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Dispute Prevention: Opening and operating a Swiss bank account

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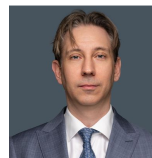

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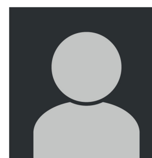

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Clients opening Swiss bank accounts should take heed when they sign the account opening documentation: recent litigation cases in Switzerland have shed some light on how clients inadvertently waive certain legal protections putting them at a disadvantage in the event of litigation.

Over the past decade a surge in litigation between Swiss banks and their clients has uncovered issues such as retrocessions, hidden fees, wrong advice, margin calls, mismanagement, and criminal fraud.

At the heart of these disputes is the banking documentation that clients sign when opening their accounts. This often grants the bank significant powers, placing much of the responsibility on the client. This imbalance, – an "information asymmetry" between the bank and the client – often leaves the client at a disadvantage in the event of a dispute.

While each case is unique, it is possible to draw some general rules to avoid waiving certain rights and protections. Indeed, clients can refuse to sign certain documents when opening a bank account and make choices that give them more leverage in the event of a dispute. This article aims to give an overview of what clients should consider when opening an account and how they can protect their rights throughout the banking relationship.

1 Sign only the documents you need

When opening a bank account, the client must sign documents from three main categories – those that:

- must be signed without any room for negotiation or modification, such as the bank's general terms and conditions;
- can be negotiated or amended/completed before signing, such as a specific loan agreement, the form on experience and knowledge of financial products, or the risk profile and investment strategy; and
- are not required for opening an account or making the desired investment, such as an OTC master agreement for options and structured products, alternative investments, or cross-pledges.

In some cases, Swiss courts have ruled that when a client signs a form relating to high-risk investments, it implies that they consent to having such investments made in their account – even if they did not explicitly instruct the bank to make the investment. If the client fails to challenge the unauthorised transaction within the 30-day contractually specified period, the investment is considered to have been ratified. This means that the client is deemed to have accepted and approved the investment.

Clients should carefully review and understand all the documents they are asked to sign and ensure that they are fully informed and aware of the terms and conditions of their account and investments.

2 Do not opt for hold mail

When opening a bank account, clients are typically offered several communication options, including mail sent to the customer's address, e-banking access, or holding/retaining the mail at the bank (the "**Hold mail**"). The latter is a common feature in banking relationships but is intended to protect the bank and could cause problems in the event of a dispute. Indeed, a feature of Hold mail is that the customer is deemed to have received and has become aware of any notices as soon as they are made available at the bank in the hold mail file. There are only a few exceptions to this rule, such as when the bank takes advantage of the hold mail contractual clause to act knowingly to the detriment of the client, to deviate suddenly from the instructions received, or to perform acts knowing that the client does not approve them.

Clients should therefore opt either to receive their bank statements directly at their address or through e-banking, and should regularly review statements, at least once a month.

For high-net-worth individuals, this can be outsourced to family offices or external service providers offering portfolio consolidation services. It is essential that outsourcing entities also regularly verify all documentation received from the bank, as responsibility for announcing discrepancies ultimately resides with the client themselves.[1] It is recommended that the client agree with their agent from the onset of their relationship on the reporting process to ensure that information is conveyed within the reclamation period.

3 Do not opt out of retail client protection

In some cases, banks have pressured clients to opt out of retail client protections by making misleading statements, claiming that the only way to continue investing in certain types of products is to opt out of the retail client category. Before making this decision, clients and their advisors should carefully consider the potential risks and disadvantages this represents.

When opening a banking relationship, the Swiss Financial Services Act ("**FinSA**") requires the bank to classify its customers in one of three categories i) retail, ii) professional, or iii) institutional clients. Individuals will automatically qualify as retail clients.[2] However, the law allows for an opt-out clause whereby high-net-worth retail clients and the private investment structures created for them may be moved to the professional client category, but this can only be done with the written agreement of the client.[3]

Clients should be wary of opting out of the retail status, as they will be presumed to have a high degree of financial knowledge and experience in financial matters and a willingness to invest in products with specific risks,[4] which results in a lower level of protection.

Opting out also releases the bank from certain legal obligations, such as: (a) providing certain banking documents to the client (such as portfolio statements), (b) conducting a full suitability test before selling a financial product, (c) providing information on associated risks and costs, (d) giving information on business affiliations with third parties, and (e) providing information regarding the market offer considered when selecting the financial instruments, and other key information documents and prospectuses on financial instruments.[5]

Clients should carefully consider such forfeitures up front, as it will be difficult to dispute later that they were not properly informed by the bank, should litigation arise. Additionally, obtaining certain documents from the bank may prove to be more challenging when a dispute arises, adding legal complexity to the case and increasing costs.

4 Set investment restrictions

Investment restrictions are limitations on the types of investments that a bank is allowed to make. These restrictions may be imposed for a variety of reasons, including protection against risk, meeting tax requirements, or aligning with an investment strategy or financial goals.

There are different types of investment restrictions that may be used, including:

- Asset class restrictions, limiting investments to certain asset classes, such as stocks, bonds, or cash (and excluding other classes such as funds, structured products, or options).
- Industry sector restrictions, limiting investments to certain industries, such as healthcare or technology.
- Geographical restrictions, limiting investments to certain countries or regions.
- ESG financial products, where investors may wish to include ESG criteria in their investment restrictions to align their investments with their values and to mitigate potential risks associated with negative ESG impacts. The Swiss Bankers Association (SBA) has issued guidelines stipulating minimum requirements for integrating sustainability preferences in investment advice and portfolio management.[6]
- Level of risk, limiting investments to a certain degree of risk, for instance by setting limits on the percentage of the investment portfolio that can be invested in any one asset or asset class.

Such restrictions are useful in better controlling the type of investments made by the bank under an asset management or advisory agreement, although they may limit potential returns and may not be suitable for all investors.

5 Avoid cross-pledging

Another common feature of account opening documentation is the general pledge of assets on the account, as well as the cross-pledging of assets when the client has different accounts in the same bank. Clients should carefully consider the potential risks of cross-pledging before agreeing to this arrangement.

Cross-pledging allows the client to use all their accounts as collateral for a Lombard loan and invest with a higher leverage. This can increase the client's risk exposure, as it allows the bank to draw on a wider pool of assets to cover any debt, increasing the losses in the event of a margin call. In this case, the bank is authorised to sell the assets held on any of the pledged accounts to cover a margin call (without cross-pledging, the bank is limited to the account subject to the margin call and can only sell the assets held on such account).

Cross-pledges have also been used in financial fraud cases, to artificially cover in bank statements losses incurred in one of the pledged accounts (giving incorrect information on the state of the client's assets).

Cross-pledging may also limit the client's ability to use their assets for other purposes, as they are already pledged as collateral in favour of the bank.

6 Conclusion

Clients should be wary of the potential risks and pitfalls associated with banking documentation and take steps to protect their rights. This includes carefully reviewing and negotiating documents when opening an account, choosing appropriate communication options, and considering the potential risks and disadvantages of opting out of retail client protections, or using cross-pledging. Clients should also pay attention to any amendments of contractual

terms when signing new documents. If clients and their advisors have any concerns, they should seek legal advice: As we say in French, *mieux vaut prévenir que guérir* – it is better to be safe than sorry.

References

[1] Swiss Supreme Court's decision 4A_161/2020 of 6 July 2020, par. 5.5.2, « *If the customer agrees with the bank that bank correspondence is to be addressed to a representative appointed by him, communications made to this representative, who is the customer's auxiliary, are deemed to have been notified to the customer and, therefore, in the absence of any objection by the representative, to have been approved. In such a situation, the concomitant fault of the customer interrupts the causal link between the bank's gross negligence and the damage suffered by the customer* ».

[2] Art. 4 FinSA.

[3] Art. 5 FinSA.

[4] Art. 5(2)(a) FinSA.

[5] Art. 20(2) FinSA, Art. 13(3) FinSA; Art. 8(3) cum Art. 58 and 59 FinSA, Art. 8(5) cum Art. 36(1)(a) FinSA.

[6] See SBA Guidelines here