

Transparency

Client access to Swiss banking files

Securing internal documents can be a challenge, since Swiss law does not allow for pre-trial discovery or fishing expeditions



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Swiss banks have long been considered insurmountable fortresses, protected by secrecy and a culture of discretion. In the wake of the 2008 financial crisis and the adoption of new standards of automatic exchange of information in tax matters, this has changed drastically. Banking clients are now more inclined to litigate against their banks. Following high losses, the fear of repercussions has lessened, given the increasing tax transparency over assets held by Swiss banks.

As in all litigation, evidence is crucial to the success of legal proceedings. Yet Swiss law does not provide for instruments equivalent to discovery as found in common law systems. There is no disclosure phase preceding the trial and once the proceedings have been initiated, the parties must present all available evidence in their first submission.

In this context, obtaining the relevant information from banks to support a mismanagement or fraud claim is challenging. Though limited in scope, Swiss law does provide for certain solutions. Here are some of the most efficient ones.

Claim for accounting

A client may file a so-called 'claim for accounting', which seeks to order the bank to produce and remit all documents related to the banking relationship. The scope of the documents requested may be far-reaching and can include not only external documents (such as portfolio valuations, account statements and correspondence with third parties) but also internal documents (such as internal emails between the bank's employees, phone recordings, visit and telephone notes).

The rule is that the client is entitled to all the internal documents that enable him/her to verify the activity performed by the bank in relation to the bank account. Nevertheless, if the bank demonstrates that such internal documents contain information related to its business secrets, the judge may allow the bank to produce redacted documents or summaries if the interest of the bank to keep certain information confidential outweighs the interest of the client to access such information. In any event, the bank is not obliged to remit a copy of 'purely' internal documents (such as draft agreements not sent to the client).

A claim for accounting may be filed before a claim for damages. Once the client obtains the requested documents, he/she may then file a claim for damages in order to obtain compensation for the damage suffered.

Procedural toolbox

If a few documents to support the claim are missing, but can be identified (at least generically), the claimant may also file a claim for damages directly and request from the judge that the bank produces the identified documents. One difficulty that arises is that the client must already articulate in the claim for damages the specific facts that the documents to be produced by the bank should prove, as no fishing expedition is admissible under Swiss law. This route may still be efficient in cases where the dispute is limited to a specific trade for which the client requests internal chats between traders and/or the accounting book of the bank displaying the price and commission charged.

Where there are insufficient elements to articulate the precise amount of damage suffered, Swiss law allows for a so-called 'action for unquantified claim' to be filed. Such a claim enables the client to request, on a preliminary basis, the production of documents (including internal documents as explained above) in the context of his/her claim for compensation as a procedural measure and to reserve his/her right to complete the claim for damage upon receipt of the documents.

Criminal proceedings

Some disputes may be tainted with criminal offences, such as criminal mismanagement, forged banking statements or churning. In such cases, a prosecutor conducting criminal proceedings against a bank may order the latter to produce any documents relevant to the investigations (even purely internal documents) and/or seize them. Depending on the circumstances, a client of the bank who has been defrauded may access the criminal file and use this information in a future claim for damages before civil courts.

Conclusion

The phrase 'knowledge is power' has never been more true. Although Swiss law does not allow for either pre-trial discovery or fishing expeditions, rules exist that enable clients to obtain, to a certain extent, internal documents that until recently remained solely in the hands of the bank. This increases transparency and the chance of recovering damages but, as always, strategic advice is crucial.

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