

Confidentiality

Disclosure of bank details: who has the right to object?

A Swiss Federal Tribunal decision clarifies who can object to foreign civil court requests for banking information and when



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Until recently, the question, who is entitled to appeal against a cantonal judgment granting international judicial assistance in civil matters was unclear since Swiss cantons did not follow a uniform practice. This could lead to instances where account holders in some cantons could raise an objection about the disclosure of their bank information to overseas courts while those in others could not. This had led to significant legal uncertainty.

Matters of fact

In a noteworthy decision rendered on December 21, 2015, the Swiss Federal Tribunal (SFT) clarified its position regarding the issue of legal standing (case reference 4A_340/2015). The underlying case concerned a commercial dispute in Spain. The Spanish court requested the Swiss authorities to provide judicial assistance based on the Hague Convention of 18 March 1970. The object of the judicial assistance request were transaction details of an account held at a Geneva bank. Neither the account holder nor the beneficial owner had been granted the right to be heard in the Spanish civil proceedings. Both, therefore, opposed the disclosure of the relevant details to the Spanish authorities in the Swiss proceedings. Both lower courts granted the judicial assistance; the SFT, however, repudiated the Spanish judicial assistance request.

Swiss Federal Tribunal judgment

1. Standing

The significance of the SFT's decision is its conclusion relating to the issue of standing. The court held that parties involved in foreign civil proceedings may file an objection against a decision to execute the judicial assistance. In addition, any individual or legal entity subject to the judicial assistance request itself may file an objection in case it has a privilege or duty to refuse to give the evidence. Furthermore, third parties also have standing if the decision affects their rights. In consequence, this means that all persons affected by a decision in judicial assistance proceedings are entitled to file an appeal, i.e. the Swiss bank as a direct addressee but also the account holder or the beneficial owner as third parties.

2. Fair hearing

Based on this finding, the court followed to analyse whether the preconditions for a refusal to grant judicial assistance were

met. The SFT held that the execution of a judicial assistance request, which did not respect the basic principles of Swiss civil procedural law, could be seen to prejudice the sovereignty and security of Switzerland. In the case at hand, the SFT found that the account holder had a right to be heard in the prior underlying commercial dispute proceedings before the Spanish court. If the claimant in the Spanish civil proceedings wanted to obtain the name of the beneficial owner from the bank in Switzerland, the Spanish court would first have to hear the formal owner of the account. Due to the fact that the account holder had not been heard in the Spanish civil proceedings and the beneficial owner had preferred to remain unknown, the judicial assistance request was dismissed.

3. Bank-client confidentiality

The SFT also opined on the extent of bank-client confidentiality in the context of international judicial assistance proceedings. The court held that banks could only refuse to co-operate with the court in judicial assistance proceedings if they could demonstrate credibly that the interest in maintaining the secret outweighs the court's interest in establishing the truth. Although the SFT did not examine whether the preconditions for such a refusal were met in the present case, it did clarify that bank-client confidentiality would not be given priority in those areas of law where Swiss substantive provisions entitle a claimant to information (i.e. in matrimonial property law, inheritance law and debt enforcement law).

Implications of the decision

The SFT's decision has clarified under which circumstances affected parties are entitled to object to the disclosure of their bank information in judicial assistance in civil matters. At the same time, the court also set out that if the requesting foreign court does not respect certain fundamental procedural rights in the principal proceedings abroad, Switzerland would decline judicial assistance. With the coming into force of the Common Reporting Standard and the automatic exchange of information, bank-client confidentiality will no longer be maintained vis-à-vis the tax authority at the place of residence of an individual or a beneficial owner of an account. However, bank-client confidentiality is still a strong pillar of Swiss legislation and private banking, which is why it must still be accounted for in civil matters.