Confidencialidad de la información financiera: Levantamiento de la reserva y confidencialidad para la obtención de evidencias en la resolución alternativa de disputas

Confidentiality of Financial Data: Disclosure for the Collection of Evidence on Alternative Disputes Resolution

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Abstract

With the extraordinary development of anti-money laundering regulations, the confidentiality of financial information has displaced banking secrecy from many Latin American jurisdictions. Such is the case in Bolivia, where confidentiality is the guiding principle on which the current financial system is based and built. Confidentiality is the tool that allows for the integral protection of a legal asset, object of constitutional protection, such as the individual freedom, and in this case, it translates into the custody of privacy of the financial information. As a general

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principle, the regime of exceptions to this rule must be regulated by the principle of specificity, which is established by national law and must be interpreted restrictively. This article will analyze the applicability of the exception's regime to the confidentiality of financial data for evidence gathering in alternative dispute resolution processes.

Keywords: money laundering / confidentiality / bank secrecy / Bolivia / financial system / constitutional protection / individual freedom / financial information / exceptions /evidence / in alternative dispute resolution processes.

Resumen

Con el notable desarrollo de la regulación en materia de lavado de activos, la reserva y la confidencialidad de la información financiera han desplazado al secreto bancario en muchas jurisdicciones de América Latina. Tal es el caso de Bolivia, donde la reserva y la confidencialidad se constituyen en los principios rectores sobre los cuales se apoya y construye el sistema financiero actual. La reserva y la confidencialidad son herramientas que permiten la protección integral de un bien jurídico objeto de tutela constitucional como es la libertad individual, y, que, en este caso, se traduce en la custodia de la intimidad y la privacidad de la información financiera. Como principio general, el régimen de excepciones sobre esta regla debe estar regulado por el principio de máxima taxatividad, hallarse fijado por la ley nacional y ser interpretado de forma restrictiva. Este artículo busca analizar la aplicabilidad de la excepción a la reserva y la confidencialidad de la información financiera para la obtención de evidencias en procesos de resolución alternativa de conflictos.

Palabras clave: lavado de activos/ reserva y confidencialidad/ secreto bancario/ Bolivia/ sistema financiero/ tutela constitucional/ libertad

individual/ información financiera/ régimen de excepciones/ evidencias/ resolución alternativa de conflictos.

1. Introduction

In recent years, banking secrecy has undergone successive transformations, within Bolivia and the rest of the world. Therefore, it is extremely interesting to analyze the evolution of this institute over time.

A commonly raised legal impediment on the production of evidence in alternative dispute resolution (ADR), particularly, in disputes involving banks, is the banking secrecy regime. Financial services and general banking legislation around the globe may provide that, financial institutions cannot disclose information and documents about accounts held by their clients. Failure to comply with these provisions may put the financial institution at a genuine risk of sanctions.

Breach of a banking secrecy or a confidentiality regime may, in some jurisdictions, even trigger a criminal prosecution and a later conviction.

For instance, under the Bolivian Criminal Code, unauthorized receiving, disclosure, or usage of information, including data covered by confidentiality, made without the permission of its owner, by a person to whom it was entrusted or who has obtained the information during business, constitutes a crime, and shall be punished with fine or by deprivation of liberty.

Evidence is needed during any arbitration procedure, which in some cases may consist of confidential and secret financial information from the parties in dispute, but which cannot be obtained at any price. Moreover, the possibility of obtaining information is limited by the rights of citizens and, particularly, by the fundamental rights to privacy and intimacy.

In this context, this article will analyze the regime of exceptions to the confidentiality of financial data for the collection process of evidence on ADR.

2. Method

2.1. Objective

Analyze the regime of exceptions to the confidentiality of financial data for the collection process of evidence on ADR in Bolivia.

2.2. Type of study

Descriptive - Non-experimental.

This investigation aims to specify the properties, characteristics, and important features of current Bolivian legislation in relation to the processing and collection of financial data in ADR processes, to safeguard the rights to privacy and intimacy of the financial consumer. The sources of information used for these purposes were the legal regulations on financial matters, the historical background of banking secrecy prior to the regulation of confidentiality in financial matters in Bolivia, and the existing doctrine on the subject.

This research is non-experimental, as the independent variable is not deliberately manipulated. According to Hernández et al. (2007, p.205, 206) in these studies “no situation is constructed, but rather existing situations are observed, not intentionally provoked by the researcher. In non-experimental research the independent variables have already occurred and cannot be manipulated, the researcher has no direct control over these variables, they cannot influence them because they have already happened and so have their effects”.

This work is based on events that have occurred in relation to the handling of information in the financial and tax field and without the direct

intervention of the researcher. Taking this aspect into account, the analysis of this study was carried out through a retrospective approach, studying the causes that resulted in the gradual disappearance of banking secrecy in Bolivia.

3. Origins and Gradual Disappearance of Banking Secrecy

The protection that banks and financial institutions must grant to their client's deposits and any raised funds that they receive from their customers, is known as banking secrecy.

History reveals that banking secrecy was introduced in Switzerland as an indispensable key to the success of today´s Swiss financial industry. It is well known that over the last thirty years, Switzerland has become a leader in cross-border asset management worldwide.

Prior to the Swiss Banking Law of 1934, according to author Robert Vogler (2006), banking secrecy was mainly based on tradition in this country, there existed laws in some cantons applicable to public banks only, on an unwritten code of confidentiality form and very similar to the professional secrecy, offered by lawyers, doctors and priests.

There is also a thesis which sustains banking secrecy was created to prevent Nazi spies getting Jewish assets in Switzerland.

Likewise, there is another current claiming that tax evasion made possible by banking secrecy, was clearly the true reason for its introduction on the financial entities.

As shown, there are, undoubtedly, a whole series of theories regarding the origins and significance of banking secrecy in Switzerland.

The truth is, the primary reason for people to transfer their money to Swiss banks was not only banking secrecy, but the tough political,

economic, currency and fiscal conditions in other countries. These negative parameters caused the flow of foreign money into Switzerland.

With the passing of years, a close association between banking secrecy and crime has been created.

The following case, according to Vogler (2006), is one example of many others that have occurred, which have damaged the reputation of banking secrecy: In the mid-1990s, Swiss banks were accused of systematically withholding dormant assets belonging to victims of the Holocaust from their rightful owners; but also, of systematically enriching themselves as result of this system. Banking secrecy was allegedly used as the pretext that allowed them to get away with Jewish wealth.

As it is evident, the financial system can be used as an instrument to legitimize dirty money from illicit activities. In this respect, organized crime seeks manners and the best possible strategies to hide enormous profits obtained without arousing the slightest suspicion, devising ingenious ways of concealing what is illegal by giving it the appearance of being legal, giving rise to what is known as money laundering.

Some of the reasons that led to the gradual disappearance of banking secrecy were:

- Evasion of regulatory conditions, e.g., stock market rules, in a specific country.
- Escape from excessive taxes.
- Financial crime and fraud (often combined with money laundering).

4. Reserve and Confidentiality of Financial Data

Focusing our attention on South America, specifically in Bolivia, it can be evidenced that with the enactment of the Financial Services Law in 2013, banking secrecy was reversed, and reserve and confidentiality of financial information were recognized. Banks, at present, may enter into confidentiality agreements or undertakings with customers under which express contractual obligations arise.

Before entering more detail, it is important to differentiate between what is meant by reserve and confidentiality of information.

Even if Bolivian regulation does not specifically differentiate between both terms, we can find this differentiation in the Uruguayan Public Information Classification Manual.

Reserved information is that which, for exceptional reasons, is declared as such by a competent authority, to prevent public access to it. To classify information as reserved it is necessary to justify it is imperative and necessary to keep the information confidential because it affects a legitimate interest of the State.

On the other hand, confidentiality consists of protecting an individual's information. It directly protects the right to privacy, a person's property, information of a business to protect competition, etc. [1]

5. Financial Data Disclosure on Alternative Disputes Resolution

The grounds provided by law for banking information disclosure by financial intermediaries are as follows:

[1] Public Information Classification Manual- Uruguay (2020).

5.1. Compulsion by Law

The duty to comply with local law overrides the duty of confidentiality. Key legislative provisions require an individual or entity to disclose information under the scenarios described above.

Prevention of Crime

The disclosure of information for the investigation of corruption offenses is not treated as a breach of restriction upon disclosing information imposed by statute, contract or otherwise under the Law against Corruption, Illicit Enrichment, and Investigation of Fortunes (2010).

Under Bolivian law, the Financial Investigations Unit (UIF), the Financial System Supervisory Authority (ASFI) or any judicial authority may order the production of, or access to, specified documents. A production order may be issued to investigate whether someone has benefited from criminal conduct or to identify the proceeds of any criminal conduct.

Article 473 of the Financial Services Law on financial data disclosure states that the reserve and confidentiality shall not apply when the information is requested by judicial authorities and public authorities investigating crimes, corruption cases, the origin of fortunes and illicit gains; tax authorities; the UIF and the ASFI.

Therefore, based on the principle of collaboration with justice and national security, among other reasons, there is a duty to hand over and exchange relevant information for the investigation of money laundering and terrorist financing offenses.

There can be extraterritorial aspects to disclosure by compulsion of law. An overseas claimant in proceedings can seek to obtain confidential information from a bank in Bolivia and the opposite situation can occur from a client in Bolivia. The position varies depending on

whether the proceedings are civil or criminal and what international treaties or conventions apply.

Taxation

Information is not only necessary, but also perhaps the most important asset a tax administration has.

The tax Bureau can have very advanced legislation, well-trained officials, and even sufficient material resources, nevertheless, without good quality information, it- will never be truly effective.

As stated in Article 31.1. of the Spanish Constitution, the duty to communicate tax-relevant data is a necessary instrument, not only for a fair contribution to general expenses, but also, for efficient tax management.

The Internal Revenue Service (IRS) authority in Bolivia has broad investigatory powers if it suspects non-compliance with statutory provisions regarding tax avoidance through the transfer of assets abroad; it has other powers to obtain information, particularly if it suspects tax fraud. These include powers to oblige third parties, including banks, to disclose documents in relevant circumstances.

Under this understanding, the right to privacy is limited by the duty to contribute. It implies that the constitutional duty citizens have to contribute to the State through the payment of taxes implies the non-existence, before the Tax Bureau or other public authorities, of an alleged absolute and unconditional right to preserve of the taxpayer's economic data with tax transcendence or fiscal relevance, as it would prevent an equitable distribution of the support of public expenditures as a constitutionally protected good.

Certainly, the right to privacy has had to yield to the duty to contribute to public expenses, as it had to yield to other constitutional rights such as the right to receive and communicate truthful information, or to the

needs arising from the exercise of employers' powers of control over their employees.

Inter-institutional Cooperation

Bolivian legislation provides that private and public Entities must adopt the necessary measures and incorporate the technologies required to promote information exchange with public and private entities in their respective activity areas.

Permitted Disclosure with the Costumer´s Consent

If a bank notifies a customer that it proposes or is entitled to disclose specified information and the reason and receives consent (preferably in writing) from the customer, there will be no breach of duty.

If the bank gives a customer notice and the customer does not reply, the bank will not necessarily be entitled to assume implied consent.

As a practical matter, consent can be difficult to prove and may easily be withdrawn.

Express provisions consenting to the disclosure of information can be important in the documentation for loans where lenders may wish to transfer their interests in the future and in intercreditor deeds where banks with separate relationships may want to share information on customers.

6. Banking Data Disclosure for Evidence Production on ADR

During the last years, we have witnessed the growing protection of the right to privacy and intimacy due to the speed with which our information can be disseminated thanks to Information and Communication Technologies.

General prohibitions on processing and transferring personal data will inevitably affect arbitration proceedings in all their stages.

Under Bolivian law, the review of correspondence and documents at the outset of a dispute in preparation thereof, can constitute a breach of the right to intimacy, the purpose of which will have to be compatible with the purpose the data was originally collected for or be covered by consent.

Bank clients may have to be informed that their data may later be processed and transferred in arbitral proceedings in order to avoid the breach of the data owner´s right to confidentiality and reserve of its financial information.

Bolivian regulation does not have a specific data protection law that preserves the proper treatment of personal data. Nevertheless, financial data is specially protected through a specific regulation issued by ASFI, which we refer to as the Regulation for the Information Security Management, besides the reserve and confidentiality regulated under the Financial Services Law.

Obligations imposed by the Financial Services Law, regarding confidentiality of financial data, might clash with a document production order by the tribunal, as the documents will contain personal data.

Although, at first sight, this seems covered by the exemption compliance with a legal requirement, the Financial Services Law specifies that financial data disclosure can only occur for legal orders from an ordinary justice tribunal, not ones created by an arbitral tribunal.

However, there could be an exemption under a “legitimate interest.” It requires a careful weighing of interests in the individual case, considering what type of data is being processed (financial data is considered especially sensitive), their volume and possible measures like blackening the relevant documents.

The principle of purpose, security, and confidentiality[2] will also require carefully limiting document production to the extent necessary.

7. Conclusions and Recommendations

Bank secrecy finds its raison d'être as a manifestation of the right to privacy. In turn, the right to privacy is one of the most precious legal assets, one of the fundamental rights, supported by constitutional laws, not only in Bolivia but also in the rest of the world.

The measures for processing financial data, to be adopted in Bolivian financial entities must comply with the provisions of ASFI's Information Security Management Regulations and the financial entity's Information Security Policy.

These measures may include, but are not limited to:

- The employees of financial institutions accessing clients´ data must maintain the confidentiality of the information, even after the employment relationship has ended.
- Since sensitive information is involved, a legal record must be kept in relation to all the activities that have been carried out.

It means that a detailed report must be made to record all data processing.

Reserve and confidentiality of financial information are two of the pillars that ensure the legal collection of information without violating the financial entity clients' right to privacy, excluding the exceptions provided by law and the production of evidence during ADR.

[2] *See* Supreme Decree No.1793, Art. 4, paragraph II.

The ICSID tribunal in the case Caratube International Oil Company LLP and Devincci Salah Hourani v. the Republic of Kazakhstan (ICSID Case No. ARB / 13/13), has established a principle whereby an arbitral tribunal may admit as evidence data or documents that were obtained illegally, for example by hacking a computer network.

In this case, the Kazakhstan government's computer network was hacked, and, as a result, the claimants gained access and relied on thousands of confidential documents that were published after the hacking.

As noted throughout this paper, there are exceptions to the confidentiality and secrecy of financial information. However, the powers of any public or private authority must balance against the fundamental rights of the financial consumer, and the collection of evidence during a judicial or arbitration process does not per se imply the subordination of these rights.

The collection of evidence requires an ethical vision and should not subordinate to the financial consumer's right to privacy, and, therefore, should not take place without a justified resolution or court order.

Financial data, useful for ADR processes, must be treated according to legitimacy and purpose principles to be used as evidence. Otherwise, the evolution of bank secrecy will end in its total extinction and the consequent suppression of individuals' right to privacy.

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