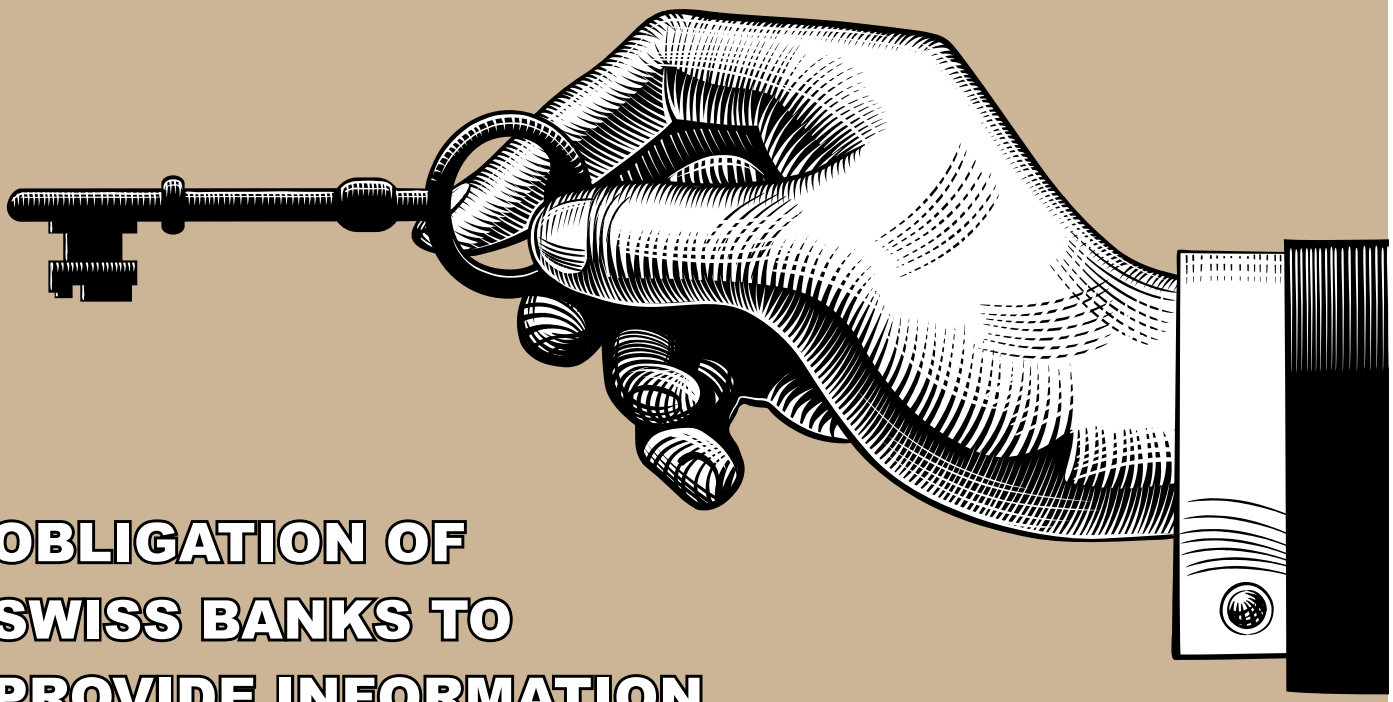
HAND OVER THE KEYS TO THE SAFE!



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 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 losses from the bank than from the directors' assets.

Whether the legal basis for the action against the bank is its contractual liability for damages, or actions for performance or for unjust enrichment, it will be necessary to prove the bank's breach of the contract or its lack of good faith. 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 law of civil procedure 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'), or to include preliminary reliefs to that end, which may, however, take several years and lead only to partial results.

The difficulty of an ordinary action to render account under Article 400 CO not only lies in the length of the procedure, but also in the formulation of the reliefs for the information and documents requested: even if the scope of the bank's duty to render account is rather broad under Swiss law, the action must describe in a sufficiently precise manner the documents and information to which the client alleges to be entitled. The clients must also expose why the information or evidence sought is relevant to their claim, which compounds the difficulty, as the contents of the requested documents will usually not be known to them. If the request is formulated too vaguely or incompletely, there is a risk that the request can never be enforced.

An alternative to the action to render account that is often used is the filing of a criminal complaint, which allows the bankruptcy administration and the creditors of the bankrupt company to become private complainants in the criminal investigation and to obtain the right to access and copy the file of the procedure, in particular the documents that the Public Prosecutor's Office will have ordered the bank to produce.

However, in cases where bankruptcy proceedings are pending (whether purely domestic or as a Swiss ancillary bankruptcy of a foreign insolvency), an efficient way to access these bank documents is through the obligation to inform under Article 222 of the Federal Debt Enforcement and Bankruptcy Act ('DEBA'), which breach is punishable under Article 324 para. 5 of the Swiss Penal Code, with the possibility of enforcing the decision by public force.

In a decision, dated June 8, 2020 (5A_126/2020, ATF 146 III 435), confirming a decision of the Geneva Court of Justice, Supervisory Authority for Debt Enforcement and Bankruptcy Offices (DCSO/27/20 of January 30, 2020), the Federal Court restated and clarified 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 Cayman Islands company 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.

The Geneva Bankruptcy Office registered in the inventory of the assets of the ancillary bankruptcy a contentious claim against a Geneva bank with which the bankrupt company had held accounts, concerning outgoing transfers totalling in excess of USD 60 million that took place shortly before its liquidation.

In this context, the Geneva Bankruptcy Office ordered the bank, under the threat of criminal sanctions, to produce a number of documents, including all due diligence documentation (KYC), all internal and external correspondence and meeting notes, with the aim of basing a possible claim against the bank.

The bank filed with the Geneva Court of Justice a complaint against the Bankruptcy Office's request 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 Code of Civil Procedure, namely the taking into consideration of an unjustified refusal to collaborate in the context of the assessment of evidence in civil proceedings.**

The bank then filed an appeal against the Court of Justice's decision to the Federal Court.

The Federal Court rejected the appeal and confirmed 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, with the exception of purely internal documents (such as preliminary studies, notes, drafts, collected material and internal accounts), since a fault in the execution of its mandate may give rise to a claim against it, which must be included in the inventory.

CONCLUSION

The advantage of the request for information based on Article 222 para. 4 DEBA over an ordinary action to render account consists in the following elements:

1. **The speed of the procedure.**
2. **The possibility of issuing supplemental requests for information in the light of the documents and information received.**
3. **The threat of criminal sanctions and enforcement by public force.**

Therefore, while the obligation to inform the Bankruptcy Office is similar to that of the bank towards its 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 ordinary action to render account.