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Settlement agreement

Analysis of the scope of a confidentiality clause

Par Nicolas Rouvinez le 5 August 2024

In a recent ruling 4A_26/2024 of 11 June 2024, the Swiss Federal Supreme Court was called upon to rule on the interpretation of a confidentiality clause contained in a settlement agreement between a bank and a private investigator. Specifically, the key question was whether the parties intended to protect secret information in the formal or material sense.

In 2019, a company active in investigation and security services became involved in the “Khan affair”, in which it was revealed that Mr Khan – a former Credit Suisse executive – had been monitored by private detectives commissioned by the aforementioned bank. Criminal proceedings ensued.

On 16 July 2021, the managing partner of the investigation company, Credit Suisse and other parties involved in the case reached an agreement to terminate the pending criminal proceedings. The agreement includes a confidentiality clause, breach of which is punishable by a contractual penalty.

On 24 July 2021, the NZZ asked the bank whether it wished to comment on the statements made by the Zurich Public Prosecutor’s Office to the effect that the parties involved in the case had withdrawn their complaints and reached an agreement. Credit Suisse replied that “the parties have agreed to terminate the criminal proceedings. The case is therefore closed”.

Citing a breach of confidentiality, the managing partner brought an action against the bank and demanded that it be ordered to pay him the agreed penalty. His claims were rejected by the Zurich courts.

On appeal by the managing partner, the Swiss Federal Supreme Court considered whether the previous court’s interpretation of the agreement was justified.

In essence, the relevant clause required the parties to keep the existence and content of the agreement secret, while providing for a number of exceptions. In particular, “if, despite the obligation of confidentiality, the conclusion of the agreement or its content were to become known”, each party would have been released from the obligation of confidentiality, in particular in order to “preserve its personality rights” or to “rectify false information”.

As the Federal Court explains, the issue is to determine whether, in entering into a confidentiality clause, the parties have adopted a formal or material understanding of secrecy.

According to the formal understanding, information is secret when it has been declared secret by the parties concerned. According to the material understanding, information is secret when it is neither manifest nor freely accessible, and when the owner of the secret has not only a legitimate interest in keeping the information secret, but also the express or tacit will to keep it secret ; in other words, while the will of the parties involved is also relevant, it is not – unlike the case of secrecy in the formal sense – in itself decisive in determining what information constitutes a secret in the material sense.

In this case, the appeal court came to the conclusion – on the basis of a subjective interpretation – that the parties had relied on a material understanding of secrecy. In this respect, it was held to be decisive that the parties had provided for a release from the obligation of confidentiality in the event that the information concerned became public. In other words, the obligation to maintain secrecy depended on whether the conclusion or content of the agreement had become public knowledge. However, such a “relative” definition of secret information is irreconcilable with the “absolute” protection that would be guaranteed by the formal concept of secrecy. It must therefore be inferred that the parties favoured the protection of materially secret information.

Limiting itself to a limited examination from the point of view of arbitrariness, the Federal Court confirmed the assessment of the previous court. In particular, and contrary to the managing partner’s argument, it is not relevant to the interpretation of the confidentiality clause that during the negotiations the managing partner had defended a formalistic understanding of secret information : in fact, the text of the agreement clearly shows that it was a material understanding that was ultimately adopted by the parties.

Having established this first milestone, the rest of the reasoning flows naturally. The facts retained by the previous court clearly demonstrate that at the time Credit Suisse was interviewed by the NZZ journalists, the conclusion of the agreement was no longer (materially) secret information. Since there was no longer any secrecy, the bank’s statement could not constitute a breach of the obligation of confidentiality.

The legal analysis of the Federal Court – and of the cantonal courts before it – is clear. It is doubtful that the formalist approach will be frequently encountered in practice, given its excessive rigidity : keeping secret information that is already known simply because it has been decided once and for all will rarely be in the interests of the parties. In this respect, it should be noted that the formal approach is also the exception in criminal law (where, incidentally, it is regularly criticised by the doctrine, see for example ATF 126 IV 236, recital 2a). Unsurprisingly, parties bound by a confidentiality clause will want to favour the pragmatism that goes hand in hand with a material conception of secrecy.

It is regrettable, however, that the Federal Court, having accepted the material concept of secrecy, did not go to the end of its analysis. This is understandable : while the information communicated was certainly no longer secret with regard to the NZZ, it was in any case neither manifest (“offenkundig”) nor freely accessible (“allgemein zugänglich”) as required by the definition of material secrecy established by the case law. Admittedly, given the ‘relative’ nature of the protection intended by the parties, the Federal Court’s conclusion is not, in our view, called into question (since the information at issue is not, in any event, secret from the party concerned). However, a more detailed explanation on this point would have been desirable.