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DISPUTE RESOLUTION

Noteworthy developments in the Swiss Federal Supreme Court's procedural case law

This newsletter highlights some notable decisions of the past year in which the Federal Supreme Court further defined its approach to partial actions, the admissibility of new allegations of fact in attachment proceedings, attorney-client privilege in internal investigations and – once again - retrocessions. We wish you pleasant summer reading.

1 PARTIAL ACTION

1.1 INTRODUCTION

The Swiss Federal Supreme Court ("**SC**") has recently rendered three decisions on so-called partial actions. The case law of the SC has taken a remarkable turn.

If a claim is divisible, an action can be brought for only part of the claim (art. 86 Swiss Civil Procedure Code, "**CPC**"). A distinction is made between a *genuine partial action*, in which only part of a single claim is brought, and a *non-genuine partial action*, in which one of a number of related claims is brought.

The partial action is a frequently used and, in principle, legitimate mechanism to limit the cost risk of bringing a claim before court.

According to the SC's previous practice, which only persisted for two years, the plaintiff had to specify the order and/or extent to which the individual claims were raised when submitting several partial claims simultaneously in the same proceedings (cf. DFT 142 III 683). If the plaintiff failed to do so, the prayers for relief were deemed not sufficiently determined and the action was dismissed in its entirety. This jurisprudence has now been amended.

1.2 DFT 144 III 452

The reason why the SC changed its practice was because it was **impracticable to distinguish** between instances where several claims were being partially brought before court (i.e., a plurality of genuine partial actions requiring a specification of the order/extent to which the individual claims were being raised), and those where individual aspects of one single claim were being brought jointly (non-genuine partial actions; no further specification required). In particular, plaintiffs could not foresee with certainty how the court would assess the factual basis presented and whether they would be required to comment on the order and scope of the individual claims in the event the court deemed that the dispute concerned a plurality of claims. Hence, plaintiffs shall now only be required to substantiate the individual partial claims brought and allege that they have a claim which, in total, exceeds the amount currently in dispute.

In the event that the partial action is granted, it is to be inferred from the reasoning of the judgment to what extent the court has assessed the alternative claims (consid. 2.4).

"In Principle, the order in which the various claims are examined is in the court's discretion."

1.3 DFT 4A_270/2018 (NOVEMBER 2, 2018)

Shortly after rendering the above-mentioned decision, the SC had the opportunity to recall its practice regarding the *res iudicata* effect of decisions on partial actions. The ***res iudicata* effect does not extend to the entire claim** that the plaintiff is asserting against the defendant, but only to the partial amount which was brought before, and was assessed by, the court.

However, the SC pointed out that the decision nevertheless has a certain binding effect. In the event of a later dispute concerning the remainder of the claim, the parties must specifically establish why the same question should be decided differently (consid. 1.2).

1.4 DFT 4A_29/2019 (JULY 10, 2019)

Most recently, the SC was able to comment on the effects of its new jurisprudence – established in DFT 144 III 452 (already mentioned in section 1.2 above) – on the admissibility of **negative declaratory counterclaims** to partial actions. In an earlier decision (DFT 143 III 506), the SC had recognized an exception to the requirement of art. 224 para. 1 CPC (i.e., that a counterclaim must fall under the same type of procedure in order for it to be admissible) where the counterclaim consists of a request by the defendant for a (negative) declaration that the plaintiff's entire claim, rather than only the part brought before court, is without merit. The exception was believed to apply only to genuine partial actions. However, following the SC's latest decision, the exception is now considered generally applicable, provided that the partial action (whether genuine or non-genuine) results in an unacceptable uncertainty for the defendant.

2 ADMISSIBILITY OF NEW ALLEGATIONS OF FACT WHEN APPEALING AN ATTACHMENT ORDER – COMMENTS ON DECISION 5A_626/2018

2.1 SUMMARY OF THE DECISION

A debtor's objection against the freezing of his assets was rejected by the court of first instance. The High Court admitted the debtor's appeal on the basis of facts that had occurred prior to the handing down of the first instance judgment and were relied on for the first time in the appeal proceedings. Following an appeal by the creditor, the SC was asked to rule on the question whether the debtor may rely on non-genuine *nova* when appealing an attachment order, i.e. on facts which had occurred before the judgment of the first instance was rendered. The SC clarified the scope of art. 278 para. 3 of the Swiss Debt Enforcement and Bankruptcy Act ("**DEBA**") by ruling that **the debtor may introduce non-genuine *nova* in the course of the appeal proceedings**. However, the SC imposed a condition on the admissibility of non-genuine *nova*. Namely, they must be submitted in accordance with the requirements of art. 317 CPC, i.e., they must be invoked without delay and are only admissible if, despite reasonable diligence, they could not have been submitted earlier.

2.2 ANALYSIS OF ARGUMENTS

After a thorough analysis of the case law and legal doctrine, the SC applied a pluralism of methods in interpreting art. 278 para. 3 DEBA. As the systematic interpretation of art. 278 para. 3 DEBA (particularly in conjunction with art. 174 DEBA and art. 326 CPC) failed to provide a solution, the SC primarily relied on the teleological interpretation to resolve the issue. It also emphasized that, in order to protect the debtor, it is vital that the court make its decision based on **all facts available at the time of judgment**. The SC further took into account the fact that a civil attachment qualifies as a provisional protective measure and has drastic effects on the debtor's position.

2.3 COMMENTS

The solution chosen by the SC seems to be the appropriate one, and it is surprising that it took so long to finally obtain this most welcome clarification.

Notably, the decision seems to apply different standards to the parties to attachment proceedings when it comes to the admissibility of new allegations of fact even though the wording of art. 278 para. 3 DEBA implies that the same standard should apply (see in particular the French version: "*Les parties peuvent alléguer des faits nouveaux*"). In fact, already in an earlier decision not published in the official records (5D_220/2017 of December 4, 2017) the SC had held that it is by no means arbitrary to prohibit the creditor from submitting additional documents in the appeal procedure to further substantiate his claim. In other words, the creditor must provide all relevant facts in his application for the attachment.

"The decision seems to establish different standards for the parties to attachment proceedings with regard to the admissibility of new allegations of fact."

Therefore, the decision of the SC primarily strengthens the debtor's protection against unjustified attachments. It also seems to introduce a differentiated rule on the admissibility of new allegations of fact, which is more favorable and more flexible for the debtor than the creditor. This approach seems justified because the evidence only needs to meet a *prima facie* test in attachment proceedings, but also because the creditor may apply for a new attachment order.

3 PROTECTION OF ATTORNEY-CLIENT PRIVILEGE IN INTERNAL INVESTIGATIONS IN THE AREA OF MONEY LAUNDERING

3.1 INTRODUCTION

The SC's decision of February 6, 2019 (DFT 1B_453/2018) put an end to the efforts of a bank trying to prevent the unsealing of a report on its internal money laundering investigation based on the attorney-client privilege.

Suspecting a major fraud scandal that had harmed many of the bank's customers, the bank had appointed a law firm to conduct a thorough *ex post* investigation. The law firm was to assess the facts, the legal compliance of the bank's conduct, and the risks involved, as well as to recommend

measures. The law firm documented the results of the internal investigation in a report. When the Federal Department of Finance initiated criminal proceedings against the bank's executives for failure to report suspicions of money laundering and requested that the investigation report be handed over, the Federal Department of Finance only obtained it under seal.

3.2 PROCEDURAL HISTORY AND DECISION

In the subsequent unsealing dispute, the bank initially prevailed. To the Federal Criminal Court, it seemed clear that the work carried out by the law firm constituted "*classic legal advice*". Yet, in a much-commented decision, the SC overturned that ruling. According to the SC's assessment, the appointment of the law firm was a "***mixed mandate***" in which lawyer-specific services and so-called ancillary business services overlapped. The investigative work which had been carried out by the law firm had the characteristics of controlling and auditing work, as required by money laundering law. Such a task, which constitutes a delegation of the bank's own obligations, does not qualify as the typical activity of a lawyer. Accordingly, the SC found that the law firm's findings were not protected by attorney-client privilege to the extent that these findings constitute the result of outsourced legal duties (DFT 1B_433/2017, consid. 4).

The Federal Criminal Court, upon analyzing the case for the second time, concluded that all parts of the investigation report are to be qualified as **ancillary commercial services** in accordance with the SC's considerations. Therefore, the full investigation report, including its annexes (such as interview minutes etc.), had to be unsealed.

The SC, again dealing with the matter in appeal proceedings, confirmed this conclusion. The bank, which had appealed, did not identify the parts of the report that could be attributed to typical lawyers' activity and thus would be protected by attorney-client privilege. To the extent that the bank's arguments were directed against the SC's previous decision, they were not admissible (DFT 1B_453, consid. 6).

3.3 COMMENTS

The complete unsealing of the investigation report is likely excessive, even taking into account the SC's earlier considerations in this regard, but may well be owed to the procedural tactics applied by the defendant bank in the specific case. On the other hand, the refusal to protect attorney-client privilege for all factual statements and documents (such as interview transcripts, etc.) is a logical consequence of **the SC's new case law on legal privilege in money laundering-related cases**.

"By approving such a broad interpretation, the SC is not furthering the goal of combating money laundering in the long term."

The new case law has been **heavily criticized**, and for good reason. By interpreting the bank's anti-money laundering (investigation and documentation) obligations in a very broad sense, the SC attaches greater importance to an efficient criminal prosecution than to the fundamental interest of administering justice, which the attorney-client privilege seeks to protect. In our opinion, this approach seems inappropriate. By approving such a broad interpretation, the SC is not furthering the goal of combating money laundering in the long term. Unsurprisingly, companies faced with the prospect of having to disclose their internal investigations to the prosecution authorities might be deterred from conducting such investigations in the first place.

4 COMMENTS ON DECISION 144 IV 294

This decision deals with the criminal consequences faced by an asset manager who failed to inform his clients in an appropriate manner of **the existence of retrocessions** received from the custodian bank. It represents a further element of the SC's case law on retrocessions in recent years.

4.1 SUMMARY OF THE FACTS

X., the appellant, was acting as asset manager in the company Y. SA, of which he was also the director and sole shareholder. From the end of 2007 to the end of 2010, Y. SA received from the custodian bank retrocessions in the amount of CHF 270'542.38 and finder's fees of CHF 134'705.66 for the years 2007 and 2008. X. neither informed his clients of these retrocessions and fees nor did he pass such sums on to them.

4.2 ANALYSIS OF ARGUMENTS

The SC held that the agent's duty to report is an **increased or qualified obligation to act**. Insofar as the agent is obliged to return to the principal everything he has received during the term of the mandate, including retrocessions (DFT 132 III 460), the duty to inform about such amounts is intended to protect the client and enable him or her to ask for the reimbursement of sums or claim damages, as the case may be. Therefore, if the asset manager remains silent, he or she is **objectively punishable under art. 158 of the Criminal Code ("CC")**.

"The asset manager who has not obtained the client's valid waiver is at risk of being convicted pursuant to art. 158 CC."

The SC did not follow the appellant's argument that he had faithfully relied on the validity of the waivers some of his clients had signed in 2008, which did not meet the requirements set out in the case law. The SC considered that it had already established, in its judgment DFT 137 III 393, that the client could not validly release the asset manager from his duties if the client did not receive complete and truthful information concerning the remuneration the manager received from the depositary bank or other third parties during the term of the mandate.

4.3 COMMENTARY

This decision establishes a link between contractual obligations in relation to retrocessions and the criminal consequences in case of non-compliance.

As a reminder, the SC has established the **following principles**:

(i) The agent is required to pass on to the principal any retrocessions received from the depositary bank pursuant to the rules governing agency agreements (art. 400 para. 1 CO). However, this obligation is not mandatory. For the waiver of such duty to be valid, the principal must be fully and accurately informed about these retrocessions and must unequivocally express the intention to waive them (DFT 132 III 460).

(ii) For the waiver to be considered valid, the principal must have been informed of the parameters necessary to calculate the overall amount of the retrocessions and the amount of the expected retrocessions (DFT 137 III 393).

In view of DFT 144 IV 294, the asset manager who has not obtained a client's waiver in accordance with these conditions is at risk of being convicted pursuant to art. 158 CC.

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