lawyers employed by or grouped together within the same law firm do not

qualify as substitutes. This holds true even if the law firm is organized as a corporation.

Based on this understanding, the practice of a legal service provider outsourcing part of the legal services to a third-party provider would therefore fall into the category of substitution, which has certain requirements and consequences.

Requirements of Substitution

Article 398(3) of the CO requires the agent to perform the services personally in any one of three exceptions: if he is authorized to transfer it to a third party; if substitution is generally deemed acceptable in the ordinary course of business; or if there is a necessity to do so under the circumstances.[31]

The first of these three alternative criteria to permit subcontracting is therefore authorization by the principal. Authorization to retain a subcontractor does not mean that the agent is authorized as a proxy to enter into an agreement for certain work to be performed on behalf of the principal. Authorization in the present case means that the principal consents to the subcontracting of certain services to be performed. Such authorization is a unilateral declaration of will by the principal, which can be made orally, in writing, or in any other form.

The second alternative criterion that permits subcontracting is when it is generally deemed acceptable in the ordinary course of business. Whether the retention of a subcontractor is generally deemed acceptable has to be assessed in the context of what is common in the ordinary course of business. For instance, the retention of specialists can be qualified as common and therefore permissible.

The third alternative criterion that permits substitution is if there is a necessity for subcontracting under the circumstances. This necessity may arise if, for example, the agent, for reasons not attributable to him, is unable to perform the services due to an actual emergency. In any event, the substitution needs to be in the best interest of the principal. Based on the agent's general duty of loyalty and care, in such an emergency situation the agent may even be required to subcontract the work to a third party to ensure protection of the principal's interests.

The subcontracting may involve all or part of the original mandate. If only a part is transferred to a subcontractor, it has to be at least a

31 Discussed in the subsection "Requirement to Perform the Legal Services Personally", above.

significant part which falls into the category of services that have to be performed under the original mandate.

Effect of Substitution

If the requirements for substitution are met, the agent may subcontract all or part of his mandate to a third party without having to supervise and control him as would be required when an auxiliary person provides a service. The agent no longer has to be active in the scope of the work that he has subcontracted.

Substitution does not create a contractual relationship between the principal and the subcontractor. Accordingly, the principal and the subcontractor generally do not have any contractual claims against each other. However, based on an explicit provision in the law,[32] the principal may directly make any claim against the subcontractor that he would be entitled to make against the agent. In effect, the law as applied by the Federal Supreme Court allows the principal to claim damages he suffered on the basis of the contractual relationship between the agent and the subcontractor.[33]

While permissible substitution frees the agent from performing the delegated tasks himself, it does not free him from all the other obligations concerning the mandate. Therefore, the requirements to render accounts in relation to the mandate,[34] to turn over to the principal everything attained in the course of the mandate,[35] and similar obligations all remain with the agent.

Liability

If a legal service provider entrusted with a mandate subcontracts all or part of the work to a third party without being permitted to do so, he is liable for any of the subcontractor's acts or omissions as if they were his own.[36]

On the other hand, if the legal service provider is permitted to subcontract all or part of the work, he enjoys a certain privilege with respect to liability. According to Article 399(2) of the CO, an attorney is only liable for applying due care in selecting and instructing the

32 Code of Obligations, Article 399(3).
33 Federal Supreme Court, 121 III 310.
34 Code of Obligations, Article 400.
35 Code of Obligations, Article 401.
36 Code of Obligations, Article 399(1).

subcontractor (*cura in eligendo vel instruendo*). In this limitation of liability lies the main distinction between permissible substitution and the support provided by an auxiliary person. If the requirements for permissible substitution are not met, the liability privilege of Article 399(2) of the CO does not apply, and the agent is unlimitedly liable for the acts and omissions of the auxiliary person under Article 101 and/or Article 97 of the CO.

The law does not specifically define the standard or level of care a legal service provider has to apply when subcontracting legal work to a third party; it depends on the circumstances of the individual case. In general, one would expect the legal service provider to assess the expertise and experience, the capacity, and the reliability of the subcontractor and to compare it with the defined requirements for the job. If the information for such an assessment is not available to the legal service provider, he is required to obtain it before entering into the outsourcing arrangement.

Likewise, the level of the required instructions cannot be generally defined, as this depends on the circumstances and the actual mandate at stake. In any event, the legal service provider retaining a subcontractor must provide that substitute with correct and complete information about the nature of the mandate and about the instructions given by the principal.

The privilege of limited liability in case of permissible substitution is not justified if the outsourcing to a subcontractor is not in the interest of the principal. If the work is outsourced primarily in the interest of the agent, such as to increase his business volume or profit, there is no reason to award the privilege.[37]

In this case, the agent remains liable under the general rules of Article 101 of the CO, which means that he has unlimited liability for the acts and omissions of an auxiliary person. According to Article 101(1) of the CO, a contracting party is liable to the other party for any damage its auxiliary persons cause in the course of performing the services.[38]

Limitation of Liability

The law generally permits the contracting parties to agree on a limitation or exclusion of liability, but requires a contractual agreement for such limitation or exclusion of liability to be effective.[39] In the same

37 Federal Supreme Court, 112 II 347 and 107 II 238.
38 Swiss Federal Court (BGE), 117 II 563 and 119 II 337.
39 Federal Supreme Court, 111 II 471.

way, indirect limitations of liability are possible by way of contractual clauses such as a limitation of the services to be provided, risk allocation, or limitations of enforcement rights.[40]

However, there are restrictions on the admissibility of contractual clauses to limit or exclude liability. While the exclusion of the agent's liability in case of his own gross negligence and intent is not valid, the liability for the acts and omissions of auxiliary persons can be excluded further. Article 101(2) of the CO generally allows the exclusion of liability for auxiliary persons altogether, but this provision is subject to some important limitations.

In case of a business that requires regulatory approval or license, which includes an attorney's legal practice, the exclusion of liability cannot be agreed on validly.[41] As a result, an attorney's exclusion of liability for his own fault is not possible,[42] but exclusion or limitation of liability for ordinary negligence is possible for auxiliary persons.[43]

Establishment, Terms and Conditions, and Termination of the Mandate

The agreement between a legal service provider outsourcing legal work to a third-party subcontractor is a mandate along the lines discussed previously.[44] The applicable principles are the same as the ones that govern the creation, the terms and conditions, and the termination of an agreement for the outsourcing of legal services by a legal service provider.[45]

Legal Outsourcing in Switzerland

In General

To illustrate the topic of outsourcing legal services in Switzerland with some empirical data and to learn more about the current trends and the aspects that corporations take into consideration when making the decision to outsource, the authors conducted a study among a representative sample of Swiss companies in August 2011. This section provides the results of the study.

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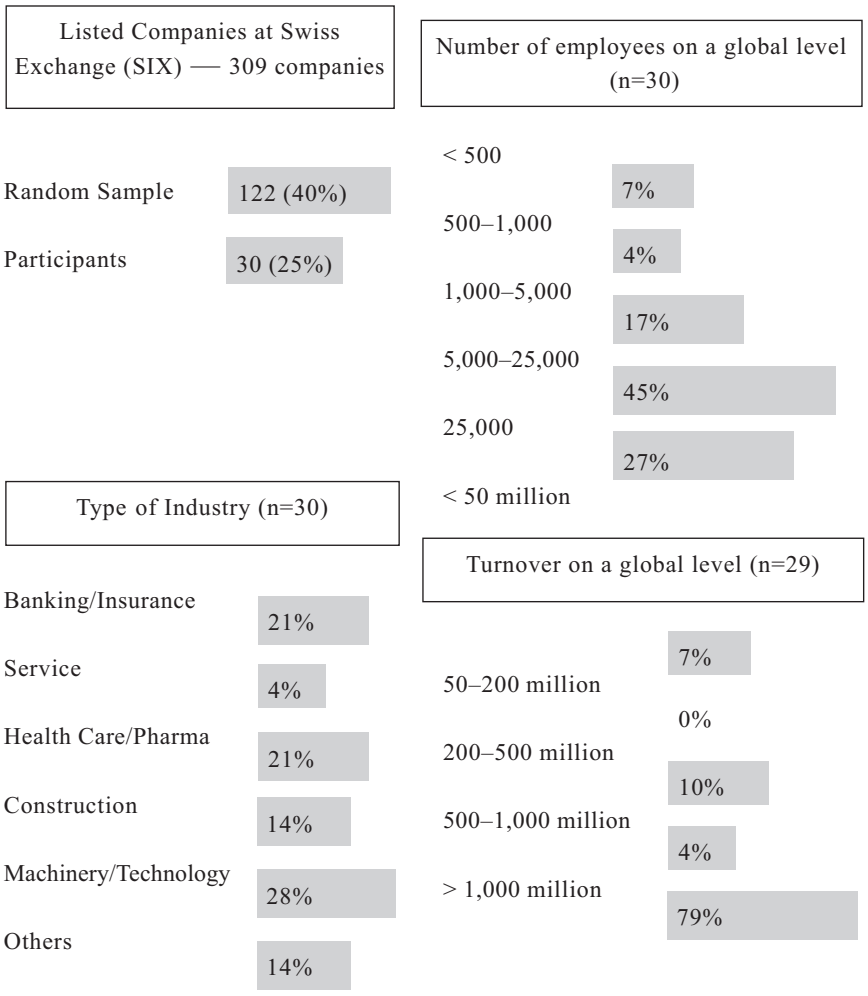
40 Federal Supreme Court, 132 III 449.
41 Code of Obligations, Article 100(2).
42 Code of Obligations, Article 100(2).
43 Code of Obligations, Article 101(3).
44 In the subsection "Mandate Agreement", above.
45 Discussed in the section "Outsourcing to a Legal Service Provider", above.

Participants

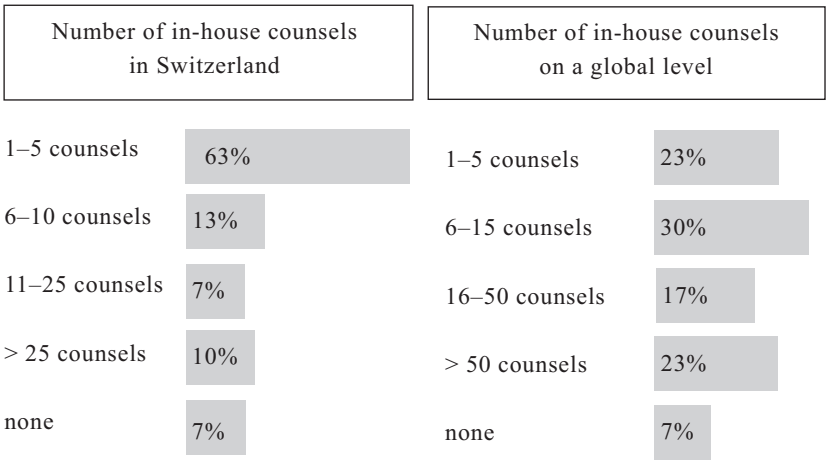
The profile of participating companies is indicated in Figure 1.

Figure 1: Profile of participating companies.



With regard to the number of in-house counsels, sixty-three per cent of the companies have between one and five in-house counsels in Switzerland and twenty-three have between one and five in-house counsels at a global level. Ten per cent have more than twenty-five counsels in Switzerland and twenty-three per cent have more than fifty counsels at a global level. Seven per cent do not employ in-house counsels, either in Switzerland or at a global level (Figure 2).

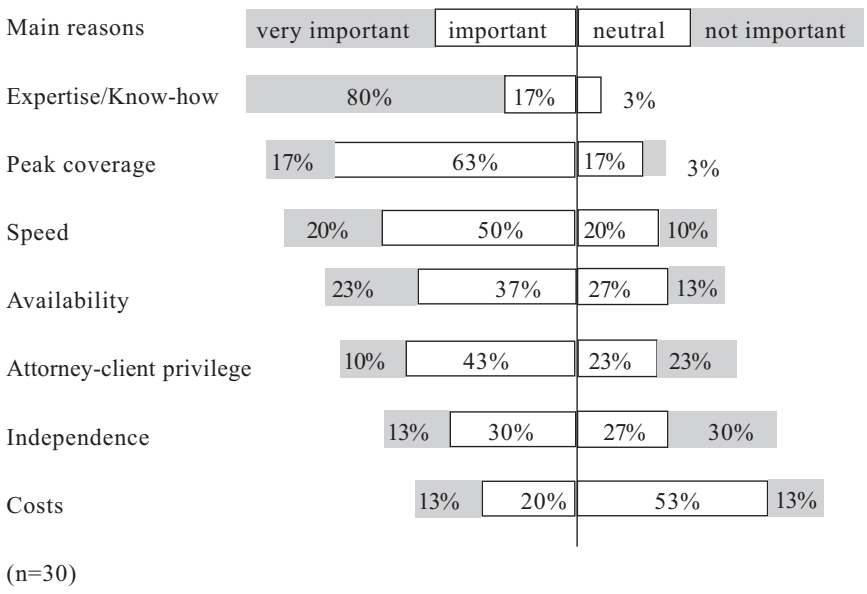
Figure 2: Number of in-house counsels in Switzerland and worldwide.



Results

What are the key drivers for outsourcing legal services in Switzerland?

Expertise/know-how is ranked first, followed by peak coverage, speed, and availability (Figure 3).



Which areas are sourced out currently and how may this develop in the future?

On the one hand, fifty per cent of the poll participants fully outsource litigation/arbitration/administrative procedures, thirty-three per cent outsource competition/antitrust and criminal matters, twenty per cent outsource tax matters, thirteen per cent outsource intellectual property (IP) matters, and thirteen per cent outsource merger and acquisition (M&A) matters.

On the other hand, there are certain matters that are not outsourced at all. Seventy-seven per cent do not outsource any of the functions of the corporate secretary, sixty-three per cent do not outsource compliance matters, sixty per cent do not outsource training, and thirty-seven per cent do not outsource matters related to contracts, information technology (IT), or employment/social insurance (Figure 4).

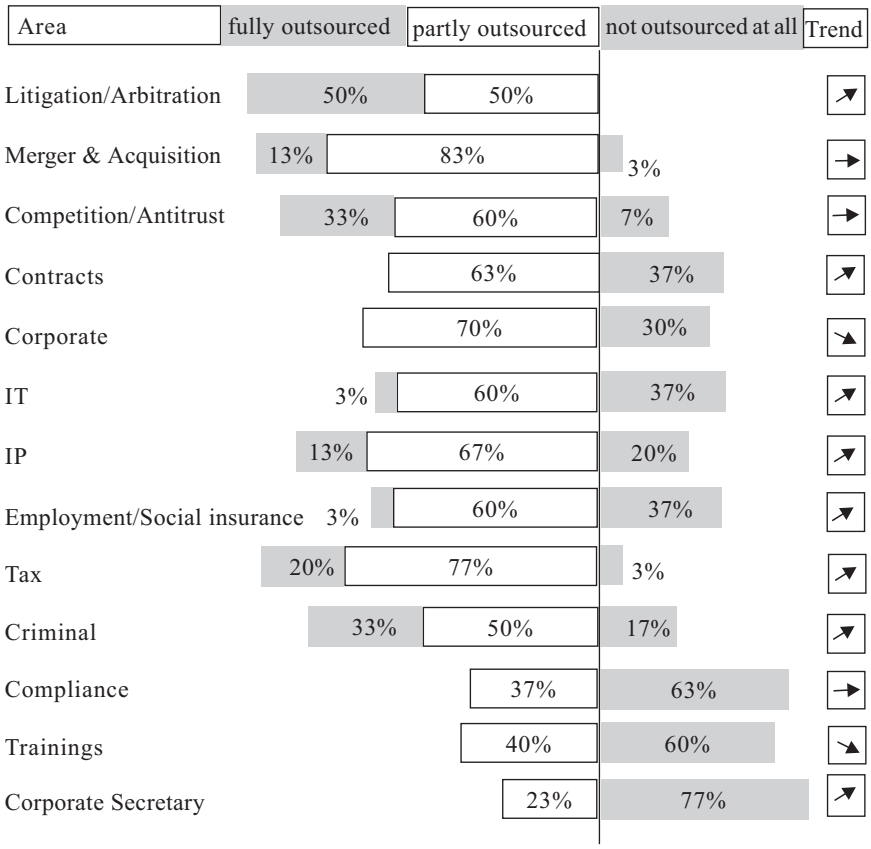


Figure 4: Areas currently outsourced.

Comparing the current situation with the future trend regarding outsourcing specific areas, litigation/arbitration, contracts, IT, IP, employment/social insurance, tax, criminal matters, and corporate secretary functions are expected to be outsourced to a larger extent, while corporate and training are expected to be outsourced less. M&A, competition/antitrust, and compliance are expected to remain on more or less the same level.

How much of the total legal budget is used for outsourcing?

Seventy-six per cent of the participants spend less than fifty per cent and twenty-four per cent of the participants spend more than fifty per cent of their legal budget for outsourced services. Ten per cent have outsourced between seventy-five per cent and a 100 per cent of their legal functions (Figure 5).

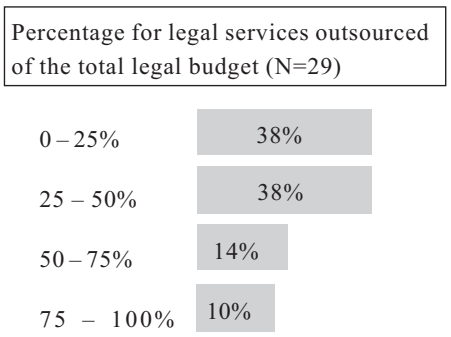


Figure 5: Percentage of total legal budget used for outsourcing.

Forty per cent of the participants have increased their outsourcing share over the last three years by approximately twenty per cent on average, forty-three per cent have kept it on the same level, and seventeen per cent have reduced it by an average of fourteen per cent (Figure 6).

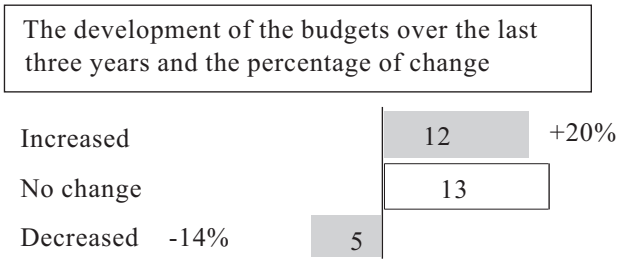


Figure 6: Development of the outsourcing budget over the last three years and percentage of change.

Looking into the future, thirty-five per cent of the participants expect a further increase of their external spending by nineteen per cent on average, nineteen per cent of the participants expect a decrease by approximately fourteen per cent, and the remaining forty-six per cent of the participants believe it should stay the same (Figure 7).

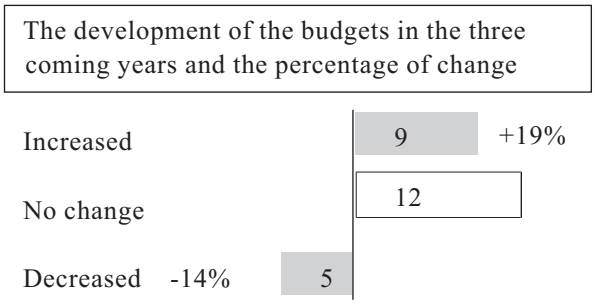


Figure 7: Development of the outsourcing budget over the next three years and the percentage of change.

Overall, there is no significant difference in spending between the last three years and the next three years in terms of the anticipated percentage of outsourcing compared to total legal spending.

However, there seems to be a clear trend that sixty-four per cent will further build up in-house capacity, twenty-six per cent will not change, and ten per cent will outsource more (Figure 8).

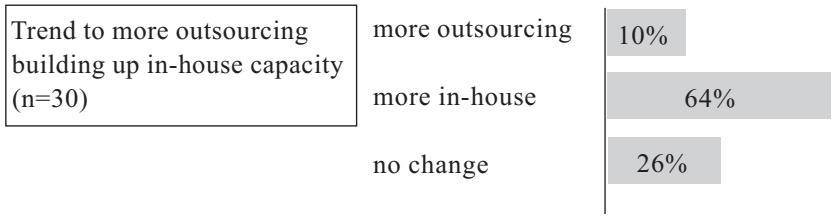


Figure 8: Trend toward more outsourcing or building up more in-house capacity.

The major driver for building up more in-house capacity seems to be costs. On the one hand, it is believed that specific knowledge is not easily available from an outside counsel at reasonable costs; on the other hand, in-house counsels are deemed to have a better understanding of the business and more ownership of projects, and there is recognition of the increasing quality of in-house lawyers. In addition, there is an increasing understanding in corporations that the

know-how gained from projects and transactions should be preserved internally, and that it also makes sense to build up in-house know-how for standard procedures and questions.

Outsourcing will therefore be used at peak times, for litigation/administrative procedures when a local familiarity with the processes, authorities, and courts cannot be easily covered internally, or will be used for internal headcount reduction, specific tasks, extraordinary projects, and special areas of law. Nevertheless, for more than half of the companies participating in the study, matters related to contracts, corporate issues, compliance, and the function of the corporate secretary will never be fully outsourced (Figure 9).

Figure 9: Areas that will never be outsourced.

Notably, one participant estimated that companies with in-house legal departments tend to cover ninety per cent of the work in-house and

therefore build up in-house know-how for standard procedures and questions. One key aspect for such in-house legal departments is training and education to ensure general legal compliance and to reduce the number of similar questions. Business opportunities for outside legal service providers (e.g., in general compliance areas) are primarily in mid-sized companies with an international business but no in-house legal department.

How many external legal service providers are involved?

With regard to Switzerland, fifty-two per cent of the participating companies have three to five external legal service providers, twenty-eight per cent have one or two, thirteen per cent have more than ten, and seven per cent have seven to ten. Sixty per cent have at least six different external legal service providers in Europe, thirty per cent in the Americas, thirty-one per cent in Asia, and fifteen per cent in Africa.

Overall, between one-third and one-half of the participants have at least three to five legal service providers in all regional areas, which is a clear indication that a "one-stop shop" does not seem to be the absolute preferred solution. Rather, companies appear to keep the option open to consciously select legal service providers on a case-by-case basis and depending on the issue at hand (Figure 10).

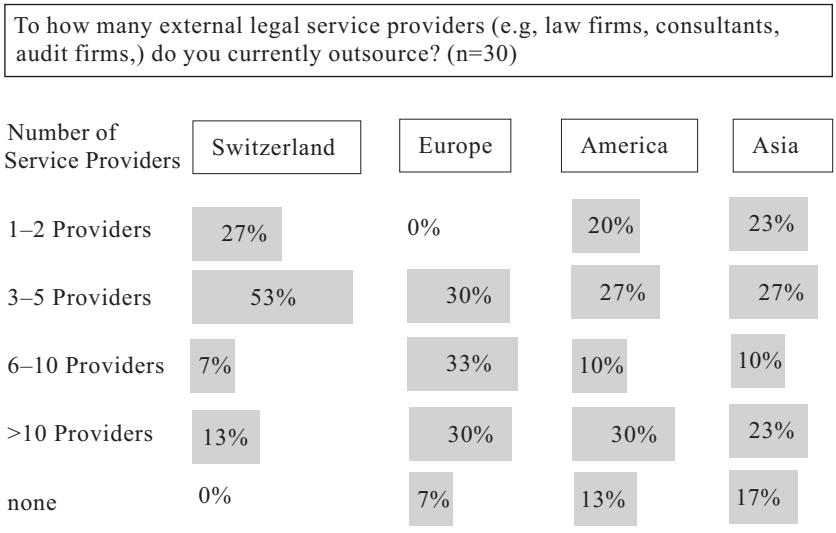


Figure 10: Percentage of external legal service providers and their location.

What are the concerns or limiting factors for outsourcing?

Costs (eighty-three per cent) and lack of business/industry understanding (eighty per cent) were mentioned as key limiting factors for more outsourcing (Figure 11). Certain companies are interested in exploring new ways to address the latter issue, such as by exchange of in-house counsel to law firms and vice-versa (i.e., for a secondment).

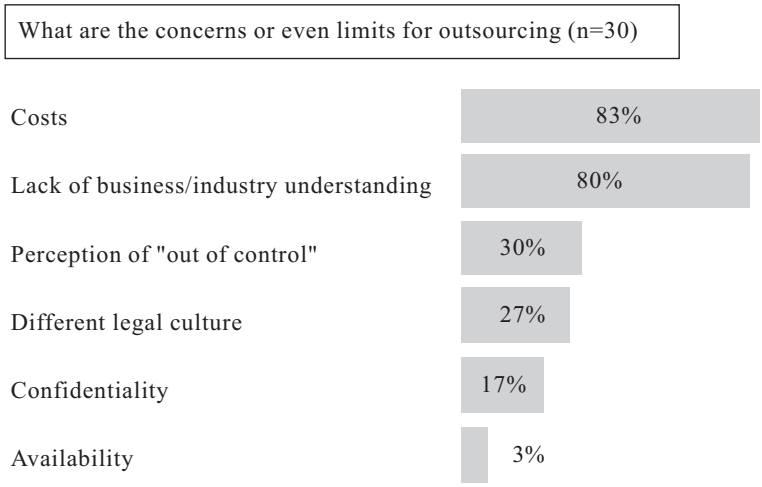


Figure 11: Concerns and limiting factors for outsourcing.

Conclusion

From a substantive Swiss law point of view, there is no specific law governing the outsourcing of legal services. Certain aspects of outsourcing legal services — such as mandate, independence/conflict of interest, instructions, confidentiality, legal privilege, fees, duty of care, liability, insurance, reporting, record retention, advertising, termination, substitution, and subcontracting — are governed by different laws.

A study conducted among Swiss companies reveals that peak coverage and expertise/know-how are still the major drivers for outsourcing of legal services. While a majority of companies even fully outsource some areas of law (e.g., litigation/arbitration, competition/antitrust, criminal matters), there are clear reserved areas that are kept in-house (e.g., corporate secretary functions, training, and compliance issues). One-quarter of the survey participants spends at

least half of the total legal budget on outsourced legal services. As in the last three years, one-third of the participants expects an increase in outsourcing to external service providers in the range of twenty per cent for the next three years.

Nevertheless, there seems to be a clear trend (indicated by sixty-four per cent of the participants) to build up more in-house legal capacity. When outsourcing, companies tend to have more than just one legal service provider. Those external legal service providers who manage to offer a good value proposition because they have a sound understanding of their client's particular industry and business and deliver high quality at competitive costs will get their share of the market.