

The limits of the bank's power: the Lugano judgment of 2015

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The restrictions raised a question of Swiss private law: could a bank refuse to pay out the assets of a client who did not prove his tax compliance? The question came before the courts of Ticino. On 12 February 2015 the Second Civil Chamber of the Court of Appeal of the Canton of Ticino upheld a first-instance decision in favour of an Italian client. His bank had requested a declaration of tax compliance, refused a cash withdrawal of EUR 75,494, blocked transfers to local merchants and announced the closure of the account under a new commercial policy, invoking legal and reputational risks.¹ The court held that the bank could not restrict the client's access to his assets on the basis of its internal directives alone. FINMA's statements on reputational risks did not require such restrictions. The new Italian law of 2014 that introduced the offence of selflaundering had no direct application in Switzerland. There was no legal basis for refusing the restitution of the assets to their legitimate owner.²

The decision did not prevent banks from terminating relationships, which they remained free to do under the general terms of business. Nor did it address the case in which the bank had concrete indications of money laundering. It did set a limit to the practice of using the client's own money as leverage to obtain proof of compliance. Swiss practitioners debated at the time how far the guarantee of irreproachable business conduct could justify contractual restrictions, and to what extent the freedom of capital movements and the private law relationship between bank and client limited them.³ The balance that emerged in Lugano was pragmatic. Banks terminated relationships with clients who refused to regularize, paid out the assets by transfer to an account in the client's name in a country that exchanged information, normally Italy, and avoided large cash withdrawals. That route ensured that the money would be visible to the Italian authorities on arrival.

1 The client's dilemma in 2014

By 2014 an Italian client with an undeclared account in Lugano faced a closing set of options. His bank was asking for evidence of compliance and threatening to close the account. Transfers to Singapore, Dubai or other distant centres were blocked or subject to scrutiny, while those centres themselves were committing to the automatic exchange of information. Cash withdrawals were limited. The presumption of Article 12 of Decree-Law No. 78 of 2009 made the account itself taxable as concealed income. The doubled assessment periods extended his exposure to the tax years since 2004 or 2005. The Italian Parliament was debating a voluntary disclosure law. It was in this situation that the Italian legislature offered the fourth regularization programme, which differed from the three *scudi* in that it was neither anonymous nor cheap.

2 Notes

1. Court of Appeal of the Canton of Ticino, Second Civil Chamber, judgment of 12 February 2015, as reported by Zulay Manganaro, "Seconda Camera Civile Tribunale d'Appello di Lugano. Una sentenza sui conti degli italiani", Studio Cataldi, 28 February 2015, <https://www.studiocataldi.it/articoli/17718-seconda-camera-civile-tribunale-d-appello-di-lugano-una-sentenza-sui-conti-degli-italiani.asp>. The docket number was not available. ↩
2. Manganaro (above). ↩
3. SUPSI seminar of 17 April 2015 (above), with a contribution by Francesco Trezzini on the civil law legitimacy of banking restrictions for foreign tax risks. ↩

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