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The rise and fall of banking secrecy, or why time has come to knock at Swiss banks' door

Ardenter discusses prevailing interests of creditors and claimants over banking secrecy

Switzerland has been well-known for decades to be very restrictive with regard to the exchange of information with foreign jurisdictions.

Claimants in foreign proceedings for civil fraud or in commercial matters face with banking secrecy and the unavailability of pre-trial disclosure of evidence. As a result, they frequently have to resort to instituting criminal proceedings in order to obtain disclosure and freezing orders from Swiss law enforcement authorities (where banking secrecy does not apply).

This practice is efficient but also questionable, as the use of criminal proceedings should be kept for what they are meant to be: a last resort.

Recent trends can be observed in civil courts in favour of lifting banking secrecy even where the prevailing interest is not the prosecution of a crime, but (in particular) insolvency or requests for mutual assistance in civil matters.

> In spite of a clear trend in favour of international collaboration coming from courts, a culture of privacy still exists outside of courtrooms, which is henceforth worth challenging.

Overlooked alternative: duty of Swiss banks to disclose internal information in insolvency, even to their prejudice

Little use has been made of Swiss insolvency proceedings so far for the purpose of collecting evidence from Swiss banks.

By statute, insolvency trustees can seek the support of Swiss bankruptcy offices in order to obtain information from Swiss banks:

- concerning the debtor's assets that they hold; or
- against whom this debtor has existing or potential claims.

Insolvency practitioners have overlooked this second alternative for decades, with the latest case law dating back to 1941. The scope of the duty of banks to provide information to insolvency trustees was understood to be limited to their duty of accountability on the assets of the debtor as their client. This practice excluded the collection of internal information.

In a landmark decision of June 2020 regarding an application based on this second option (5A_126/2020), the Swiss Supreme Court ruled that in the context of insolvency, there is a public interest in the disclosure of internal information of the bank that may enable Swiss and foreign insolvency trustees to identify claims, to assess their amounts and to collect all supporting evidence for the purpose of bringing a legal action against the bank itself. In other words, the scope of the duty to inform insolvency trustees is much broader than their contractual duty of accountability.

This is almost to say that pre-trial collection of banking internal information as evidence in favour of insolvency trustees is now available in Switzerland, which is justified by the prevailing interest of all and worldwide creditors over banking secrecy.

This leading case was extensively commented in light of the legal provisions on the duty of accountability. Surprisingly, the key issue of such prevailing interest was overlooked. This shows that in spite of a clear trend in favour of international collaboration coming from courts, a culture of privacy still exists outside of courtrooms, which is henceforth worth challenging.

Civil mutual assistance and disclosure of banking information – who is the secret's keeper?

Outside the specific need of protection of creditors in the distressed situation of insolvency, Swiss courts also tend to lift banking secrecy in favour of foreign civil trials even where only private parties are at stake.

The execution of letters rogatory are as matter of public international law. As such, private persons have only limited legal standing related to State sovereignty and public order.

Private persons concerned by the execution of letters rogatory aiming at the collection of information from Swiss banks are:

- The parties to the main trial;
- The bank holding assets, which is the secret's keeper;
- The client of the bank, which is the secret's beneficiary.

It is a common pitfall to believe that anyone involved in a trial may invoke banking secrecy to defeat any attempt to obtain information from Swiss banks. The legal situation is, however, quite clear:

- First, banking secrecy is not part of Swiss sovereignty or public order.
- Second, only Swiss banks may invoke banking secrecy as they are the keeper of it.

Parties to the dispute have no standing in the Swiss execution of letters rogatory as they are neither the keeper of the secret nor, *per se*, the beneficiary of the secret.

The client of the bank (which is usually the account holder, but might be the beneficiary owner) is the beneficiary of the secret, which can be opposed to the bank as their counterparty. In turn, the bank cannot reveal to third parties the existence of the contractual relationship with their client. This contractual secrecy does not give any direct right to the client against third parties, including courts and authorities.

In fact, a bank's breach of secrecy at the expense of the client triggers criminal sanctions when revealed to a third party. To this and only extent, banking secrecy might be compared to the professional secrecy of lawyers or doctors. But the comparison stops where it just starts as banking secrecy does not grant any privileged right to refuse to collaborate before courts and authorities. In this regard, the Supreme Court took the opportunity to recall, in a decision of December 2015 (4A_340/2015), that banking secrecy is only an exception to the duty to collaborate of third parties holding information.

The only room that remains to Swiss banks to resist a request of collection of banking information is to argue, on a case-to-case basis, that the interest in keeping the secret outweighs the interest in finding the truth in the main trial abroad.

Legally speaking, banking secrecy has been relegated to the qualification of 'other legally protected secrets', far behind professional secrecy of lawyers, doctors or priests. This is to say, the chances of success of opposing banking secrecy to the collection of banking information in support of a trial abroad are shrinking.

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Switzerland remains the main offshore banking centre in the world, with more than 25% of the world's foreign assets under management. Apart from its obvious attraction to chase assets, Switzerland can now be seen as an appropriate jurisdiction to collect information from all stakeholders in the market (banks, family offices, HNWI's service providers).

Criminal proceedings undoubtedly remain a powerful asset tracing tool to get access to banking information in case of fraud and money laundering. However, times where Switzerland was considered as a haven for dirty money is over, while remaining a private banking hub.

With this in mind, identifying the relevant interest at stake and the appropriate civil paths available appears as an efficient and more balanced approach to seek banking information for the upcoming decades.

About the author

Antonia Mottironi is a Swiss international civil, business crime and tax lawyer in Geneva. She was admitted to the Geneva and Swiss Bar in 2013, after graduating in law and economics.

She focuses on civil and criminal litigation, especially in the area of international business crime, international judicial assistance, enforcement of foreign arbitral awards and judgements, and cross-border insolvency.

Over the past years, she has handled a great number of international asset recovery cases which included the laying of civil and criminal attachments and the enforcement of foreign judgements. She also assisted clients in preparing and coordinating multi-jurisdictional disputes, in particular in common law jurisdictions.

In her asset recovery practice, she has developed a strong experience in cross-border insolvency cases involving foreign bankrupt banks and fraud schemes (Ponzi, wire transfer, Forex, tax fraud schemes). She has been involved over the past years in one of the largest art law disputes of the last decade between a Russian oligarch and his art dealer.

Mottironi has published on tracing and recovery of assets, with a specific focus on cross-border insolvency. She regularly speaks at international conferences on these matters.

She is a board member of the steering committee of the European network of the International Women's Insolvency and Restructuring Confederation IWIRC.

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