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publication of statements? It will certainly require a large amount of understanding and cooperation between those that procure goods and services and those that supply them, which may be particularly challenging across language and cultural barriers. Suppliers may be reluctant to put their supply chains too closely under the microscope for fear that they will suffer reputational damage and lose consumer confidence if slavery is discovered. This fear may be particularly potent in low-margin businesses that may lack the expertise and/or resources to implement an effective global supply chain management system.

There are also some practical issues to address. For example, the Act does not require UK companies to report on all the supply chains in their groups overseas, such as those of wholly owned subsidiaries abroad. While the business could state on its website that no steps have been taken to combat slavery and human trafficking, this is not likely to be an attractive option, given the reputational risks to the business associated with such a statement. There are inherent risk and compliance considerations given the linkages to anti-corruption, ethics and whistleblowing policies and procedures.

The Act also brings with it legal risk. Legal campaigners will surely push legal boundaries more and more: we can certainly expect them to test legal definitions. Recent US class actions have claimed that alleged forced labour in global supply chains means that companies have breached California's consumer fraud and unfair competition laws. These claimants argue that companies are liable for allegedly misrepresenting in various corporate declarations their efforts to eradicate forced labour from their global supply chains.

In summary then: businesses will ignore their obligations under the Act at their social and commercial risk. For instance, there are further legal obligations coming from the European Union that will affect businesses with more than 500 employees. The real sanctions for a business for failure to comply with the Act may well be in damage to its reputation, which is likely to be far more expensive to recover from than litigation.

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FOCUS ON SWITZERLAND

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Increased protection for financial investors in Switzerland: Swiss banks forced to release untaxed assets

Following the UBS and other scandals regarding untaxed assets held by Swiss banks for foreign clients, Swiss banks have become increasingly nervous and restrictive about any remaining untaxed assets on their books. In particular, they fear money laundering accusations from foreign prosecution authorities if they do not prevent a client from withdrawing untaxed assets. Pursuant to the Financial Action Task Force (FATF) Recommendations, failure to declare assets to tax authorities has now become a predicate offence for money laundering in many countries. To avoid the risk of being accused of money laundering or other offences, several Swiss banks have decided to freeze untaxed assets internally until the legal situation is clarified, either by the filing of a tax conformity declaration by the client or by a Swiss court decision ordering the bank to follow the client's withdrawal instructions.

This freeze conflicts with the wishes of several clients who want to withdraw Swiss bank funds before the anticipated regime of automatic exchange of information between tax authorities of different countries is implemented, as this exchange of information will alert home countries to possible tax evasion. A recent decision of the Geneva court of first instance[1] (the 'Geneva Banking Decision') that required a Swiss bank to "release" its client's untaxed assets brings much-needed legal clarity for financial investors in Switzerland. This decision is expected to contribute to a trend of increased rights and protection for those who choose to hold assets in Switzerland.

The Geneva Banking Decision arises in the context of Switzerland's efforts to reform its financial system and capital markets law to provide more protection for financial investors. Swiss authorities have in fact elaborated two new draft laws,[2] namely the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA). The FinSA is a cross-sectional[3] legal instrument governing the prerequisites for providing financial services and offering financial instruments, while the FinIA provides a differentiated supervisory regime for financial institutions requiring government authorisation to operate (ie, portfolio managers, managers of collective assets, fund management companies and securities firms). Both the FinSA and the FinIA are based on existing supervisory provisions. By setting behavioural standards for all service providers (not simply regulated providers), the FinSA in particular is expected not only to improve the competitiveness of the Swiss financial sector but also to provide better investor protection. The FinSA and the FinIA are expected to enter into force in 2017 or 2018.

Legal issues at stake

To justify internal freezing of clients' untaxed assets in the absence of a tax conformity declaration, Swiss banks have raised the following arguments:

- **Alleged violation of Swiss banking and foreign tax/criminal laws.** According to Swiss banks, the transfer of untaxed assets to an account held outside a client's home country, as well as cash withdrawal of the funds, potentially violates Swiss banking and foreign tax/criminal laws (in particular anti money-laundering provisions). Based on this conclusion, Swiss banks have declared themselves unable to execute clients' withdrawal orders on the ground of legal impossibility, and they are restricting asset withdrawals or transfers pending proof of tax compliance; and
- **Internal policies and general terms and conditions.** Swiss banks have also argued that their internal policies and general terms and conditions affecting clients' accounts constitute a sufficient basis to refuse to execute certain operations in the absence of proof of tax compliance, including cash withdrawals or transfers of untaxed assets to accounts held outside clients' home countries.

The Geneva Banking Decision

The Geneva court recently rendered one of the first decisions on the merits regarding Swiss banks' internal freezing of clients' assets on the ground of alleged lack of tax compliance.[4] In the case at hand, in the absence of a tax compliance declaration from the client, the Swiss bank would only allow a transfer to a bank located in the client's home country.

In a nutshell, the reasoning of the Geneva court was the following:

- the legal impossibility alleged by the bank – that execution of the transfer would be impossible due to possible violations of Swiss banking and/or foreign laws – was in fact groundless as the bank relied on laws already in place when the banking relationship began. The court held that legal impossibility – if existing at all – could only be considered if the law creating the impossibility came into being subsequent to creation of the banking relationship. This is a necessary condition under Swiss law to justify non-performance of a contractual obligation on the basis of legal impossibility;
- general terms and conditions must be interpreted in accordance with the principle of protection of legitimate expectations. The general terms and conditions could not in the present case be reasonably understood as implying a general right for the bank to retain clients' assets; and
- finally, the court also rejected the bank's argument that foreign legal provisions should be applied as foreign mandatory law,

stressing the high threshold set by Swiss law to take foreign mandatory law into account, which was not satisfied in the case at hand. As a result, the Swiss bank was ordered not only to satisfy the client's claim and pay the amount owed as a result of the client's bank deposit, but also to pay late interest as well as significant legal costs. It is expected that the bank will appeal this decision, but the decision is already an important step towards better recognition and enforcement of financial investors' rights.

Towards a broader focus on investor protection

The new Swiss capital markets laws expected to enter into force within the next two years (the FinSA and the FinIA) will provide additional procedural instruments to enhance financial investor protection and access to justice, in addition to existing ones:

Evidence taking

Discovery, that is, pre-trial procedural devices used to require the adverse party to disclose information essential for preparation of the requesting party's case, is alien to Swiss civil procedure.[5] A plaintiff has in fact limited means to induce the adverse party to file necessary evidence that it holds. The initial FinSA draft provided for a procedural mechanism to overcome evidence-taking hurdles from the financial investor's perspective – reversal of the burden of proof.[6] That has not, however, survived the consultation process. Under existing law, service providers have nonetheless an obligation to collaborate in judicial proceedings by presenting only well-founded arguments in response to clients' breach allegations, and proving the facts underlying those arguments.[7]

Principles of allocation of costs

Legal costs associated with litigation are often a major obstacle for clients to act against banks and other financial service providers, especially when contemplated legal action is the result of major losses to their portfolio. Although provisions for both a procedural costs fund and an arbitration court, while initially contemplated, were finally withdrawn from the draft laws, cost rules on who will pay for the cost of a proceeding will be improved as a result of other changes to Swiss procedural rules. In particular, private clients will be automatically exempt from advance payment on costs and security for party costs obligations.[8] This is different from current law where an application to the court for this exemption is needed; and where granting the request is generally subject to both the plaintiff's financial situation and the chances of success. In addition, banks will under certain conditions have to pay the costs of judicial proceedings even when the court rules in their favour[9] (under current procedural rules, the unsuccessful party is generally ordered to pay costs). Finally, the new procedural rules will leave flexibility to the court to depart from general principles of allocation of costs.[10] By reducing economic risks linked to judicial proceedings, these changes contribute to better access to justice for private clients.

Collective legal enforcement mechanisms

Initially, the draft FinSA provided a specific regime for collective legal enforcement, which allowed group settlement proceedings[11] as well as representative (class) actions.[12] This might have been the result of a widespread European move in favour of collective legal enforcement mechanisms.[13] This regime was ultimately removed from the final draft law and will rather be examined as part of the implementation of a motion adopted by the Swiss Federal Council, now in charge of preparing a draft law with regard to collective legal enforcement mechanisms in Switzerland.[14]

Conclusion

Important steps are being taken in Switzerland towards increased protection of financial investors' rights and better access to justice for those investors. Recent judicial decisions rendered by Swiss courts support bank clients' general right to freely dispose of their assets, despite possible conflicting contractual terms and conditions or foreign anti-money-laundering legislation. Those decisions already clarify the prevailing legal uncertainty and should as such be welcomed by both investors and banks. It is anticipated that the bank will appeal the Geneva Banking Decision, but this lower-court decision, together with the legislative reform of the Swiss financial system currently under way, are already positive steps towards an increased protection of financial investors.

Notes

1 Decision No JTPI/2192/2016 of 18 February 2016 (a redacted copy of this decision will be available from the Geneva court of first instance upon request once the judgment becomes final and executory, if not challenged).

2 These laws are not yet in force. They must gain approval from the Federal Assembly before being finally adopted, and are still subject to change.

3 Issuers as well as financial service providers and their client advisers must comply with their obligations under the FinSA, regardless of their organisational structure and whether they are required to obtain an authorisation to operate.

4 By the time of the 18 February 2016 Geneva Banking Decision, the Swiss Supreme Court had already ruled, in October 2015, in two cases brought by clients prevented by their Swiss bank to close accounts by way of a cash withdrawal – although those rulings, made on evidentiary grounds, did not reach the merits of the claims. The bank argued that such a cash withdrawal would breach its risk-related internal policies and its general terms and conditions, as well as violate Swiss and foreign tax/criminal laws. The Supreme Court decided in favour of the clients on the grounds that the bank had not proven the risk analysis undertaken nor filed the internal policy relied upon with the lower courts. In addition, the Court held the bank had not demonstrated that foreign tax/criminal laws were actually applicable in this case. Decision Nos 4A_168/2015 and 4A_170/2015, both dated 28 October 2015.

5 In limited instances, Swiss procedural rules entitle a party to apply to the court to be allowed to gather evidence before initiation of legal proceedings, ie, if evidence is at risk or where the applicant has a justified interest. In addition, courts are entitled in the evaluation of evidence to take the opposing party's lack of cooperation into account when considering flaws in relevant documentation.

6 The initial FinSA draft placed the burden of proof on service providers to demonstrate fulfilment of their informational duties in the event of a dispute. It also reversed the burden of proof regarding the causal link between breach of duty and incurred damage – in case a service provider breached its informational duties, the client did not have to prove that, if duly informed, it would not have engaged in the envisaged transaction. The Swiss Federal Council's comments relating to the FinSA and FinIA drafts, p21, are available at: www.news.admin.ch/NSBSubscriber/message/attachments/41574.pdf.

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 I refer here to a collective settlement negotiated between the service provider and a large number of injured parties, who can generally opt out of the settlement within a set time limit. Moreover, the group settlement must be approved by a tribunal.

12 The initial FinSA draft gave associations and other organisations power to act in their own right against service providers in order to defend their members' rights.

13 Swiss Federal Council report dated 3 July 2013 on collective enforcement mechanisms in Switzerland, available at: www.bj.admin.ch/dam/data/bj/aktuell/news/2013/2013-07-03/ber-br-f.pdf.

14 Motion 13.3931 (Birrer-Heimo) dated 27 September 2013, available at: www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20133931.

Freezing assets in Switzerland: new developments

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Based on its history and owing to a relatively stable political system, substantial amounts of worldwide offshore assets are managed in Switzerland. Recent estimates put the figure at about US$2.2tn. However, these days funds may be in and out of a jurisdiction at the click of a mouse. With this in mind, Switzerland regularly reviews its approach to attachment orders and to find a balanced approach regarding the freezing of assets.

In 2011, simultaneously with the coming into force of the unified Swiss Civil Procedural Code, certain amendments came into effect in the Swiss Debt Enforcement and Bankruptcy Act (DEBA) as a result of the Lugano Convention II in 2009. The main aspect of that revision was the introduction of a new attachment ground for claims evidenced by an enforceable (foreign) judgment. A creditor who has an unsecured but matured claim against a debtor may attach the debtor's asset held in Switzerland if such creditor holds an enforceable title, such as a judgment.

Since the introduction of this new attachment ground, several legal questions that were still open at the time have been decided by the Swiss Federal Tribunal, the highest court of the country. This article will sum up the most important of these developments and shed light on some of the remaining undecided issues.