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The Duty of Confidentiality of Banks in Switzerland: Where It Stands and Where It Goes - Recent Developments and Experience - The Swiss Assistance to, and Cooperation with the Italian Authorities in the Investigation of Corruption among Civil Servants in Italy (The "Clean Hands" Investigation): How Much Is Too Much?

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**THE DUTY OF CONFIDENTIALITY OF
BANKS IN SWITZERLAND: WHERE IT
STANDS AND WHERE IT GOES.
RECENT DEVELOPMENTS AND
EXPERIENCE. THE SWISS ASSISTANCE
TO, AND COOPERATION WITH THE
ITALIAN AUTHORITIES IN THE
INVESTIGATION OF CORRUPTION
AMONG CIVIL SERVANTS IN ITALY (THE
“CLEAN HANDS” INVESTIGATION): HOW
MUCH IS TOO MUCH?**

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INTRODUCTION

To many, the Duty of Confidentiality of Banks (commonly called Bank secrecy) is controversial. Because banking activities affect practically everyone, it is hard to ignore the confidentiality issue. Indeed, the laws of almost every country address it in some manner. From the United States to Great Britain, from Antigua to Hong Kong, from Bahrain to Singapore and from Liechtenstein to (of course) Switzerland, one finds some form of regulation dealing with banking secrets.¹

Switzerland has developed a system to protect Bank secrecy unrivaled in the world, one that has endured over time. No other country has shown such strong attachment to a principle that has enjoyed little public sympathy but strong private support. Holding fast to the notion of protection of privacy, Switzerland has built an efficient and competitive Banking system second to none.² Since the enactment of the Federal Banking Law of Switzerland, and particularly in recent years, Bank secrecy has been subject to critique and attack in connection with certain well-publicized abuses.³ On some occasions even

¹ For an overview, country by country, of the legislation on bank secrecy see DENNIS CAMPBELL, *INTERNATIONAL BANK SECRECY* (1992).

² *Schweizerische Bankiervereinigung, DAS SCHWEIZERISCHE BANKGEHEIMNIS* 3 (1985).

³ As recently as Spring 1994, the Duty of Confidentiality of Swiss Banks was debated in connection with the bank accounts held in Switzerland by Aldrich Ames, the CIA officer who provided information to the Russian KGB. See for a brief discussion of the Ames case, Tim Weiner, *Why I Spy: Aldrich Ames*, N.Y. TIMES, July 31, 1994, § 6 (Magazine), at 16.

criminal activities have benefitted from the protection that the system offers. Nevertheless, to dismiss the Duty of Confidentiality of Banks, on the basis of those few cases,⁴ is as unthinkable as abolishing the Miranda rights simply because their abuse has been instrumental in the release of several murderers.

The purpose of this article is to present the basic principles of Swiss Bank secrecy and to analyze the recent developments of a legal notion that is identified with the Swiss Banking system. The Duty of Confidentiality of Banks does not consist of a static and rigid principle; on the contrary, this notion is subject to developments in areas like criminal law, tax law, trust and wills, and generally the whole civil law structure.⁵ As we will see in the course of this article, the Duty of Confidentiality of Banks has been designed to protect the interests of natural, as well as legal, persons.⁶ The principle of the protection of personality plays a very important role in the definition of Bank secrecy since it may be limited only by needs related to public law and order. Principles which dominate criminal law and criminal procedure, as well as international judicial assistance, also contribute in defining the limits of the Duty of Confidentiality of Banks but at the same time enhance its significance.

What we have tried to achieve in the following pages is an examination of the Duty of Confidentiality of Banks through the eyes of practitioners, in order to better understand this institution of Swiss law.⁷ Our study integrates the findings and devel-

⁴ See for example, the critiques and debates related to the handling of the Marcos matter. In this case involving the former president of the Philippines, the late Ferdinand Marcos, Swiss Banks were criticized because assets deposited on Marcos' bank accounts were blocked even before the official intervention of the Swiss authorities. In order to avoid the challenge that funds notoriously under dispute could be withdrawn from Marcos' bank accounts, Swiss Banks acted unilaterally, independently and based solely upon their internal diligence mechanism which was triggered by the intervention of the Federal Banking Commission; DUNANT & WASSMER, *SWISS BANK SECRECY: ITS LIMITS UNDER SWISS AND INTERNATIONAL LAW*, 20 CASE W. RES. J. INT'L L. 541, 564 (1988).

⁵ Hanspeter Dietzi, *Schweizerischer Bankverein*, DER MONAT, Nov. 1990, at 32.

⁶ AUBERT ET AL., *DAS SCHWEIZERISCHE BANKGEHEIMNIS* 29 (1978).

⁷ The mystique created around the notion of bank secrecy in Switzerland has often confused the perception of its essence among lawyers and business operators. Recent controversies, together with negative publicity from foreign public entities interested in looking into private assets deposited in Swiss Banks, have further

opments related to the prosecution by Italian authorities against the corruption that has dominated politics in that country during recent times.⁸ The authorities of both Italy and Switzerland have cooperated in the attempt to bring corrupt politicians to justice, and have sought access to Banking records of an extensive number of individuals. Thus, Swiss courts have been called to clarify, and to some extent reinforce, the Duty of Confidentiality of Banks in connection with the commitments to the international mutual assistance treaties.

I. THE NOTION OF DUTY OF CONFIDENTIALITY OF BANKS

Bank secrecy can be defined as the obligation of a financial institution, and of its officers and employees, to protect and withhold information acquired while handling a client's business.⁹ In addition to the bank itself, in Switzerland, the obligation extends to every individual who, in the performance of his or her professional activities, acquires information related to the business of a client.¹⁰

created insecurity and confusion as to the real significance of the principle of confidentiality. Often we had the opportunity to encounter wrong evaluations of what the Swiss Banking system stands for. In other circumstances, it was suggested to us that the Duty of Confidentiality of Banks in Switzerland was no longer the law of the land. Among others, our intent is to clarify some of the doubts around the notion of bank secrecy and to show, for better or worse, it solidly survives the attacks of its detractors.

⁸ The so called "Mani Pulite" (Unclean Hands) inquiry has shaken the Italian political establishment at all levels. As a consequence, Italy has had a radical change in the composition of its national and regional governments, parliament, and administrative institutions. The level of corruption based on kickbacks for public contracts was so institutionalized that it reached and affected the ability to do business at all levels. For an example of how deep the problem had gone, see a description of how it affected the fashion industry in Sara Gay Forden, *'Clean Hands' put squeeze on Milanese; corruption investigation in Milan, Italy, code-named 'operation clean hands'*, WOMEN[S] WEAR DAILY, Mar. 8, 1993, at 1. Far from being resolved or put to rest, the problem of corruption under past governments keeps affecting the Italian political life. See Oliver Baube, *Berlusconi gears up for quizzing by corruption judges*, AGENCE FRANCE PRESSE, INTERNATIONAL NEWS, Dec. 12, 1994, available in LEXIS, News Library, CUR File.

⁹ Bank secrecy is also defined as "[t]he obligation of the bank and its employees to keep secret information referring to its customers." See generally, UBS DICTIONARY OF BANKING AND FINANCE PUB. NO. 66 (1984).

¹⁰ Among the individuals subject to the Duty of Confidentiality are internal, as well as external, auditors and professionals performing services involving the business of the bank. See art. 41 FEDERAL BANKING LAW OF SWITZERLAND (1972) [hereinafter "FEDERAL BANKING LAW"].

In Switzerland, Article 1 of the Federal Banking Law includes under the definition of "Bank" other financial enterprises that solicit the deposit of money.¹¹ Under Swiss law, persons acting for or on behalf of banks are directly responsible to safeguard the client's secrets (banks, financial institutions and their employees are hereafter referred to as "Banks").¹² In this regard, the protection of Bank secrecy requires the following elements: (i) a Bank or other financial institution as defined by applicable law; (ii) an individual or legal entity that enters into a legal relationship with the Bank to obtain its services ("Client");¹³ (iii) any information concerning the business or personal affairs of the Client which the Bank has acquired in performing services to the Client (the "Information");¹⁴ and (iv) an obligation under applicable law for Banks to protect the Information relating to their Clients, and the prosecution of disclosures in violation of such law.¹⁵ As discussed below,¹⁶ under Swiss law such obligation is set forth, interpreted and enforced under three separate legislative acts.

II. HISTORICAL BACKGROUND

The Duty of Confidentiality of Banks is as old as Banking institutions themselves. The Articles of Association and the By-Laws of many older western Banks provided for the observance of strict confidentiality in their dealings with Clients. In fact, the notion of confidentiality in financial matters was already contemplated in the commercial codes of Germany and Northern Italy in the Middle Ages.¹⁷ As commerce expanded, the need of trustworthy Bankers increased and the performance of Banking services based on discretion and confidentiality was the private individual's only protection against the feudal authority.¹⁸ Clearly, the Duty of Confidentiality of Banks is not a

¹¹ Article 1.2 of the FEDERAL BANKING LAW lists in detail all other entities which are to be considered banks for purposes of the application of the law.

¹² AUBERT ET AL., *supra* note 6, at 64.

¹³ MARTIN LÜSCHER, DAS SCHWEIZERISCHE BANKGEHEIMNIS IN STRAFRECHTLICHEN SICHT 34-36 (1972).

¹⁴ AUBERT ET AL., *supra* note 6, at 29.

¹⁵ Article 47 of the FEDERAL BANKING LAW, *infra* note 43.

¹⁶ See *infra* section III.

¹⁷ See *Le secret bancaire en suisse: legende et verité* Zurich, HANDELSBANK N.W. (1976).

¹⁸ *Supra* note 2, at 3-9.

creation of modern times nor does it represent a discovery of the Swiss Banking system.¹⁹

Even before the adoption in 1934 of the Federal Banking Law, Swiss Banks were required to preserve their Clients' privacy and prohibited from disclosing Information acquired in servicing such Clients. Protection was limited, however, to the privacy contemplated by the Civil Code and the laws regulating contracts in the Commercial Code. In essence, remedies were available only if a Client could bring legal action against the Bank, and it was impossible to hold individual employees responsible.²⁰

In preparing to enact the Federal Banking Law, Swiss authorities strove to develop a set of rules to support the integrity of the Banking system. The creation of a legal basis to maintain the credibility of Bank secrecy was of extreme importance to the Swiss political authorities in the late 1920's. Of particular concern were espionage activities carried on in Switzerland by Germany in an effort to stop fiscal evasion. Nazi Germany had also begun the persecution of Jews by attempting to deprive them of financial resources.²¹ Indeed, guaranteeing Bank secrecy represented the reaffirmation of both Swiss sovereignty and the individual's right of privacy.²²

In 1934 Switzerland adopted the Federal Banking Law, which introduced a new criminal standard to protect Bank secrecy.²³ The new law set forth, in addition to the usual fines, jail terms for individuals violating Bank secrecy. Unlike the disclosure of other professional secrets, for example by an attorney, the disclosure of Bank secrets was made punishable even without a specific complaint by the victim. By making it a state crime, the political authorities reaffirmed the Duty of Confiden-

¹⁹ See Tim Salmine, *Banking Secrecy Legislation in Western Europe*, *The World of Banking*, (Sept.-Oct. 1988).

²⁰ Elliot A. Stultz, *Swiss Bank Secrecy and United States Efforts to Obtain Information from Swiss Banks*, 21 VAND. J. TRANSNAT'L L. 63, 67 (1988).

²¹ *Supra* note 2, at 3.

²² The adoption of the criminal penalties for violation of the Duty of Confidentiality in art. 47 of the FEDERAL BANKING LAW is also to be seen as a concession to the demands for decentralization, federalism and protection against interferences of the central government; JOHN R. LADEMAN, *DAS SCHWEIZERISCHE BANKGEHEIMNIS* 158 (1984).

²³ See *infra* note 43.

tiality of Banks as a principle benefitting not only private but public interests as well.

Since the adoption of the Federal Banking Law, Bank secrecy has helped protect, among others, the assets of individuals subject to political persecution. The first group to benefit from the rules of 1934 were Jews persecuted by the Nazis in Germany. It is no secret that Swiss Banks helped shield the assets of a great number of Jewish fugitives during those tragic years.²⁴ Indeed, attempts are often made to find assets of individuals persecuted for political or ethnic reasons.²⁵ These and other experiences, together with a deep respect for personal privacy and the understanding that a credible Banking system was crucial to the survival of Switzerland as an independent state, helped the country withstand many public attacks in recent years.²⁶ Individual scandals during the 1970's and 1980's generated fierce criticisms from abroad and some attempts to dismantle the legal structure protecting the Duty of Confidentiality of Banks.²⁷ Despite such attacks, and thanks to the fact that abuses of Bank secrecy are only a small, insignificant component of the Banking activities, the system has grown into a symbol of the Swiss Banking industry. Indeed, Switzerland looks towards the year 2000 with no intention of changing a notion that has proven sound for over half a century. Respect of the Client's secrets is such an intimate part of the Swiss Banking system that to dismantle it would require the reeducation of an entire country.²⁸

III. THE LEGAL BASIS FOR BANK SECRECY

In Switzerland, the obligation of Banks and Bankers to maintain in confidence Information relating to the business

²⁴ I Foglio federale 1161 (1970).

²⁵ ROGER SCHINDELHOLZ, *Licencie es Sciences commerciales et economiques*, Le secret bancaire 2 (1969).

²⁶ Strong criticism has been raised by the Socialist Party and other leftist organizations echoing the opinions of foreign judicial authorities; see *Probleme Mit Mythen*, DER BUND, Apr. 23, 1991.

²⁷ See JEAN ZIEGLER, *La suisse lave plus blanc* 16 (1990).

²⁸ The last attempt to weaken the Duty of Confidentiality of Banks occurred in the field of tax. This was in connection with the international assistance in criminal matters which was rejected by a 3 to 1 ratio in a general vote held in Switzerland in 1984.

of Clients is found in three legislative acts, which will be discussed in detail below: the Civil Code, the Commercial Code and the Federal Banking Law. Each complements the other and sets forth a particular consequence: criminal, civil or administrative.

A. *Civil Code*

The Civil Code provides for a Duty of Confidentiality of Banks in general terms. The protection of Banking secrets is not directly mentioned, but is derived from the interpretation of Article 28.²⁹ Article 28 sets forth a general obligation not to interfere with the private life of others. As interpreted by the Swiss Supreme Court, the right to privacy includes, among others,³⁰ all Information related to the private life of an individual,³¹ which includes financial Information.³² The obligation to avoid interference is particularly important for those who acquire personal Information about others in the performance of their professional activities. Legal entities are also protected under Article 28 of the Civil Code,³³ subject only to the exceptions in § 2 of Article 28.³⁴

Banks' obligations to their Clients under Article 28 are based on the type of Information acquired and the nature of the relationship with the Client. Typically, the professional relation between Banks and Clients puts the Bank in possession of Information that would otherwise not be disseminated by the Client. Information related to the economic affairs of a person

²⁹ Article 28 provides under § 1 that "[w]hoever is illegally deprived of his right to privacy may obtain the intervention of a judge against whoever participate in the offense." § 2 states: "The offense is illegal whenever it is not justified by the consent of the victim, by a prevailing public or private interest, or by the law."

³⁰ Every democratic state incorporates the right to privacy in the constitution as one element of personal freedom; BGE 89 I 98 and BGE 90 I 34.

³¹ The relations between the Bank and the Client are considered part of the private domain protected by law as an element necessary to maintain personal freedom; BGE 95 I 439.

³² Thus, under Swiss law the notion of personal privacy is broader than the U.S. common law concept of right to privacy, which extends only to such areas specifically designated as fundamental by the U.S. Supreme Court; see *Roe v. Wade*, 410 U.S. 113, 152 (1973).

³³ DTF 108 II 241.

³⁴ See *supra* note 29, § 2.

are always deemed private.³⁵ In fact, the Swiss system assumes that Bankers receive the same level of trust from their Clients as do clerics.

The Civil Code protection of the Client's interests is set forth under § 1 of Article 28(a). Pursuant to this provision, if a violation of confidential Information is expected or threatened, the Client can ask a judge to bar the Bank from releasing the Information. In addition, as explained below,³⁶ Article 27 of the Civil Code offers the Client the option of suing the Bank for damages under Articles 41 and 49 of the Commercial Code.³⁷

B. *Commercial Code*

Although the Commercial Code does not directly mention the Duty of Confidentiality of Banks, it provides the legal basis for Banks' obligation to maintain Clients' secrets in its provisions pertaining to contracts. The Duty of Confidentiality of Banks thus derives from the contractual relationship between the Bank and the Client: the mandate.³⁸ This type of contract is regulated in Articles 394 to 406 of the Commercial Code governing an agent's undertaking to provide services or carry out business transactions on behalf of a principal.³⁹ The Duty of Confidentiality in connection with this legal relation is derived from the combination of Articles 394 and 398.⁴⁰

³⁵ In Switzerland, all Information concerning the Client-Bank relationship is deemed to be private and to be protected as such, but also qualifies as reserved. As the term indicates, reserved Information are intended for disclosure only and exclusively to the individual who has received them in the first place; See ANDREAS BUCHER, *Personnes physiques et protection de la personnalité* 127-128 (1985).

³⁶ For a specific discussion, see *infra* section V, part B.

³⁷ Articles 41 to 61 of the Commercial Code ("Liability For Illegal Acts") provide for a legal ground to construct liability for damages caused in a non-contractual relation. In some situations it is possible that a cause of action arises simultaneously out of a contract and out of an illegal act covered under said provisions of the Commercial Code. The choice of the cause of action in such cases depends mostly on litigation tactics and requirements related to the rules of evidence. 1 K. OETINGER, *Schweizerisches Haftpflichtrecht*, ALLGEMEINER TEIL 482 (4th ed. 1975).

³⁸ BGE 100 II 153.

³⁹ For a discussion of the mandate see DANIEL GUGGENHEIM, *DIE VERTRÄGE DER SCHWEIZERISCHEN BANKPRAXIS* (1985).

⁴⁰ Article 394, § 1, states: "[b]y accepting a mandate, the agent is obligated to carry out the contractually agreed business transactions or services with which he has been entrusted." The obligation of the Bank to maintain discretion in handling the Client's business is implied by § 2 of art. 398 which provides that "[t]he

Typically, the Bank provides the Client with two types of services: financial advice and Banking transactions. To obtain such services the Client must provide the Bank with specific, personal non-public Information. The duty of care and the obligation of faithful execution of services set forth in § 2 of Article 398 create the legal basis for the Duty of Confidentiality of Banks. Dissemination of Information relating to the Client and acquired in connection with the performance of Banking services violates Article 398. Under the Commercial Code, breach of the mandate contract gives the principal the right of termination, as well as the right to compensation for damages.⁴¹

Clearly, the services provided by a Bank fit the definition of the mandate contract.⁴² Since a Bank rarely refuses to listen to a potential Client, a mandate contract — and with it the Duty of Confidentiality — is created almost every time a Client comes into contact with a Bank.

C. *The Federal Banking Law*

The Duty of Confidentiality of Banks is defined by the Federal Banking Law in Article 47 which deals with criminal penalties.⁴³

agent] is responsible towards the principal for the careful and faithful execution of the entrusted services.”

⁴¹ THEO GUHL, *DAS SCHWEIZERISCHE OBLIGATIONENRECHT* 497 (1991).

⁴² Note that a contract between the Bank and the Client is created even if no formal agreement exists. Article 395 of the Commercial Code provides that “[u]nless immediately rejected, a mandate is presumed to be accepted if it refers to services which the agent carries out in an official capacity or on a professional basis, or if it publicly offers performance of such services.”

⁴³ 1. Whoever discloses a secret that was entrusted to him, or of which he has knowledge in his capacity as member of an organ of the bank, as an employee, agent, liquidator, trustee, observer of the Banking Commission, or director or as an employee of a chartered accounting or audit firm, and whoever instigates another to such violation of the professional secrecy shall be punished by way of imprisonment up to six months or by a fine [up to 50,000 Swiss Francs, which is currently valued at approximately \$35,000 U.S.].

2. If the offender acted negligently the punishment shall be a fine up to [which is currently valued at approximately \$20,000 U.S.].

3. The dissemination of secrets is punished even after termination of the service, function or employment.

4. The provisions of federal and cantonal law regulating the duty to inform certain authorities or the obligation to testify in court remain applicable.

See art. 47 of FEDERAL BANKING LAW.

Even though the law does not specifically create a Duty of Confidentiality of Banks, Article 47 indirectly defines the elements of such duty, namely the obligation to withhold any Information acquired in the performance of Banking-related activities by any person professionally connected to the Bank.⁴⁴ Such activities include not only those directly connected with servicing the Client, but the entire process of receiving Information from the Client, analyzing such Information and advising the Client.

Article 47 punishes intentional and unintentional disclosures of confidential Information.⁴⁵ In order to stress the importance of protecting Information acquired from Clients, Bank employees are subject to punishment for both negligent and intentional disclosures. In particular it allows for punishing disclosures that occur due to a lack of appreciation of the notion of secrecy.⁴⁶

Finally, by criminalizing the act of instigating a breach of the Duty of Confidentiality of Banks, the law protects against external attacks on Bank confidentiality. The law punishes the Bank employee who breaches the Banking Secret, as well as individuals who attempt to learn it.⁴⁷

IV. LIMITS TO THE DUTY OF CONFIDENTIALITY

While the Duty of Confidentiality of Banks is a strictly enforced requirement, it is not absolute.⁴⁸ Article 47 of the Federal Banking Law, that provides for the criminal punishment of Banking Secrets, specifies that limits to the Duty of Confidentiality of Banks may be set by federal, as well as cantonal, law.⁴⁹ In this chapter we will examine the provisions of public, as well

⁴⁴ Article 47 of the FEDERAL BANKING LAW expressly mentions employees, among others, as persons being punished if disclosing a secret. The term employees includes trainees and volunteers, as well as all other paid and unpaid collaborators of the Bank; see AUBERT ET AL., *supra* note 6, at 64.

⁴⁵ See AUBERT ET AL., *supra* note 6, at 73.

⁴⁶ This is the case when unauthorized third parties acquire knowledge of the contents of documents left unattended or otherwise not protected by the Bank. No intent to disclose is required in this situation. See LUSCHER, *supra* note 13, at 42.

⁴⁷ “. . . whoever instigates another [to disclose a bank secret]. . .” art. 47.1 of the FEDERAL BANKING LAW, *supra* note 43.

⁴⁸ Under certain, well defined, circumstances the prohibition against disclosure of banking secrets may be lifted; See *supra* note 24, at 907.

⁴⁹ See FEDERAL BANKING LAW, *supra* note 43, § 4.

as civil, law limiting the obligations connected to the Duty of Confidentiality of Banks.

A. *Limits Under Civil Law*

1. *Regulations on Inheritance.*

Pursuant to the rules applicable to the contract of mandate, the Bank has a continuous obligation to inform the Client about its services.⁵⁰ A problem arises, with respect to the heirs, once the owner of the account dies.

Under Swiss law, after the death of a person, his or her heirs automatically acquire all rights and obligations not strictly personal.⁵¹ The Duty of Confidentiality, as well as the obligation to provide Information are not considered rights having a strictly personal character.⁵² The Bank's obligations become the rights of the heirs, who are substituted in all effects into the position of the deceased.⁵³ The Bank cannot ignore the heirs by invoking the Duty of Confidentiality towards the deceased. The Bank must deliver to the heirs all Information necessary to establish the amount and substance of the assets of the deceased.⁵⁴ Different treatment is reserved for Information deemed strictly personal. With respect to strictly personal Information, the Duty of Confidentiality of Banks is maintained also against requests for disclosure by the heirs.⁵⁵

The right of the heir to receive disclosure of certain Information is based on their acquisition of the contractual rights of the deceased. In addition, their capacity as heir gives them a legal ground to obtain all Information necessary to establish the essence of the estate.⁵⁶ Far from being unlimited, such right is confined to Information necessary to establish the value of the

⁵⁰ Pursuant to art. 400 of the Commercial Code, the Bank's duty of Information arises upon the Client's demand.

⁵¹ The Civil Code under § 2 of art. 560 provides that "unless otherwise provided by applicable law, claims, properties and all other rights of ownership or disposition of the deceased are transferred to the heirs and the debts of said deceased become their personal debts."

⁵² DANIEL BODMER ET AL., KOMMENTAR ZUM BUNDESGESETZ UEBER DIE BANKEN UND SPARKASSEN n.17 to art. 47 (6th ed. 1993).

⁵³ BGE 74 I 493.

⁵⁴ BGE 89 II 93.

⁵⁵ See BODMER ET AL., *supra* note 52.

⁵⁶ See AUBERT ET AL., *supra* note 6, at 187.

estate at the decedents time of death.⁵⁷ Information relating to events occurring prior to the death of the owner are not subject to disclosure, except in cases when legal heirs try to establish if values due to the estate had been illegally transferred prior to death.⁵⁸ With respect to legal heirs, the Duty of Confidentiality of Banks does not apply in connection with procedures against the estate pursuant to Article 522 of the Civil Code.⁵⁹ In those cases, disclosure must occur also with respect to transactions prior to the owner's death, except when the express request of secrecy by the deceased consists of interests superior to the interest of the legal heirs to establish the exact amount of the estate.⁶⁰

The right of the heirs to obtain Information based on legal or contractual rights is general and extends to the estate administrators, as well as officials responsible for the inventory of estate properties.⁶¹

2. *Powers of Attorney.*

The unlimited power of attorney issued by the owner of an account to a third person, for purposes of operating assets deposited on said account, confers to that person all rights to obtain disclosure of any Information.⁶² Generally, powers of attorney relating to Bank accounts provide for the extension of their validity after the death of the issuer.⁶³ Nevertheless, once the effects of the power of attorney are terminated, the repre-

⁵⁷ See AUBERT ET AL., *supra* note 6, at 227.

⁵⁸ Recently, the Swiss Supreme Court has reviewed its willingness to extend the right to Information concerning a decedent's acts prior to his/her death for purposes of establishing transfers of money out of the decedent's accounts into trust accounts of which the decedent retained beneficial ownership. This willingness would enable heirs to trace payments out of known accounts in order to locate potential additional assets. See unpublished decision of the Swiss Supreme Court, Chamber for Civil Law, 14 VIII 92.

⁵⁹ This procedure allows legal heirs to reduce the amount deposited to third parties whenever their legal quota is not preserved. See TUOR & SCHNIDER, *DAS SCHWEIZERISCHE ZIVILGESETZBUCH* 401 (9th ed. 1979).

⁶⁰ BGE 74 I 493.

⁶¹ BGE 88 II 87.

⁶² FELIX ERB, *DIE BANKVOLLMACHT* 242 (1974).

⁶³ Thus defeating the automatic termination set forth by art. 35 of the Commercial Code for standard powers of attorney. BGE 101 II 117.

sentative loses any and all rights to Information from the Bank.⁶⁴

A further limitation of the Duty of Confidentiality of Banks relates to persons with a power of attorney conferred by law to represent the owner of the Bank account. This is the case of parents managing the accounts of their children.⁶⁵ Also in this case, all Information relating to the account shall be disclosed to the tutor⁶⁶ as well as to the curator⁶⁷ of the owner.

B. *Limits Under Public Law*

1. *Criminal and Civil Procedure Provisions.*

The protection of Bank secrets is very carefully contemplated in connection with judicial proceedings. It is sometimes the prevailing interest of justice to obtain disclosure of Information which is otherwise considered privileged. This is particularly the case in criminal proceedings where the search for truth represents the primary goal of the process.

a. Rules of Civil Procedure.⁶⁸

At the national level, the Federal Code of Civil Procedure provides that only persons contemplated by Article 321.1 of the Swiss Penal Code⁶⁹ may refuse to be deposed and that all other individuals bound by the obligation to protect a professional or business secret must be exempted from testimony by the presiding judge.⁷⁰ Nevertheless, because of the structure of the Swiss judicial system, civil lawsuits at the Federal level are rare and

⁶⁴ BGE 101 II 119.

⁶⁵ Article 304, § 1 of the Civil Code.

⁶⁶ The tutor is nominated in the cases set forth under arts. 368-372 of the Civil Code. The tutor is responsible pursuant to art. 367 for the personal and financial interest of the person under his responsibility.

⁶⁷ The curator is nominated in the cases set forth under arts. 392-395 of the Civil Code. The responsibility of the curator is similar to the one of the tutor. See *supra* note 66, art. 367. But his function is limited to specific tasks, generally of financial nature. The right of the curator to obtain disclosure from the Bank depends on the specific task that he has been appointed to accomplish.

⁶⁸ Under the Swiss Constitution, all matters not regulated by the Confederation are left to the legislation of the Cantons. Article 3 of the Swiss Constitution. This is the case for the rules of criminal, civil, and administrative procedure except with regard to federal proceedings.

⁶⁹ See *infra* note 80.

⁷⁰ Articles 42.1(b) and 42.2 of the Federal Code of Civil Procedure.

do not substantially impact the principles of civil procedure.⁷¹ Thus, the importance of the limits to the Bank secrecy at that level is almost irrelevant.

At the Cantons' level the codes of civil procedure follow one of the following guidelines:⁷² (i) persons subject to a Duty of Confidentiality, such as Bankers, lawyers, clerics, do not have to disclose any secret and may not be deposed to that effect in civil proceedings;⁷³ (ii) the presiding judge has the authority to decide, subject to appeal, if, when and to what extent a Bank employee may be deposed;⁷⁴ and (iii) the code of civil procedure itself defines which professionals may or may not be deposed.⁷⁵ The cantons following these guidelines generally do not include Bank employees among the persons exempt from the witness' obligations.

The relevance of the limits set by the rules of civil procedure covers areas which extend from the most general claims, to divorces or bankruptcy. In most proceedings the parties find the disclosure of the opponent's assets both valuable and relevant. Since such disclosure could lead to abuses, the codes of

⁷¹ See AUBERT ET AL., *supra* note 6, at 86.

⁷² See BODMER ET AL., *supra* note 52, at n.40 to art. 47; see also AUBERT ET AL., *supra* note 6, at 85-89 and LÜSCHER, *supra* note 13, at 18.

⁷³ Argovie, art. 183.2(b).

Berne, art. 246.1.

Geneva, art. 227.

Neuchâtel, art. 222(b).

⁷⁴ Fribourg, art. 214.1(c).

Nidwalden, art. 148.2 and 148.3.

Schwyz, art. 238.1(2) and 239.

Ticino, art. 230(b), 230(c), and 231.2.

Uri, art. 192.1(b) and 192.1(d).

Zug, art. 168.1(2) and 169.

Zürich, art. 187.2 and 188.

⁷⁵ Appenzell Ausserrhoden, art. 160.3.

Appenzel Innerhoden, art. 182.2.

Basel Stadt, art. 116.2.

Basel Land, art. 161.2.

Glarus, art. 176.3.

Grisons, art. 196.2(3).

Lucerne, art. 161.2.

Obwalden, art. 153.1(b) and 153.2.

Schaffhouse, art. 203.2.

Soleure, art. 172.1(2) and 172.2.

Thurgovie, art. 259.1.

civil procedure often give judges the power to exempt potential witnesses from testimony.⁷⁶

b. Rules of Criminal Procedure.

The focus of any criminal procedure is the research of the truth in the interest of justice.⁷⁷ Therefore all codes of criminal procedure, at the national as well as cantons' level, provide for a general obligation to intervene as a witness in a proceeding, to be deposed and to disclose all relevant Information and documentation.⁷⁸ Since the criminal procedure looks after the public interest — as opposed to the private interest that is the object of civil proceedings — the effect of Bank secrecy in this area is substantially limited and the Duty of Confidentiality of Banks is rarely accepted as a reason to avoid depositions.⁷⁹

Therefore the codes of criminal procedure exempt from the obligation to depose as a witness only those persons falling under the professional categories contemplated by Article 321 of the Penal Code.⁸⁰ In particular, the following categories are exempt from the obligation to depose: clerks, attorneys, notary publics,⁸¹ doctors, dentists, and other specific professionals of

⁷⁶ See for example, art. 231.2 of the Code of Civil Procedure of the Canton of Ticino authorizing the judge to "exempt the witness from revealing industrial or commercial secrets when the witness' interest to preserve the secret exceeds the interest of the party who wants it revealed."

⁷⁷ On the relation between criminal law, penal code and punishment see 1 HANS SCHULTZ, *EINFÜHRUNG IN DEN ALLGEMEINEN TEIL DES STRAFRECHTS* 23-50 (4th ed. 1982).

⁷⁸ See LUSCHER, *supra* note 13, at 18.

⁷⁹ See AUBERT ET AL., *supra* note 6, at 95.

⁸⁰ Clerics, attorneys at law, defense counsels, notary publics, auditors subject to duty of confidentiality pursuant to the Commercial Code, doctors, dentists, pharmacists, midwives, as well as their assistants who disclose a secret which was communicated to them in connection with their professional services or of which they have acquired knowledge in relation to [such professional services] will be punished, contingent upon charges being pressed by the victim, with the imprisonment or a fine. Same punishment will be handed down to students for disclosure of secrets whose knowledge they acquired during their studies. The disclosure remains punishable even after the person subject to the duty of confidentiality stops exercising his profession or terminates his studies.

Article 321.1 of the Swiss Penal Code.

⁸¹ The role of the notary public in civil law systems is considerably more relevant than in common law countries. In Switzerland, the notary public is a figure embodying certain governmental powers and is subject to very strict requirements of professional conduct.

the healthcare sector. Those professionals are criminally liable for the disclosure of Information qualifying as secrets; substantially all Information they acquire during their professional activities. Although bound by a Duty of Confidentiality, all other persons not expressly contemplated by Article 321 of the Penal Code are subject to the obligation to depose in criminal proceedings and to disclose all relevant Information and documentation.⁸² Not being covered by said provision of the Penal Code, Bank employees must therefore comply with the general obligation to serve as witnesses in criminal proceedings.⁸³

This limit to the Duty of Confidentiality of Banks is nevertheless subject to strict interpretation.⁸⁴ Disclosures must include only Information relevant to the investigation. Any Information related to third parties not involved in such investigation are subject to absolute protection.⁸⁵ In particular, it is important that Information disclosed in connection with a specific investigation are not used for other unauthorized purposes.⁸⁶

2. Tax Regulations.

Taxpayers in Switzerland undergo the same treatment as in the United States: they must file a tax return indicating all elements necessary to establish the tax due and, upon request of the tax authorities, they must provide all documentation rele-

⁸² The list of professionals subject to the Duty of Confidentiality pursuant to art. 321.1 of the Penal Code is exclusive and can not be extended by including other professional categories, even of similar character. BGE 83 IV 197.

⁸³ The Swiss Supreme Court has clearly stated that art. 321 of the Penal Code is subject to strict interpretation. *See e.g.*, BGE 95 I 139. The Penal Code cannot be interpreted as covering professional categories, such as Bank employees, which are not expressly contemplated within the statute.

⁸⁴ *See* AUBERT ET AL., *supra* note 6, at 97.

⁸⁵ For example, any Information related to payments made to or from the account, which is the object of disclosure, must not be revealed if not directly related to individuals involved in the criminal investigation.

⁸⁶ This is the case when other parties to the proceeding acquire knowledge of documents disclosed in connection with a specific case. *See* LÜSCHER, *supra* note 13, at 96. In a controversy involving the U.S. Government, the Swiss Supreme Court has stated that in certain situations the right of the parties to acquire knowledge of documents disclosed in a proceeding may be limited. *See* BGE 95 I 451. The decision is to be taken by the presiding judge based on the evaluation of the prevailing interest. *See* BGE 92 I 263.

vant to the tax assessment.⁸⁷ Therefore, taxpayers shall provide the tax authorities with all documents certifying their relations with third parties.⁸⁸ Third parties on the other hand have an obligation to deliver to the taxpayer all such documents that are in their possession.⁸⁹ Finally, if taxpayers do not deliver sufficient and satisfactory documents, the tax authority has a legal right to obtain from third parties all documents required for the tax assessment.⁹⁰

The obligation of third parties to provide Information to the tax authorities does not apply to persons or entities who are under a legally mandated Duty of Confidentiality.⁹¹ Therefore, even when a taxpayer refuses to deliver sufficient documentation to the tax authorities, Banks have no obligation to release any statement or Information whatsoever.⁹²

The Banks' obligation is to release documents to the Client. The decision to disclose to the tax authority is left to the Client.⁹³ The consequence of nondisclosure for the Client is a tax penalty on top of a tax assessment based solely upon the arbitrary estimate by the tax authority,⁹⁴ generally higher than the "should be" tax burden.⁹⁵

The obligation of Banks to provide statements to their Clients describing their relation is limited to (i) the relation of the Client with a specific branch⁹⁶ and (ii) the relation which existed in the past or is still existing at the time of the inquiry.⁹⁷

⁸⁷ HEINZ MASSHARDT, COMMENTARIO ALLA LEGGE SULL'IMPOSTA FEDERALE DIRETTA 391-392 (1989).

⁸⁸ Article 126 Law on Federal Income Tax [hereinafter "LFIT"].

⁸⁹ Article 127(e) LFIT.

⁹⁰ Article 127.2 LFIT.

⁹¹ *Id.*

⁹² See BODMER ET AL., *supra* note 52, at n.45 to art. 47.

⁹³ CHRISTOPH IM OBERSTEG, *Die Bescheinigungspflichten Von Bank Und Kunde Im Veranlagungsverfahren Der Direkten Bundessteuer*, BEITRÄGE ZUM SCHWEIZERISCHEN BANKENRECHT 415 (1987).

⁹⁴ Article 130.2 LFIT.

⁹⁵ See MASSHARDT, *supra* note 87, at 390.

⁹⁶ Associazione Svizzera dei Banchieri, circ. No. 6497 11.10, at 10 (1988). Under Swiss law, branches are treated as independent legal entities who enter their own contracts, sue independently, and are sued at their domicile. See OBERSTEG, *supra* note 93, at 417-18.

⁹⁷ See art. 127(e) LFIT. The consequence is that a Bank is under the obligation to provide negative statements. This Information could confirm the non-existence of a Banking relation.

The same applies to disclosures required from Banks in connection with criminal investigations⁹⁸ and in the cases of tax fraud in which judicial assistance is granted.⁹⁹

3. *Anti-Money-Laundering Legislation.*

On August 1, 1990 Article 305 (bis) on Money Laundering¹⁰⁰ and Article 305 (ter) on Lack of Due Diligence in Financial Transactions¹⁰¹ were adopted in the Swiss Penal Code. Those two provisions allow for the punishment of individuals who impede the recovery of money related to criminal activity, as well as those individuals that in the performance of their professional activity failed to verify the identity of the beneficial owner of money they handled. The necessity for Switzerland's adoption of an efficient legal basis to fight organized crime became apparent during the 1980's in connection with international prosecutions for drug smuggling and other drug related crimes.¹⁰²

Both provisions do not create new responsibilities for the Banks, which prior to their adoption were already liable for

⁹⁸ See BODMER ET AL., *supra* note 52, at n.88 to art. 47.

⁹⁹ PAOLO BERNASCONI, *Droits et devoir de la banque et de ses clients dans la procédure d'entraide judiciaire internationale en matière pénale*, BEITRÄGE ZUM SCHWEIZERISCHEN BANKENRECHT 349 (1987).

- ¹⁰⁰ 1. Whosoever undertakes actions which lend themselves to defeat the ascertainment of origin, the discovery or collection of assets which, as he knows or must assume, emanate from crime, will be subject to punishment by imprisonment or a fine.
2. In severe cases punishment is seclusion up to five years or imprisonment. Added to this penalty of detention is a fine of up to one million francs. A severe case is if the perpetrator: a) acts as a member of a criminal organization; b) acts as a member of a criminal organization whose purpose is the continued practice of money-laundering; c) realizes a large turnover or considerable profit from professional money laundering activities.
3. The perpetrator will also be subject to sentencing if he commits the principal act of violation abroad and such act is also punishable in the place of perpetration.

Article 305 (bis) of the Swiss Penal Code.

- ¹⁰¹ Whoever professionally accepts, keeps in safe custody, assists in the investment or transfer of assets which are the property of others and fails to apply the relative due diligence required for establishing the identity of the economic beneficiary, is subject to punishment by imprisonment of up to one year or a fine.

Article 305 (ter) of the Swiss Penal Code.

- ¹⁰² CHRISTOPH K. GRABER, *GELDWÄSCHEREI* 100 (1990).

knowingly accepting money related to criminal activities based on Article 3.2(c) of the Federal Banking Law.¹⁰³ This provision was strengthened by the principles of the Due Diligence Agreement.¹⁰⁴ Nevertheless, problems appeared in the process of identifying and defining the attitude that Banks had to adopt in dealing with money of unclear origin or other assets that the Bank could suspect of being related to criminal activity.¹⁰⁵ Articles 305 (bis) and (ter) of the Penal Code sought to diminish the

¹⁰³ Article 3.2(c) of the FEDERAL BANKING LAW requires, when issuing a banking license, that "the individuals responsible for the administration and management of the Bank be of good repute and warrant an irreproachable activity." *Id.*

¹⁰⁴ The agreement on the Swiss Banks' code of conduct with regard to the exercise of due diligence, commonly referred to as the "Due Diligence Agreement," is individually entered into by the Swiss Bankers Association with its members. Pursuant to the agreement, the signatory Banks commit to the observance of certain due diligence measures, including:

Verification Of The Contracting Partner's Identity :

- 1) The banks undertake to verify the identity of the contracting partner when establishing business relations with said partner.
- 2) This rule applies to:
 - the opening of accounts or passbooks;
 - the opening of securities accounts;
 - the entering into of fiduciary transactions;
 - the renting of safe-deposit boxes;
 - cash transactions exceeding the amount of Sfr. 25,000.

Article 2 of the Due Diligence Agreement.

Ascertaining The Identity Of The Beneficial Owner :

- 1) If, when a business relationship is entered into by way of opening an account, passbook or securities account, or when a fiduciary transaction is entered into, there is any doubt as to whether the contracting partner is himself the beneficial owner, the bank shall require by means of Form A a written statement setting forth the identity of the beneficial owner.
- 2) If the amount of a cash transaction exceeds Sfr. 25,000 the bank must require the contracting partner to provide a declaration setting forth the identity of the beneficial owner. The bank shall keep such declaration on record in an appropriate manner. The use of Form A is optional.

Article 3 of the Due Diligence Agreement.

Prohibition Against Active Assistance In The Flight Of Capital :

- 1) Banks may not provide any active assistance whatsoever in transferring capital outside countries whose laws prohibit said transfers or impose restrictions on the placing of funds abroad.

Article 7 of the Due Diligence Agreement.

Prohibition Against Actively Assisting In Tax Evasion And Similar Acts:

- 1) Banks shall not provide any assistance to their customers in acts aimed at deceiving Swiss and foreign authorities, particularly tax authorities, by means of incomplete or otherwise misleading attestations.

Article 8 of the Due Diligence Agreement.

¹⁰⁵ In note 6590 of July 5, 1990 at 2, the Swiss Banking Association pointed out that it was necessary to clarify at what time business relations with Clients have

above identification problem and clearly set forth the principle that in the financial world good faith in dealing with unknown parties could no longer be presumed.¹⁰⁶

On May 1, 1992 the Federal Banking Commission enacted specific directives providing for guidelines on the interpretation of Article 305 (bis) and (ter) of the Penal Code.¹⁰⁷ In addition to clarifying the position of Banks in connection to Article 305 (bis) and (ter), the directive took into consideration, and to some extent adopted, the international recommendations for the fight against money laundering. Nevertheless, such directives are applicable only to personnel of financial institutions and do not apply to criminal justice.¹⁰⁸ The power and effect of such directive is similar to the power and effect of directives adopted in other countries pursuant to Recommendation No. 28 of the International Financial Action Task Force on Money-Laundering ("FATF").¹⁰⁹ The directive of the Federal Banking Commission sets forth guidelines on the attitude to be adopted by Banks when confronted with suspicions that certain assets are related to criminal activities. In particular, the directive provides for the possibility to inform the authorities in the event of serious doubts as to the origin of specific assets.¹¹⁰ Such possibility was

to be terminated. The note establishes when Banks should be alerted that assets received or given to a Client are related to criminal activity.

¹⁰⁶ PETER NOBEL, *Operazioni Finanziarie in Svizzera: La Diligenza Necessaria Dopo La Nuova Normativa Penale*, 4 Rep. 109 (1990).

¹⁰⁷ See *supra* note 80 and *supra* note 100.

¹⁰⁸ PAOLO BERNASCONI, *Fonti Giuridiche Riguardanti La Diligenza Nell'Accettazione Di Fondi*, IL SISTEMA BANCARIO SVIZZERO CONTRO IL RICICLAGGIO 28 (1993).

¹⁰⁹ . . . the competent authorities should establish guidelines which will assist financial institutions in detecting suspicious patterns of behavior by their customers. It is understood that such guidelines must develop over time, and will never be exhaustive. It is further understood that such guidelines will primarily serve as an educational tool for financial institutions' personnel.

International Financial Action Task Force on Money-Laundering, Recommendation No. 28 ("FATF").

¹¹⁰ Federal Banking Commission's directive, § 9, provides that "[u]pon suspect of criminal origin of funds and depending on the reasons for such suspects, Banks have either to closely monitor the relation with the client, or to undertake additional verifications, or to decline or terminate the business relation and/or inform the authorities competent for criminal prosecution." FATF, *supra* note 109.

also contemplated in § 17 of the guidelines issued by the FATF.¹¹¹

Nevertheless, since directives of the Federal Banking Commission do not supersede the requirements set forth by law, Banks could not use the power of communication provided for in the May 1, 1992 directive. Although in Note 5 to the directive, the Federal Banking Commission had determined that a good faith notification to the criminal authorities would not expose Banks to the criminal consequences of the violation of the Duty of Confidentiality, doubt about this interpretation was widespread even within the Federal Banking Commission. No assurance against civil or criminal claims for violation of the Duty of Confidentiality could be found because the exclusionary grounds of the Penal Code were not applicable in that specific case.¹¹² It was therefore apparent that the adoption of legal provisions regulating the issue were mandatory.

On August 1, 1994 a provision was enacted in the Penal Code specifically allowing any employee of the financial sector to disclose all Information generating the doubt that certain assets are related to criminal activity.¹¹³ Nevertheless, the issues confronting Banks are far from being resolved. Questions arise in connection with the legitimization of the doubt, with its justification and with the valuation of the elements that generate it. Criminal tribunals need to identify the minimum requirements justifying a doubt and therefore allowing disclosure.¹¹⁴ A legal proceeding for wrongful disclosure is still possible in case of negligence in judging the facts or whenever a mistake could have been avoided by using diligence in the evaluation of the Information.¹¹⁵

¹¹¹ See FATF, *supra* note 109. "... if financial institutions suspect that funds stem from a criminal activity they should be permitted or required to report promptly their suspicions to the competent authorities. . ." FATF, *supra* note 109.

¹¹² NIKLAUS SCHMID, *Insiderdelikte und Geldwascherel*, AKTUELLE PROBLEME IM BANKRECHT 205 (1994).

¹¹³ A second paragraph was added to art. 305 (ter), see *supra* note 100, providing that: "The persons covered by the first paragraph of this article have the right to disclose to the Swiss authorities in charge of criminal prosecution, as well as to all other federal authorities designated by the law, any information originating the doubt that certain assets emanate from crime." *Id.*

¹¹⁴ See SCHMID, *supra* note 112, at 206.

¹¹⁵ See art. 47.2 of the FEDERAL BANKING LAW, *supra* note 22, art. 47.2, which sets forth the punishability of negligent violations of the Duty of Confidentiality of

V. CONSEQUENCES FOR BREACH OF THE DUTY OF CONFIDENTIALITY

Breach of the Duty of Confidentiality of Banks generates three types of consequences: criminal, civil and administrative. The breaching party is not limited to the person disseminating the Information, but may also be his or her employer; e.g., the Bank.¹¹⁶ By making the employer liable, Swiss law sets a clear standard requiring the Bank to closely supervise and monitor how confidential Information is handled.

A. Criminal Penalties

Pursuant to Article 47 of the Federal Banking Law, the penalty for breach by an individual of the Duty of Confidentiality of Banks can be imprisonment and/or a fine.¹¹⁷ In addition to the person directly responsible for the breach, the instigator, regardless of whether a breach has actually occurred, is subject to Article 47.¹¹⁸ In this regard, the Federal Banking Law sets forth a fundamental difference between prosecution of the breach of confidentiality by Banks and prosecution of the same breaches by other professionals (such as doctors, lawyers or clerics) pursuant to Article 321 of the Penal Code. While the prosecution pursuant to Article 321 of the Penal Code requires the victim to bring charges, the breach of the Duty of Confidentiality of Banks is a state crime and is prosecuted whether or not the victim has brought charges. Thus, the crime is prose-

Banks. See also, *Messaggio concernente la modificazione del Codice penale svizzero e del Codice penale militare*, III Foglio federale 193 (September 1993).

¹¹⁶ While the Bank itself is not subject to the criminal consequences set forth for the direct violation of the Duty of Confidentiality under art. 47 of the FEDERAL BANKING LAW, it may be liable for damages caused by an illegal disclosure pursuant to the regulation of commercial and civil law. Additionally, it may incur in administrative consequences, such as the withdrawal of the Banking license, set forth under the FEDERAL BANKING LAW generally.

¹¹⁷ See generally art. 47, *supra* note 43. The imprisonment and the fine can be cumulated pursuant to art. 50 of the Swiss Penal Code.

¹¹⁸ Contrary to principles applicable to the violation of official and professional secrets pursuant to arts. 320 and 321 of the Penal Code, not only the completed instigation, but also the attempted instigation to violate a banking secret is punished under art. 47.2 of the FEDERAL BANKING LAW *supra* note 43.

cuted every time the authority, generally the Attorney General's Office, acquires knowledge of a breach.¹¹⁹

B. *Civil Claims*

Individuals and Banks may be sued in civil courts for violations of Bank secrecy. The principal claims are based on Articles 41 and 49 of the Commercial Code which deal with the civil consequences of illegal acts.¹²⁰ Since Article 28 of the Civil Code¹²¹ sets forth a duty that includes the Duty of Confidentiality of Banks, when a violation occurs the victim has the right to be indemnified for damages under Article 41 of the Commercial Code.¹²² Under Article 49 of the Commercial Code, the victim may also be compensated for pain and suffering.¹²³

In addition to Articles 41 and 49, which specifically involve the breach of Article 28 of the Civil Code, under the Commercial Code a breach of Bank secrecy triggers reparation rights inherent in the contract.¹²⁴ The provisions concerning breach of contract, beginning with Article 97, also provide the victim with (among other rights) a general right to be compensated for damages.¹²⁵

The Commercial Code also provides the legal grounds for a claim for damages if a contract did not arise or if disclosures

¹¹⁹ Note also, that where a crime can be punished only upon formal complaint of the victim, the charge must be brought within three months from the day in which the victim acquired knowledge of the violation. *See* art. 29 of the Penal Code. The statute of limitation for violations of the Duty of Confidentiality of Banks is five years from the day in which the violation has been committed. *See* art. 51.3 of the FEDERAL BANKING LAW.

¹²⁰ *See* OFTINGER, *supra* note 37, for a discussion of arts. 41 to 61 of the Commercial Code.

¹²¹ *See* OFTINGER, *supra* note 37.

¹²² IDA HARDEGGER, *BANK-RECHTSKUNDE* 126 (1988).

¹²³ The judge has latitude regarding the amount of the compensation. BGE 108 II 352.

¹²⁴ *See* GUHL, *supra* note 41, at 223.

¹²⁵ It is necessary that the victim proves the existence of a monetary damage and of a direct relation between the violation of the Duty of Confidentiality and such damage. In contrast, the Bank can prove that no fault can be imputed to its handling of the Information, thus excluding liability; *see* BODMER ET AL., *supra* note 52, at n.105 to art. 47 of the FEDERAL BANKING LAW. *See also* BGE 113 II 352 (on the treatment of claims for damages relating to breaches of the Duty of Confidentiality).

occurred after termination of the contractual relationship with the Bank.¹²⁶

C. *Administrative Consequences*

The breach of the Duty of Confidentiality of Banks also generates certain administrative consequences for both the person responsible for the breach and for the Bank. An employee breaching Bank secrecy will certainly end up dismissed, and other individuals such as directors or auditors may also see the end of their association with the Bank.¹²⁷ The Bank itself faces two types of administrative measures: it may lose its license to engage in Banking activities in Switzerland, or it may be expelled from the Federation of Swiss Banks. Both measures have a catastrophic effect and are strong incentives for Banks to monitor and preserve confidential Information.¹²⁸

VI. DUTY OF CONFIDENTIALITY, JUDICIAL ASSISTANCE AND THE PROSECUTION OF CORRUPTION IN ITALY

A. *Applicable Principles*

The Duty of Confidentiality of Banks in Switzerland is well structured and strictly enforced against interferences from abroad. Nevertheless, under certain, well-defined circumstances, the prohibition against disclosures of Banking secrets may be lifted pursuant to international treaties. In addition, these disclosures may be lifted by domestic law.

Far from giving "carte blanche" to disclosures, the conventions and treaties carefully limit the situations in which the

¹²⁶ The theory of the "culpa in contrahendo" has been developed by scholars and supported by the jurisprudence although not directly mentioned in the Commercial Code. The theory allows for the contractual protection against those damages which occur before a contract is formed. Most important, protection is also offered in those cases where negotiations have not been successful. Pursuant to the doctrine of "culpa in contrahendo," parties have certain contractual obligations in the pre-contractual phases. Accordingly, the beginning of the negotiations between the Bank and a potential Client imposes on the Bank the duty to preserve the confidentiality of the Information received. See AUBERT ET AL., *supra* note 6, at 42.

¹²⁷ See AUBERT ET AL., *supra* note 6, at 35.

¹²⁸ The Federal Banking Commission has the power to withdraw the license of a Bank pursuant to art. 23 (quinquies) of the FEDERAL BANKING LAW. Before adopting such an extreme measure, the Federal Banking Commission may intervene adopting intermediate measures pursuant to art. 23 (ter) 1 and 4.

Duty of Confidentiality of Banks may be lifted. The following are the general principles which govern the application by Switzerland of all conventions and treaties concerning mutual assistance in judicial matters.¹²⁹ They are the "sine qua non" for the lifting of Bank secrecy.¹³⁰

1. *Protection of Privacy.*

In protecting the individual's right to privacy, Switzerland follows the standards and principles developed within the European Community. The definition of privacy, in what is certainly an oversimplification of the concept, includes all elements that contribute to the development and existence of the person as an individual.¹³¹ As one of those elements, the individual's financial life will be protected from unjustified interferences.¹³²

¹²⁹ Next to specific treaties with individual countries, the main legislative acts which provide a legal basis for the lifting of Bank secrecy are the Hague Convention of March 5, 1957 on Civil Proceedings; the European Convention of April 20, 1959 on Mutual Legal Assistance in Criminal Matters; and the Federal Law of March 30, 1981 on International Assistance in Criminal Matters.

¹³⁰ These principles apply to any provision for mutual legal assistance in all treaties signed by Switzerland. Among them are the Income Tax Treaty Between Switzerland and the United States of January 1, 1951, the United States-Switzerland Treaties on Mutual Assistance in Criminal Matters dated May 25, 1973 and December 23, 1975, the Switzerland-United States Understanding Concerning Treaty on Mutual Assistance in Criminal Matters and the Switzerland-United States Memorandum of Understanding on Mutual Assistance in Criminal Matters and Ancillary Proceedings of November 10, 1987.

The Income Tax Treaty of 1951 states in its provision concerning the Exchange of Information under art. XVI.1 that: "[n]o information shall be exchanged which would disclose any trade, business, industrial or professional secret or any trade process." On the other hand, the Treaty on Mutual Assistance in Criminal Matters limits its scope to assistance in connection with the prosecution of specific crimes. Under art. 2 of the treaty, assistance is expressly denied in investigations or proceedings concerning, among others, political offenses, the violation of laws relating to military obligations, the enforcement of cartel or antitrust laws and the violation of tax and customs laws (except in connection with the prosecution of organized crime).

Furthermore, under the provision concerning Limitations on Use of Information, the principle of specialty is set forth in clear terms. In fact, art. 5 provides that Information obtained pursuant to the treaty shall not be used in any proceeding relating to an offense other than the offense for which assistance has been granted.

¹³¹ See *supra*, section III, part A.

¹³² JORG PAUL MULLER, *ELEMENTE EINER SCHWEIZERISCHE GRUNDRECHTTHEORI* 49 (1982).

2. *Only Evidence Available Under Domestic Law.*

Foreign authorities may obtain, by invoking a treaty concerning mutual assistance in judicial matters, evidence that can be obtained only under Swiss law.¹³³

3. *Specialty.*

This principle requires that Information provided under a treaty with a foreign country be used only for the purposes for which it was provided.¹³⁴ For example, Information provided in connection with the prosecution of certain crimes may not be used against a party not involved in such crimes, or against a party involved in such crimes but in connection with a different offense.¹³⁵

4. *Reciprocity.*

Pursuant to this principle, legal assistance is provided only in connection with charges that could also be brought under Swiss law.¹³⁶ Likewise, Information provided pursuant to legal assistance treaties can be used only to the extent the purpose of such use is recognized under Swiss law.¹³⁷ For example, Swiss authorities may not provide judicial assistance in prosecuting criminal activities that are not "criminal" in Switzerland. Similarly, Information provided in connection with a crime recog-

¹³³ See art. 63.1 of the Federal Law March 30, 1981 on International Assistance In Criminal Matters.

¹³⁴ Compliance with this principle is presumed with regard to countries with which a treaty has been executed; BODMER ET AL., *supra* note 98, at n.70(a) to art. 47. With respect to other countries, prior to delivery of Information, assurances are requested that no use will be made other than for the investigation in connection with which assistance was granted. When assurances are not given, a note with respect to the use authorized is delivered with the Information. BGE 115 Ib 377; BGE 107 Ib 394; BGE 105 Ib 423.

¹³⁵ Information obtained pursuant to a proceeding of international mutual assistance cannot be used for purposes of inquiry nor as evidence in proceedings, such as tax evasion, for which assistance is not allowed. BGE 115 Ib 376.

¹³⁶ The exam of courts is directed to the existence of those elements which objectively determine the existence of a crime under Swiss law. See BGE 110 Ib 182; BGE 117 Ib 268.

¹³⁷ The request for judicial assistance must provide such description of the acts under prosecution, sufficient for the Swiss authority to determine that such acts are considered crimes also under Swiss law. A general description of the crime, such as "fraud," is therefore not considered sufficient to support a request for judicial assistance. BGE 106 Ib 264; BGE 103 Ia 210.

nized as such in Switzerland may not be used to prosecute another offense that under Swiss law is not a crime.¹³⁸

5. *Proportionality.*

This requirement applies to any governmental intervention and must therefore be observed also in connection with judicial assistance among states, whether or not based on a specific treaty.¹³⁹ Thus, the principle of proportionality allows acts of assistance to be granted only to the extent that they appear necessary to the specific foreign proceeding¹⁴⁰ and provided that the interests of justice and public order prevail over the interest to protect the confidentiality of the Information.¹⁴¹ Accordingly, Information regarding unrelated third parties are not to be provided unless absolutely necessary to the prosecution of the case and justified by the importance of the investigation.¹⁴² A significant limit set by the principle of proportionality is the prohibition against the so called "fishing expedition." These types of requests are made against large groups of people in the hopes of finding evidence against individuals on which there are otherwise not sufficient grounds to individually obtain assistance. The generalized request for Information concerning large groups of persons violates the principle of proportionality when it is not supported by specific indications justifying the request against each of the members of the group. The Swiss Supreme Court has found that judicial legal assistance shall not be granted for the purpose of justifying accusations or suspicions and that requests shall only be accepted in those cases that already present serious reasons and evidence for suspicion or accusation.¹⁴³

6. *No Assistance for Political, Military, or Tax Related Offenses.*

All treaties signed by Switzerland set forth the exclusion of judicial assistance for the purpose of prosecuting political, tax

¹³⁸ BGE 111 Ib 315 (This decision denied assistance on the ground that under Swiss law conspiracy cannot be prosecuted on its own as an independent offense).

¹³⁹ BGE 106 Ib 260.

¹⁴⁰ See BERNASCONI, *supra* note 99, at 396-397.

¹⁴¹ BGE 101 Ia 10-11.

¹⁴² BGE 113 Ib 165; BGE 112 Ib 462.

¹⁴³ BGE 118 Ib 122; BGE 103 Ia 122.

or military offenses.¹⁴⁴ One exception is generally admitted in connection with the prosecution of tax fraud (as opposed to the mere tax evasion) for which assistance is granted subject to compliance with the strict requirements set forth by the Swiss Supreme Court.¹⁴⁵

7. *Principles Affecting the Position of the Bank.*

The Swiss Supreme Court has confirmed on many occasions two basic principles affecting the position of Banks in connection with a proceeding of judicial assistance. The Swiss Supreme Court has held that Banks, when notified of an order of disclosure, have an obligation to inform their Clients.¹⁴⁶ With respect to their position in the assistance proceeding, the Swiss Supreme Court has repeatedly confirmed that Banks have an independent right to appeal an order of disclosure.¹⁴⁷ This conclusion stems from the basic assumption that Banks have a personal interest in protecting their own business relations with Clients against unjustified or illegal interferences.¹⁴⁸

B. *The Request for Assistance by Italy and the Response from Switzerland*

1. *The Facts.*

In May 1992 the Italian authorities asked the support of their Swiss counterparts in connection with the prosecution of corruption among Italian politicians and public employees. During their inquiry, the Italian prosecutors had found evidence that on many occasions the financial transactions in the corruption scheme, e.g. the payment of the bribe, had occurred by way of money transfers between accounts in Swiss Banks.

¹⁴⁴ See United States-Switzerland Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, art. 2.

¹⁴⁵ The Swiss Supreme Court has repeatedly held that the tax fraud exception is not intended to assist in connection with the prosecution of all tax offenses. It has therefore strictly defined the conditions upon which assistance for tax fraud may be granted and the requirements necessary to show the existence of tax fraud. BGE 116 Ib 103; BGE 115 Ib 78; BGE 111 Ib 242.

¹⁴⁶ BGE 113 Ib 168; BGE 110 Ib 88.

¹⁴⁷ BGE 118 Ib 442; See also Court of Appeals CRP 3/9/92, Rep. 342 (1992).

¹⁴⁸ For a discussion of the interest of Banks to protect their business relations with Clients in connection with assistance proceedings. See BODMER ET AL., *supra* note 52, at n.58 to art. 47.

Based on that assessment, the Italian authorities formally notified a request for assistance to the Public Prosecutor and to the Instruction Judge of the Canton of Ticino.¹⁴⁹

2. *The Decree of the Public Prosecutor.*

Based on the Information included in the request for judicial assistance notified by the Italian authorities, the Public Prosecutor suspected that third parties in Switzerland were responsible for handling and managing such bribes. He therefore formally opened an independent investigation into the alleged crimes of money-laundering and receiving stolen goods. In connection with his inquiry, the Prosecutor ordered all Banks in the Canton of Ticino (i) to disclose any and all Information related to accounts that might be held by said Banks in the name and for the account of forty-four persons, and (ii) the seizure of all amounts found on any such accounts.¹⁵⁰

The decree of the Public Prosecutor was "self-serving," e.g. was intended only for purposes of his own investigation and was not intended to satisfy the request for assistance by the Italian authorities. The issue on hand was to ascertain if, by whom, and to what extent one or more crimes had been committed in Switzerland.¹⁵¹

3. *The Decree of the Instruction Judge.*

The decree of the Instruction Judge was a response to the request for assistance by the Italian authorities. The order directed to all Banks in the Canton of Ticino was substantially the same as the one issued by the Public Prosecutor. All credit institutions were required to provide Information on, and to seize all funds deposited in, any account in the name or for the benefit of the same forty-four persons indicated by the Public Prosecutor.¹⁵²

With his decree, the Instruction Judge was positively responding to the request for assistance by the Italian authorities.

¹⁴⁹ An extensive presentation of the events which have caused the intervention of the Swiss authorities is included in the decision of the Court of Appeals CRP 3/9/92 published in Rep. 334-372 (1992).

¹⁵⁰ *Id.* at 338.

¹⁵¹ *Id.*

¹⁵² *Id.*

His purpose was (i) to gather information to send to Italy for use in a criminal investigation therein, and (ii) to obtain control of funds which were purportedly derived or otherwise connected with criminal activities.¹⁵³

4. *The Appeals.*

Both decrees were appealed by Banks as well as by most of the owners of the accounts.

Against the decree of the Public Prosecutor, the appellants claimed violations of form, as well as substantiation requirements. It was also claimed that the decree had the character of a "fishing expedition" which is prohibited under Swiss law. With respect to the object of the inquiry, the appellants claimed that (i) the crimes did not materialize as such; (ii) the antecedent crimes, necessary for the existence of the crime of money-laundering, do not exist under Swiss law; and (iii) there was no urgency to justify such a general and vague decree.¹⁵⁴

The claims against the decree of the Instruction Judge were based on violations of the form requirements and on the lack of substance in the request for judicial assistance by the Italian authorities. The notification of the Italian authorities was considered to lack sufficient description of the crimes imputed. The appellants claimed that, the description being necessary to verify the punishability of the crimes in Switzerland, it became impossible to establish if the decree was justified. Pursuant to the appeal, it was impossible to verify if the acts imputed in Italy represented political or tax crimes. Furthermore, the appellants claimed there were no facts to suggest crimes had been committed in Italy which were punishable under Swiss law. Finally, the decree of the Instruction Judge was opposed for representing a "fishing expedition" and for being disproportional.¹⁵⁵

Both the Public Prosecutor and the Instruction Judge opposed the Appeal.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 338-339.

C. *The Decision of the Court of Appeals*

Before entering the discussion of the Court decision itself, we note that the appeals against the decrees of both the Instruction Judge and Public Prosecutor were held jointly by the Court of Appeals. The Court found that not only were the facts upon which the decrees rested similar, but also the legal issues arising were common. The argument for consistency of judgment, arising out of the joint appeals, was considered with the technical problems that a separation of the proceedings would have generated.¹⁵⁶ Furthermore, while a separation of the proceedings would have been in the interest of privacy, the list with the names of the parties involved had received such publicity from the media that a severance of the appeals would not have preserved privacy.

Since no reason existed for the Court to produce separate sentences, all appeals against the two decrees were joined. Nevertheless, the examination of the specific issues arising out of the two decrees was conducted separately except with regard to procedural issues.

1. *Procedural Issues.*

In addition to the issue of the joinder of the appeals, the Court identified three major questions: (i) the right of Banks to appeal; (ii) the right of the owners of the accounts to appeal anonymously; and (iii) the compliance of the decrees with requirements of form.

The main arguments of the Public Prosecutor and of the Instruction Judge in favor of denying the right of Banks to appeal their decrees were that Banks could not be considered a party to the judicial assistance proceeding, nor to the independent prosecution investigation. In essence, for the Public Prosecutor and Instruction Judge, parties to the process were technically only those authorities requiring Information or individuals required to disclose Information. Banks were deemed mere instrumentalities of the investigation, purportedly thus deprived of a legitimate interest in appeal. While recognizing that Banks were not parties to the two proceedings, the Court found that the Banks had an independent interest to protect

¹⁵⁶ *Id.* at 341.

their Duty of Confidentiality. Thus, confirming prior jurisprudence,¹⁵⁷ the Court of Appeals accorded Banks a limited right to appeal decrees which violated their interest in safeguarding the Duty of Confidentiality.

Since Banks intervened in the appeal to protect their own interests in the preservation of confidentiality and to defend their Client's interests, the grounds that could be invoked against the decrees were limited. Accordingly, the Court of Appeals permitted the Banks to raise all formal objections, including the lack of proportionality and the reservation against "fishing expeditions."¹⁵⁸ Confirming prior decisions, the Court of Appeals allowed Banks to raise issues relating to the objective elements of the crime which would deny judicial assistance,¹⁵⁹ such as the statute of limitations,¹⁶⁰ but did not admit claims relating to the non-fulfillment of the subjective elements of the crime. The Court concluded that Banks have a specific, as well as a legal, obligation to protect confidential Client account Information. Accordingly, Banks were recognized as having the right to appeal the decrees based on their individual rights.

The Public Prosecutor and Instruction Judge also contested the Banks' right of appeal. The reasoning was that if a Bank had not maintained any relation with an individual, such Bank had no Duty of Confidentiality to protect Information which did not exist. Pursuant to this reasoning, then only Banks who maintained or had previously maintained accounts for the individual(s) who were the object of the inquiry were subjected to the decrees. Any other Bank lacked a legitimate interest in the appeal. The Court of Appeals dismissed the argument on the notion that it would defeat the purpose of the appeal process.¹⁶¹ In fact, under those circumstances, an appeal against a disclosure order would result in a positive response to the disclosure requested by such order. The Court of Appeals argued that discretion on the mere existence of a Banking relation, not only on the details of the relation itself, is mandated by the essence of

¹⁵⁷ BGE 105 Ib 429.

¹⁵⁸ CRP 3/9/92, at 344.

¹⁵⁹ BGE 117 Ib 54.

¹⁶⁰ BGE 112 Ia 602.

¹⁶¹ CRP 3/9/92, at 342-343.

the Duty of Confidentiality of Banks. The appeal against a disclosure order could represent in itself a disclosure and thus a potential violation of the Duty of Confidentiality. The paradoxal consequence of the Public Prosecutor's reasoning would put Banks in an automatic disclosure situation: if the decree is not appealed, disclosure must follow; if a decree is appealed, the existence of a Banking relation is disclosed. In both instances, Banks could incur a violation of the Duty of Confidentiality. Thus, the Court of Appeals rejected this argument and confirmed the right of Banks to appeal both decrees.¹⁶²

The right of account owners to appeal, without disclosing their identity, was contested by the City of Milan, which the Court of Appeals had admitted as a party to the proceeding.¹⁶³ Referring to its own precedents,¹⁶⁴ the Court of Appeals underlined that the authorization to appeal as "the owner of the account N[____] at Bank[____]"¹⁶⁵ represented a limited disguise of the appellant's identity. In fact, the name of the owner of the account was delivered to the Court in a sealed envelope. While the name was not disclosed to the parties to the appeal, the Court of Appeals reserved the right to open the envelope, at any time, in case of opposition to the title of an account. Nevertheless, even during this verification process, the Court would not have disclosed to the other parties the name of the account's owner.

The Court of Appeals confirmed that the right to appeal anonymously is necessary to protect the right of appeal. As maintained by the Swiss Supreme Court,¹⁶⁶ the access to certain Information by the parties to a proceeding may be denied in order to protect Bank secrecy. The issue to be resolved is related to the prevailing interest based on the principle of proportionality:¹⁶⁷ on one hand the protection of secret Information relating to the Bank customer; e.g. the identity of the owner of a certain Bank account; on the other hand the right of a participating party to know the identity of the appellant. Considering that the owners of the accounts entered the appeal

¹⁶² *Id.*

¹⁶³ *Id.* at 341.

¹⁶⁴ CRP 20/12/91; CRP 3/7/89; CRP 21/6/88.

¹⁶⁵ CRP 3/9/92, at Rep. 345 (1992).

¹⁶⁶ BGE 95 I 439, 445-446.

¹⁶⁷ BGE 95 I 103.

to oppose the disclosure of certain secret Information, including their identity, the Court of Appeals asked rhetorically: "[h]ow can one protect a secret if to do so he has to disclose it?"¹⁶⁸ Accordingly, the right of the account owner to appeal the decrees, without disclosing their identities, was protected.

Finally, among the preliminary issues examined by the Court of Appeals, was the lack of explanation for the decrees themselves. Considering that on one hand the obligation to provide the arguments supporting the decrees is mandated by law¹⁶⁹ and that on the other hand the explanation of the reasons behind a decree is an absolute requirement for the exercise of the right to appeal,¹⁷⁰ the Court of Appeals concluded that while the decree of the Instruction Judge satisfied the minimum requirements of the law, the decree of the Public Prosecutor, which did not provide supporting arguments at all, was insufficiently motivated.¹⁷¹ Nevertheless, the Court affirmed previous jurisprudence, whereby sufficient disclosure and argumentation in the appeal process would remedy a lack of argumentation of the decree appealed,¹⁷² thus saving the formal validity of the Public Prosecutor's decree.

2. *On the Appeals Against the Decree of the Instruction Judge.*

The Instruction Judge issued his decree complying with the request for judicial assistance received from the Italian authorities. The law applicable to the judicial assistance between Italy and Switzerland consists principally of the European Convention¹⁷³ and, where the European Convention is silent, legal grounds are provided by domestic laws on judicial assistance¹⁷⁴ which provide the limits and conditions for this assistance.¹⁷⁵

¹⁶⁸ CRP 3/9/92, at Rep. 346 (1992).

¹⁶⁹ Article 28 of the Code of Criminal Procedure.

¹⁷⁰ Article 4 of the Swiss Constitution and art. 13 of the European Convention on Human Rights.

¹⁷¹ CRP 3/9/92, at Rep. 350 (1992).

¹⁷² BGE 117 Ib 66.

¹⁷³ The European Convention of April 20, 1959 on Judicial Assistance in Criminal Matters has been ratified by both countries.

¹⁷⁴ Federal Law of March 20, 1981 on Judicial Assistance in Criminal Matters. Since Conventions prevail over domestic regulations, this law is applicable only to the extent it does not violate the letter and the spirit of the European Convention.

¹⁷⁵ BGE 112 Ib 576.

For the Instruction Judge to decide on the acceptability of a request for judicial assistance, it is necessary that the application by the foreign authorities provides Information sufficient to verify if the conditions for its acceptance are followed.¹⁷⁶ In particular, the Instruction Judge should be able to verify the punishability in Switzerland of the crime imputed by the foreign authority.¹⁷⁷ This Information can be provided at different stages prior to a formal decision by the Instruction Judge. The Instruction Judge can also solicit clarifications and additional details.¹⁷⁸ Considering that the mere legal qualification of a crime is not sufficient to support a request for judicial assistance, the Court of Appeals required a short description of the facts imputed, to allow the exam of the application and the evaluation of the proportionality of the specific acts of assistance requested.¹⁷⁹ Accordingly, after examining the Information available, the Court of Appeals suspended the execution of the decree against 11 of the 44 individuals and assigned the Italian authorities a 60 day period to complete the application with additional Information.¹⁸⁰

With regard to the issue of reciprocity,¹⁸¹ Switzerland has limited its assistance to the prosecution of such crimes whose objective elements are subject to prosecution in Switzerland in accord with its participation in the European Convention on judicial assistance.¹⁸² Confirming numerous precedents at the national level,¹⁸³ the Court of Appeals held judicial assistance admissible in connection with the prosecution of passive, as well as active, corruption.¹⁸⁴

¹⁷⁶ The Instruction Judge will base his decision for judicial assistance on the description of the facts which suggest illegalities by the Italian Authorities. The Instruction Judge's decision will be binding on the Italian Judge responsible for the matter. BGE 109 Ib 329. Accordingly, the Swiss Instruction Judge will attempt to limit potential contradictions and substantial loopholes in Swiss law.

¹⁷⁷ Except for military, political or tax crimes for which Switzerland does not provide judicial assistance. See CRP 3/9/92, at Rep. 351 (1992).

¹⁷⁸ DTF 106 Ia 264.

¹⁷⁹ DTF 106 Ib 264; 105 Ia 213; 99 Ia 78-79.

¹⁸⁰ CRP 3/9/92, at Rep. 354 (1992).

¹⁸¹ See Reciprocity . . . , *supra* section VI, part A, sub. 4.

¹⁸² Article 64.1 of the Federal Law on Judicial Assistance In Criminal Matters.

¹⁸³ BGE 115 Ib 257; 113 Ib 257; 112 Ib 576.

¹⁸⁴ CRP 3/9/92, at Rep. 356 (1992).

The Court of Appeals also examined the claim, raised by all appellants, that the decree of the Instruction Judge consisted of a "fishing expedition," e.g. a general and indiscriminate search for evidence to substantiate a theory of crime for which no sufficient elements are available.¹⁸⁵ The claim was that instead of targeting specific accounts, the decree covered all Banks for all Banking relations of 44 persons during the last five years.¹⁸⁶ Noting that the extended search did not in itself constitute a prohibited "fishing expedition," the Court of Appeals held that it was necessary that substantial elements indicated that the individuals listed in the decree were involved in the crimes described in the application, and that a reasonable suspicion existed that such individuals had used Swiss Banks, where the proceeds of the crimes may still be deposited.¹⁸⁷

After examining all available Information, the Court of Appeals came to the conclusion that a reasonable suspicion existed for only 13 of the 44 individuals listed in the decree.¹⁸⁸ For the remaining persons, the Court held that the suspicions, if any, were mere theories not supported by substantial elements. Accordingly, with regard to those remaining 31 individuals, the application for judicial assistance from the Italian authorities was held to be a "fishing expedition" and could therefore not be executed by the Instruction Judge.

Finally, the Court of Appeals examined the claim and held that if judicial assistance was granted, the Information transmitted would be used to prosecute tangential crimes. The condition that Information disclosed in connection with judicial assistance was not to be used in other proceedings, was contemplated by Switzerland in the act of ratification of the European Convention on Judicial Assistance in criminal matters.¹⁸⁹ Compliance with this requirement by states who have signed the European Convention can be presumed and the limits to the use of the Information transmitted are to be clearly stated in the transmission act.¹⁹⁰ Furthermore, only documents clearly rele-

¹⁸⁵ BGE 103 Ia 206.

¹⁸⁶ CRP 3/9/92, at Rep. 338 (1992).

¹⁸⁷ *Id.* at 357.

¹⁸⁸ *Id.* at 359.

¹⁸⁹ *Id.* at 362.

¹⁹⁰ BGE 112 Ib 590.

vant for the specific procedure are to be transmitted¹⁹¹ and the rights of privacy of unrelated third parties are to be protected.¹⁹² Accordingly, the Court of Appeals did not share the fear of abuse by the Italian authorities and rejected that claim as reason invalidating the decree of the Instruction Judge.¹⁹³

The Court of Appeals concluded its exam by partially confirming the decree of the Instruction Judge against 13 of the 44 individuals under investigation and submitting the execution of said decree against 17 other individuals to the condition of delivery by the Italian authorities of additional documentation within a 60 day period. For the remaining 14 cases the appeal was entirely admitted and the decree repealed.

3. *On the Appeals Against the Decree of the Public Prosecutor.*

As indicated in the section on the facts leading to this judicial case,¹⁹⁴ the Public Prosecutor issued his decree in connection with his own investigation for crimes presumably committed in Switzerland. The elements on which that inquiry was based were all found in the Information included in the request for judicial assistance filed by the Italian authorities. After examining that Information, the Court of Appeals concluded that the elements offered were so vague and generic that the decree appeared more as a "fishing expedition" for purposes to assist the Italian authorities than a step necessary to support reasonable suspicions of criminal activity in connection with the prosecutorial investigation.¹⁹⁵ In particular, the Court held that the effects and the potential damages of the Public Prosecutor's decree on the individuals concerned were disproportional and unjustified in consideration of the elements supporting the suspicion of crimes committed in Switzerland. Accordingly, while recognizing that the independent investigation of the Public Prosecutor could eventually justify the issuance of a decree such as the one appealed, the Court held that at that stage of the inquiry, and based on the Information and evi-

¹⁹¹ BGE 112 Ib 604.

¹⁹² Article 10.1 of the Federal Law on Judicial Assistance in Criminal Matters.

¹⁹³ CRP 3/9/92, at Rep. 362 (1992).

¹⁹⁴ See *supra* section VI, part B, sub. 1.

¹⁹⁵ CRP 3/9/92, at Rep. 364-65 (1992).

dence available at that point in time, the decree of the Public Prosecutor lacked probable cause.¹⁹⁶

The requirement that probable cause support a disclosure and seizure decree led the Court of Appeals to comment incidentally on the issue of reciprocity¹⁹⁷ in connection with the crime of money-laundering. Siding with one part of the doctrine on the subject,¹⁹⁸ the Court of Appeals required as proof of the crime of money-laundering¹⁹⁹ that the money so "laundered" originates from a criminal act, which is considered criminal, not only pursuant to the legislation of the country where it has been committed, but also in Switzerland.²⁰⁰ In doing so, the Court of Appeals required the application of the reciprocity standard not only to the crime of money-laundering, but also to the crime necessary to fulfill the crime of money-laundering.²⁰¹

With regard to the seizure ordered by the Public Prosecutor pursuant to Article 58 of the Penal Code,²⁰² the Court of Appeals observed that such a measure was unnecessary, extremely difficult and of limited effect.²⁰³ While admitting the authority of the Public Prosecutor to order a seizure pursuant to Article 58 of the Penal Code, the Court submitted the decision, on the adoption of the order, to the principle of judicial efficiency applicable to any public act performed under domestic law. Based on that notion, the Public Prosecutor should have withheld action, both because it was not clear that Switzerland had jurisdiction on the matter and because the foreign courts

¹⁹⁶ *Id.* at 366.

¹⁹⁷ See Reciprocity, *supra* section VI, part A, sub. 4.

¹⁹⁸ See 1 N. SCHMID, *RIVISTA DI DIRITTO AMMINISTRATIVO TICINESE* 412-414 (1992).

¹⁹⁹ Article 305 of the Swiss Penal Code.

²⁰⁰ The rationale behind this approach is that, under Swiss Law, confidential Bank Information will not be ordered disclosed by the judiciary if the essential element of the crime, e.g. money-laundering, was not deemed to be a crime under Swiss Law. This approach is not shared by those scholars who separate the crime of money-laundering from the act generating the money. The scholars supporting this doctrine focus exclusively on the double punishability of the money-laundering itself. See 8 PAOLO BERNASCONI, *SCHWEIZERISCHE ANWALTSVEREIN* 13.

²⁰¹ CRP 3/9/92, at Rep. 367 (1992).

²⁰² Article 58.1 of the Penal Code allows seizure of the profits or other assets derived from a criminal activity even if the owner cannot be prosecuted and punished for the crime. This may be the case when the owner is a resident of a foreign country, not legally competent, dead or unknown.

²⁰³ CRP 3/9/92, at Rep. 370 (1992).

were in a better position to ascertain the facts.²⁰⁴ Accordingly, the seizure was not justified by domestic law pursuant to Article 58 of the Penal Code and therefore any such measure was to be reserved for the procedure of judicial assistance.

The Court of Appeals further examined the relation between the Italian investigation, which caused the request for judicial assistance followed by the decree of the Instruction Judge, and the independent investigation of the Public Prosecutor.²⁰⁵ Certain appellants suggested that the decree of the Swiss Prosecutor, which was based solely on the request for judicial assistance and was not supported by any independent act of investigation, was in fact motivated by the desire of the Public Prosecutor's to assist its Italian colleagues, rather than the genuine need for discovery to support the Swiss investigation. Noting that it was not opposed to cooperation between the Swiss and the Italian authorities, the Court of Appeals held that such cooperation is illegal when it intends to by-pass, or has the effect of by-passing, principles regulating judicial assistance between states as well as the legitimate interests in protecting private or national interests.²⁰⁶

The Court further observed that because the Public Prosecutor was not part of the judicial assistance proceeding, this did not preclude him from accessing the Information acquired thereby.²⁰⁷ Therefore, despite not being permitted to issue his own decree, the Public Prosecutor still maintained the option of beginning or sustaining an independent investigation based on the findings of the Instruction Judge.²⁰⁸ Finally, the Court of Appeals found that the Public Prosecutor's decree also lacked the legal requirement of urgency since, on the one hand, he had access to the Information acquired by the Instruction Judge and, on the other hand, the seizure was accomplished in connection with the judicial assistance proceeding.

²⁰⁴ In those cases the prosecution of the crime and the seizure proceeding should be left with the authorities of the countries requesting assistance. *See* BGE 115 Ib 538.

²⁰⁵ CRP 3/9/92, at Rep. 371 (1992).

²⁰⁶ *See* CRP 3/9/92, at Rep. 334-72 (1992). This comment of the Court of Appeals was inexplicably not published in the reported decision.

²⁰⁷ Article 142.2 of the Code of Criminal Procedure of the Canton of Ticino.

²⁰⁸ CRP 3/9/92, at Rep. 371 (1992).

Accordingly, the Court of Appeals repealed the decree of the Public Prosecutor which ordered the disclosure of Information and seizure of the assets related to the accounts owned by the individuals subject to investigation of the Italian authorities.

D. *The Decisions of the Swiss Supreme Court*

The Swiss Supreme Court was first called upon to rule on this matter by an appeal of some of the individuals who were objects of the decree of the Instruction Judge²⁰⁹ and later by an appeal by the City of Milan,²¹⁰ both against the decision of the Court of Appeals in connection with the decree of the Instruction Judge. The portion of the decision of the Court of Appeals repealing the decree of the Public Prosecutor was not opposed by any of the parties involved.

The first appeal claimed that the Court of Appeals had mistakenly admitted compliance with the requirement of reciprocity²¹¹ for lack of punishability in Switzerland of the crime of corruption. The reasoning of the appellants rested on the assumption that Swiss law punishes as the act of corrupting Swiss but not Italian civil servants. Since the Italian authorities had requested the assistance of the Swiss authorities in connection with their investigation into the corruption of Italian public employees, the appellant concluded that the requirement of reciprocity was not complied with and therefore no judicial assistance could be granted. The Supreme Court dismissed this reasoning indicating that the exam of reciprocity of the punishability of the crime required transposition of the events.²¹² The acts attributed to the person under investigation, for purposes of the reciprocity requirement, had to be considered as if they were performed in Switzerland or under Swiss jurisdiction.²¹³ Accordingly, the Supreme Court held the act of corruption must be considered committed in Switzerland and the public employee corrupted was assumed to be serving as a Swiss authority.²¹⁴ The appeal was therefore dismissed.

²⁰⁹ Sentence 29/3/93, at Rep. 142-47 (1993), partially published.

²¹⁰ Sentence 1A. 211/1992 of June 29, 1993 of the Swiss Supreme Court, unpublished.

²¹¹ See Reciprocity, *supra* section VI, part A, sub. 4.

²¹² CRP 3/9/92, at Rep. 145 (1992).

²¹³ See also SCHULTZ, DAS SCHWEIZERISCHE AUSLIEFERUNGSRECHT 327 (1953).

²¹⁴ CRP 3/9/92, at Rep. 145 (1992).

The Swiss Supreme Court was later called again to decide on the portion of the sentence of the Court of Appeals concerning the decree of the Instruction Judge by an appeal of the City of Milan. Reconfirming the sentence appealed, the Supreme Court held that the Banks were correct to appeal since they were requested to disclose Information protected by the Duty of Confidentiality.²¹⁵ The Supreme Court also confirmed the requirement that sufficient explanation be included in the demand of judicial assistance filed by a foreign authority so as to allow the Instruction Judge to verify the existence of objective elements relating the person investigated to the crime asserted, as well as tracing the money to Swiss Bank accounts.²¹⁶ The Court held that requiring the Instruction Judge to begin indiscriminate searches to find the elements supporting the request of the Italian authorities would have violated the principle of proportionality and exceeded any reasonable requirement of the international judicial assistance.²¹⁷ The Supreme Court did not accept any of the other reasoning offered by the City of Milan in its appeal. Accordingly, the sentence of the Court of Appeals of the Canton of Ticino was held to conform to all applicable law.²¹⁸

CONCLUSION

Over the past two decades the Duty of Confidentiality of Banks has endured both foreign and domestic attacks. International treaties and conventions have reduced possible abuses, strengthening the credibility of the system. Having learned from the mistakes of the 1970's and 1980's, Swiss Banks have developed a system of internal controls and regulation that allows them to prevent, among others, the abuse of Bank secrecy

²¹⁵ Thus, the precedent held by the Supreme Court was confirmed. See BGE 118 Ib 444.

²¹⁶ *Supra* note 210, at 7.

²¹⁷ *Supra* note 210, at 7-8.

²¹⁸ The Supreme Court did not issue a decision on the appeal but simply concluded that no legal interest in the matter existed since, the persons for which judicial assistance had been suspended or denied, either the City of Milan had obtained the disclosure in later proceedings or it had withdrawn the request for assistance. Despite finding the issue moot, the Supreme Court discussed the matter summarily in order to decide, for purposes of refund of legal and judicial costs and fees, which party would have won and which party would have lost the appeal. See *supra* note 210, at 4.

for criminal purposes, particularly by organized crime. At the same time, the legitimate purposes that Bank secrecy is intended to serve have been reaffirmed at the political as well as judicial levels. Specifically, principles upon which Bank secrecy rests have been confirmed and have remained untouched by the decisions of the Court of Appeals of the Canton of Ticino and the Swiss Supreme Court. Therefore, the Duty of Confidentiality of Banks has remained intact and the respectability and strength of the Swiss Banking system has been enhanced.