

Banking - Switzerland

Extension of banks' obligations relating to client information

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Introduction

A recent trend observed in the Federal Supreme Court's case law is the extension of banking clients' options to obtain information, including internal documents, from the banks. The court has recently rendered two landmark decisions on this issue. The first decision⁽¹⁾ was based on the Federal Act on Data Protection, and the second decision⁽²⁾ on the agent's duty to inform provided by the rules on mandate agreements.

Duty to inform

Article 400(1) of the Federal Code of Obligations, which applies to banks acting as agents, provides that on request an agent is obliged at all times to account for the management of its business activities and to reconstitute all assets to the principal which are directly related to the execution of the order. There are two distinct obligations:

- a duty to inform; and
- a duty for restitution.

The duty to inform extends to all acts that the principal may be interested in, in order to determine if the agent has executed the mandate with due diligence and if it has followed the principal's instructions. The information provided by the agent must be sufficient and understandable, and cover all elements necessary for a client to understand the operations and to be informed of any errors made by the agent.⁽³⁾ A client need prove no particular interest for such a request.

In the present case, the client and the bank were bound by different agreements, including a framework agreement for over-the-counter transactions in foreign exchange, call and put options on precious metals and foreign exchange, a Lombard loan and a deposit agreement. In the framework of the Lombard loan, the client had to pay a certain margin as collateral. However, if the margin proved "insufficient due to recent calculation at the discretion of the bank", the client was required to pay the bank an additional margin immediately. A dispute arose between the parties regarding the calculation of the additional margin. The client started legal proceedings in order to obtain information on the contractual relationship. The Court of Appeal of the Canton of Basel City ruled that the bank should:

- submit a comprehensive and documented final account to the client;
- account for a complete and detailed statement regarding the investment positions considered as collateral for the business relations;
- account for some designated exposures and net present values that were mentioned in four telephone calls;
- edit the key data and calculations concerning the call made by the bank for an additional margin; and
- edit the notes and minutes of four telephone calls concerning the business relations.

In the Federal Supreme Court's view the bank's internal documents and information could be submitted to the client on the basis of Article 400(1) if they were necessary for the principal to assess the execution of the mandate by the agent. The duty to inform allows the principal to determine whether the agent has fulfilled its duty of care, while it

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is not the purpose of the obligation for restitution. For this reason, the court considered that the duty to report was broader than the duty for restitution, and thus considerably extended the bank's obligation to inform the client. Hence an internal document, which in principle is not subject to restitution, may be subject to the duty to inform.

Thus, records made by the bank during visits or contact with clients may be subject to the duty to inform insofar as these records help to determine whether the mandate was carried out with diligence, even though the bank is not obliged to return such records to clients.

The court specified that a distinction had to be made between purely internal documents that were not subject to the duty to inform - such as draft contracts that were never sent - and internal documents whose contents should be brought to the attention of the principal in an appropriate form to the extent that they were relevant to assess the execution of the mandate by the agent. Further, information and documents need not necessarily be submitted in full. Courts must weigh up the interests at stake, taking into account the interest of the agent to maintain secrecy. Only extracts of internal documents can be sent to clients. In some cases, the court could also order that internal documents or copies of these documents be made available to clients.

The court thus confirmed the appeal court's decision. The bank was forced to provide its client with:

- copies of telephone call minutes;
- records of telephone conversations;
- a statement of assets; and
- a complete and detailed indication of determined key data.

Data protection legislation

The second ruling concerned a dispute regarding options dealings supposedly made without any client instruction. The client asked the bank to provide it with some internal documents, including profiles and investment objectives. The bank refused to submit the latter documents. The client filed an action in order to gain access to these documents on the basis of Article 8 of the Federal Act on Data Protection.

Article 8 provides that anyone may ask a file controller if data stored relating to them is being processed. The file controller must provide information on:

- all data relating to the individual that are contained in the file, including information available on the origin of the data; and
- the purpose - and, if necessary, the legal basis - for the processing, categories of processed personal data, individuals involved in processing the file and individuals designated to receive the file.

Information is generally provided free of charge and in writing, in print or photocopy, and no one can waive in advance his or her right of access.

According to the court, Article 8 gives clients the right to access all personal data in the bank's possession, to the exclusion of internal notes taken by a client's adviser for personal use. On this basis, the client succeeded in obtaining its client profile and a document describing its investment objectives. The exclusion of access to notes taken by the client's adviser for personal use was not addressed by the Federal Supreme Court, but it was implicit in the ruling.

The right to require the disclosure of personal data under Article 8 is not subject to the proof of any particular interest. Moreover, it cannot be exercised if a civil trial, criminal trial or administrative proceedings are pending. However, as in the present case, it may be invoked in the context of evidence research before the beginning of a lawsuit.

Comment

Both rulings are major developments with regard to accessing a bank's client information.

Through its ruling on Article 400(1), the Federal Supreme Court specified and expanded considerably the information that must be passed onto banking clients.

The second ruling shows that the Federal Act on Data Protection could help clients looking for information held by a bank upstream of judicial proceedings. Despite its very broad scope, the act is generally overlooked.

The already wide potential of the innovative action based on the act could be strengthened if the courts confirm that the scope of a request based on Article 8 is as wide as the scope of the duty to inform based on Article 400(1). Banks could then be forced to pass onto their clients a wide range of internal documents under the act.

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Endnotes

- (1) ATF 138 III 425, April 17 2012.
- (2) 4A_13/2012, November 19 2012.
- (3) 4A.413/2007 TF December 10 2007, ATF 110 II 181 and JdT 1984 I 488.

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