Hand over the keys to the safe!
Obligation of Swiss banks to provide information in bankruptcy proceedings, including evidence against themselves

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In bankruptcy proceedings, particularly in cases of criminal mismanagement by the directors of the bankrupt company, the question of the liability of the bank with which the company had opened accounts frequently arises, with the possibility for the creditors of the bankruptcy to obtain greater compensation for their damage than the assets of the directors would allow.

Whether the legal basis for the action against the bank is contractual liability for damages, for performance or unjust enrichment, it will always be necessary to prove the bank's breach of the contract or its lack of good faith. The documentary evidence will usually be found in the bank's internal and external correspondence, interview notes, due diligence documents (KYC), risk profiles, etc.

However, Swiss civil procedural law only imperfectly allows for the possibility of obtaining evidence against the bank during the course of a lawsuit, in particular because of the burden of proof and the bank's ability to refuse to cooperate in the gathering of evidence. In particular, there is no pre-trial discovery in the common law style.

It is therefore usually necessary to precede the action on the merits with an action to render account based on Article 400 of the Swiss Code of Obligations (**CO**), which may, however, take several years and lead to only partial results.

An alternative often used is the filing of a criminal complaint, which allows the bankruptcy administration and the creditors of the bankrupt company to become plaintiffs and to obtain the right to access the file of the procedure, in particular the documents that the Public Prosecutor's Office will have ordered the bank to produce (see our forthcoming article on this subject).

However, in cases where bankruptcy proceedings are opened (whether purely domestic or as a Swiss ancillary bankruptcy of a foreign insolvency), a quick and effective way to access these documents is through the obligation to inform under Article 222 of the Federal Debt Enforcement and Bankruptcy Act (**DEBA**).

Recent rulings by the Federal Court illustrate the bank's obligation to provide information and its limits, and the advantage of the obligation to inform in bankruptcy proceedings over an ordinary action to render account.

A. Ruling of 8 June 2020 (5A_126/2020, ATF 146 III 435)

In a first ruling of the Federal Court, dated of 8 June 2020 (5A_126/2020, ATF 146 III 435), confirming a decision dated of 30 January 2020 of the Geneva Court of Justice, Supervisory Authority for Debt Enforcement and Bankruptcy Offices (DCSO/27/20), the Federal Court had the opportunity to clarify its jurisprudence on the duty of a bank to inform the bankruptcy office in the context of its client's bankruptcy.

The case concerned a company based in the Cayman Islands that had had a business relationship with a bank prior to its liquidation in 2009. At the request of the foreign liquidators, the Cayman Islands liquidation order was recognized in Switzerland by the Geneva Court of First Instance in 2010, with the opening of a Swiss ancillary bankruptcy.

At the request of the foreign liquidators, the Geneva Bankruptcy Office registered in the inventory of assets of the ancillary bankruptcy a contentious claim against the bank concerning six transfers that took place shortly before the bankruptcy of the Cayman company.

In this context, in June 2019, the Geneva Bankruptcy Office required the bank to produce a number of documents of an internal nature, under threat of the penalties provided for in Article 324 ch. 5 of the Swiss Penal Code (**CP**), with the aim of basing a possible claim against the bank, including:

"4. all due diligence documentation (KYC) relating to the accounts of B._____ Ltd, from the opening until 2011;

5. all external correspondence, visit notes or interviews (paper or electronic) between the bank, account managers and representatives of B._____ Ltd for the period 2006-2011;

6. all documents, notes, internal and external correspondence in electronic or paper form, relating to the six [disputed] *transfers*.

The bank refused to produce part of this documentation and filed a complaint against the decision of the Bankruptcy Office on the following grounds:

- Purely internal documents were not subject to the obligation to render account, unlike other internal documents, which could be subject to account provided there was no overriding interest in doing so. In this respect, such examination was to be reserved for the civil court, in the context of an action to render account.

- The contested decision, which was issued under the threat of criminal sanctions, deprived the complainant of the possibility of refusing to collaborate without incurring sanctions other than those provided for in Article 164 of the Swiss Civil Procedure Code (**CPC**), namely the taking into consideration of an unjustified refusal to collaborate in the context of the assessment of evidence in civil proceedings.

The Geneva Court of Justice partially rejected this complaint by decision of 30 January 2020 (DCSO/27/20), while specifying that documents of a purely internal nature (such as preliminary studies, notes, drafts, collected material and accounts), which are irrelevant for the purposes of monitoring the management of the agent and therefore, a priori, also for assessing whether or not he has incurred liability, did not have to be produced.

The bank appealed against this decision to the Federal Court, which rejected the appeal on two grounds that may be relevant to the bank's duty to provide information.

1. Contract law duty to inform

Under Swiss law, a bank has a contractual obligation to report to its client at any time on the basis of Article 400 SCO. The purpose of this obligation is to allow the client to control the bank's activities.

A distinction must be made between (i) internal documents which must be brought to the attention of the principals in an appropriate form in order to enable them to monitor the agent's activities, and (ii) purely internal documents which are not relevant for verifying whether the agent has performed the mandate in accordance with the contract and which do not need to be disclosed (e.g. preliminary drafts).

2. Duty to inform under bankruptcy law

In the context of bankruptcy proceedings, Swiss law provides that third parties against whom the bankrupt person has claims have the same obligation to provide information as the bankrupt

person, subject to the penalties provided for by law. Banks cannot hide behind banking secrecy to refuse to provide information to the Bankruptcy Office.

With regard to the content of the obligation to inform, according to the Federal Court, the third party must transmit to the Bankruptcy Office all the information necessary to establish the inventory of the bankruptcy and hand over the documents that allow the enforcement of these claims.

The duty of the third party to inform the Bankruptcy Office includes information and means of proof suitable for determining the existence, the extent and, if applicable, the location of the bankrupt's assets. This includes the assets and claims, even if contested, that the bankrupt person has against the third party, as well as documents that allow these rights to be asserted.

3. Relationship between private law and bankruptcy law

The Federal Court confirmed in this decision that, in bankruptcy proceedings, the obligation to inform has the same scope as that of Article 400 CO. Consequently, the bank is obliged to inform the Bankruptcy Office of everything that allows it to control its activity, including by transmitting internal documents, since a fault in the execution of its mandate may give rise to a claim against it, which must be included in the inventory.

In short, this ruling confirms that the information that a bank must give to the Bankruptcy Office is the same as that which it must give to a client who is not in bankruptcy: all the information that allows it to judge the proper execution of its mandate and, if necessary, to take action against the bank.

B. Rulings 4A_599/2019 and 4A_287/2020 of 1 and 24 March 2021

Two more recent cases shed light on the material limits of the obligation to render account and the procedural difficulties posed by an accountability action, and illustrate the advantages of the obtaining of information under bankruptcy law over an ordinary action to render account.

1. Ruling 4A_599/2019 of 1 March 2021

A Federal Court ruling 4A_599/2019 of 1 March 2021 clarifies the *material limits of the* rendering of accounts.

A client had taken action against his bank in the context of a dispute relating to a margin call. The client had sought as a preliminary relief that the bank should be obliged to hand over documents relating to the banking relationship since its inception, under threat of the penalty provided for in Article 292 CP:

- documents related to the disputed margin call in order to verify how the bank had valued the options in its portfolio at the time of the margin call and how these options had been unwound; and
- documents relating to the period prior to the disputed margin call in order to verify whether the costs and margins charged by the bank on the products at the time of subscriptions and settlements were reasonable. The latter documents were not directly related to the dispute between the parties.

In its reasoning, the Federal Court recognized that the action to render account under Article 400 CO must make it possible to control the bank's activity. It includes all relevant information to verify whether the activity carried out by the agent corresponds to a good and faithful execution of the mandate.

However, the Federal Court points out that the right to accountability is limited by the rules of good faith, which means that the manifest abuse of a right must not be protected. The absence of good faith must be recognized when the exercise of the right by the client does not correspond to any interest worthy of protection, when it is purely vexatious or when it tends to serve interests that do not correspond to those that the provision is intended to protect.

This means that the action to render account does not merit protection if the client already has the required information or could obtain it from his own documents, whereas the bank could only provide it with the greatest difficulty. The same applies if the client has not made any enquiries for years, without any reservations and without any new elements justifying explanations, for example if the client has never contested the fee notes presented to him for a long time and suddenly asks for clarification in the course of a dispute.

In the case at hand, the existence of an abuse of rights was recognised in relation to the request for documents prior to the disputed margin call. Indeed, it turns out that the client had already received some of the requested documents but had not kept them. Moreover, he had never contested the execution of the orders he had given to the bank, nor had he questioned the price it was charging. Thus, according to the Federal Court, the mere assumption that the bank had received secret commissions throughout the contractual relationship, put forward by the client once the dispute over the margin call had begun, could not be considered as a new element capable of establishing a legitimate interest in monitoring all the transactions over several years.

With regard to the documentation relating to the margin call, the Federal Court also concluded that the request was disproportionate, vexatious or not sufficiently motivated. In particular, the court noted that the bank was operating as a custodian and creditor-guarantor in an execution-only relationship and was not obliged to warn the client of the risks associated with its speculative strategy, particularly in view of his experience.

2. **Ruling 4A_287/2020 of 24 March 2021**

A Federal Court ruling 4A_287/2020 of 24 March 2021 illustrates the *procedural difficulties* posed by an action to render account.

In this case, a company had brought an action against its bank and was partially successful. The bank was ordered to produce a number of documents requested by the company, in particular in connection with disputed margin calls. However, the bank had not complied with the judgment, which it had only partially executed, and the company had to take action before the same court to request its execution.

As part of the enforcement action, the company therefore requested the documents which, in its view, had not yet been provided by the bank, in particular: the final account statement, the list of positions held during the disputed period, documents relating to its exposure and the values of the positions taken, the ratios and calculations used for the margin calls, transcripts of telephone conversations and a letter from the bank confirming that it had fulfilled its obligation to provide exhaustive information.

In support of its analysis, the Federal Court began by recalling that the role of the enforcement judge is to determine whether the debtor has complied with the obligations imposed on him in the judgment to be enforced, and not to determine the scope of those obligations insofar as this is not clear from the judgment to be enforced.

According to the Federal Court, if the operative part of the judgment itself does not contain the level of detail required for enforcement of the judgment, the scope of the operative part must be interpreted in the context of the enforcement proceedings in the light of the recitals of the judgment. However, it cannot be a question of interpreting terms that are vague. On the contrary, it must be clear from the recitals what can be required of the obliged party.

Thus, if it is not possible to decide whether the performance provided is sufficient, because the details necessary for this purpose cannot be gathered from the recitals of the decision to be enforced or cannot be gathered with sufficient clarity, the enforcement procedure is of no use.

In short, the judgment on the merits in the account must therefore be sufficiently clear and precise to be enforceable.

In this case, this requirement for precision and clarity resulted in a harsh decision for the company. The company was denied access to the requested documents. The Federal Court found that some of the requested documents had either already been submitted or went beyond what was required by the judgment to be enforced.

Furthermore, the Federal Court pointed out that when the judgment to be enforced contains too vague terms, it is not possible to determine which documents were missing and it was up to the company to sufficiently explain why the judgment had not yet been properly enforced.

Enforcement of a judgment in this area can therefore be a delicate matter. The applicant must formulate his or her request in a sufficiently precise manner so that the condemnatory judgment can then be enforced.

CONCLUSION

The difficulty of an action for an accounting under Article 400 CO lies in the length of the procedure and the formulation of the information and documents requested: even if the scope of the duty to inform is rather broad under Swiss law, the request made to the bank must describe in a sufficiently precise manner the documents to which one believes one is entitled.

If the request is formulated too vaguely, there is a risk that the request can never be enforced by a judge. In such a case, the only option is to resort to other mechanisms under Swiss law, such as data protection law, regulatory law in the case of a bank, or a criminal complaint.

The advantage of the request for information according to Article 222 para. 4 DEBA consists in the following elements:

1. The speed of the procedure: only the complaint according to Article 17 DEBA, then the appeal to the Federal Court are available to the third party to oppose the request for information, that is to say six to twelve months at most.
2. The possibility of completing requests for information in the light of the documents and information received.
3. The threat of sanctions, as provided for in Article 324 para. 5 CP, and the possibility of enforcing the decision by public force, guarantee an execution that cannot be achieved by the rendering of an account in accordance with Article 400 CO.

Therefore, while the Bankruptcy Office's right to information is similar to that of the bank's client under Article 400 CO, the speed of the decision and the means of its execution are superior, so that bankruptcy law is a good alternative to filing a criminal complaint and is far superior to an action to render account.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.