CENTRE DE DROIT
BANCAIRE ET FINANCIER

International mutual assistance in civil matters

Towards an interpretation more favourable to banks' rights of defence ?

Par Claire Tistounet le 7 June 2023

In its ruling 4A_389/2022 of March 14, 2023, the Swiss Federal Supreme Court examined a request for mutual assistance in civil matters, in which a bank was asked to provide documents relating to a client.

In 2012, the MPC opened criminal proceedings against the former CEO of a state-owned institution in Y for money laundering and fraudulent mismanagement. Judging that there was a risk that the documents obtained in the criminal proceedings might be passed on to State Y, the TPF limited access to the file for the institution, which was able to consult the file on the MPC's premises, but without being able to remove a copy.

In 2019, criminal proceedings are initiated against the director in State Y. In this context, Y files a request for mutual assistance in criminal matters in order to obtain the bank documents obtained in the aforementioned Swiss criminal proceedings.

Also in 2019, the institution brings a civil action in the UK, against, inter alia, the director and a Swiss bank in which the latter held an account. In this context, the English court sent Switzerland a request for mutual assistance based on the Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (CLaH70), seeking the bank's production of documents relating to the director's bank account. The purpose of this request is to enable the bank to defend itself in the UK without breaching banking secrecy. While the Geneva Court of First Instance agreed to execute the request for mutual assistance, the Court of Justice ruled otherwise, rejecting it on the basis of art. 12 para. 1 let. b CLaH70.

On the bank's appeal, the Federal Court analyzed the scope of art. 12 al. 1 let. b CLaH70 : according to the text of the provision itself, the execution of a request for mutual assistance that complies with the formal requirements of CLaH70 can only be refused on the grounds listed exhaustively in art. 12 CLaH70.

Furthermore, a literal interpretation of art. 12 CLaH70 (as well as, in particular, the context, purpose and object of CLaH70) shows that what is decisive in assessing whether the request risks undermining the sovereignty or security of the requested state is the actual execution of the request, and not its purpose.

Conversely, the text of art. 12 CLaH70 does not allow us to infer that the judge of the requested

State should examine for what purposes – other than those of the request for mutual assistance – the evidence gathered in this context could be used. For example, there is a risk that the documents produced could be used in the criminal proceedings of State Y, after having been handed over to the institution in the English civil proceedings.

Accordingly, the exceptions allowing the requested State to reject a request for mutual assistance (and thus the concepts of endangering sovereignty and/or security in art. 12 para. 1 let. b CLaH70) must be interpreted restrictively.

Our High Court then refers to its ATF 142 III 116 (cf. cdbf.ch/989/), where it held that a request for mutual assistance could not be executed in Switzerland if the person about whom information was requested had not been heard by the foreign judge before the request was sent, since such a violation of the right to be heard constitutes an infringement of the fundamental principles of Swiss civil procedure law.

The Federal Court clarifies its reasoning here, indicating that a violation of the fundamental principles of Swiss civil procedure can only undermine Swiss sovereignty or security under art. 12 para. 1 let. b CLaH70 if it involves a violation of the fundamental principles of procedure recognized by international public policy, which includes respect for the right to be heard of persons affected by the rejection of a request for mutual assistance.

In casu, the Federal Court found that it had not been demonstrated that execution of the request would per se be prejudicial to Switzerland’s sovereignty or security, or incompatible with international public policy.

Furthermore, according to our High Court, the Court of Justice cannot be followed when it indicates that the rejection of the request could be motivated by the principles of good faith and the prohibition of abuse of rights : even if these principles were part of international public policy, the execution of the request could not, in casu, be qualified as abusive or in bad faith.

In particular, the argument that executing the request for mutual assistance would be tantamount to circumventing the mutual assistance proceedings pending in Switzerland cannot be accepted, because :

criminal and civil mutual assistance proceedings are different in nature, do not necessarily involve the same parties and the requesting States are different ;
the objective pursued by the latter is different : while the former wishes to gather evidence in the context of criminal proceedings conducted on its territory, the latter wishes to enable a party, the bank, to produce the evidence necessary to assert its rights in a civil suit without violating banking secrecy.

Consequently, refusing to execute the request for mutual assistance would amount in casu to an inadmissible infringement of the bank’s rights of defence ; the request must therefore be executed.

With this ruling, the Swiss Federal Supreme Court modifies its previous case law, thus narrowing the interpretation of the grounds for refusing to execute a letter rogatory under article 12 al. 1 let. b CLaH70. In so doing, our High Court is showing itself to be in favor of mutual assistance ; such an approach is welcome, inter alia insofar as the CLaH70 is the only

mechanism enabling a bank to produce abroad documents covered by banking secrecy (if, in the context of the national proceedings initiated to execute the request for mutual assistance, the Swiss judge lifts banking secrecy, cf. art. 163 and 166 CPC).

It should be noted that, in the context of the English proceedings, the Court recently ruled on a request from the heirs of the deceased managing director to refuse production of any documents from Switzerland. The Court rejected this request, considering inter alia that production did not give rise to any concrete risk of violation of Swiss law. It did, however, leave open the question of whether access to the documents produced should be restricted, as the TPF feared that the documents obtained in the Swiss proceedings might be passed on to Y.
