

Pre-trial rights of information and inspection under Swiss law

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Before the initiation of costly legal civil proceedings, the claimant must assess whether a claim exists, whether he can prove it, and whether the defendant has sufficient financial resources to pay the award. Sometimes there exists an asymmetry of information in favour of the defendant, rendering the above tasks challenging for the claimant. In contrast to the discovery proceedings available in many common law jurisdictions, in Switzerland as a civil law jurisdiction, the possibilities to compel the defendant to produce documents during legal proceedings are limited. It is therefore important to use the instruments offered by Swiss law during the pre-trial phase to receive the required information. This article presents some possibilities.



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Right of inspection pursuant to Art. 958e of the Swiss Code of Obligation (CO)

I. Which data can be inspected?

All entities that have outstanding bonds or equity listed on a stock market have a duty to disclose their annual report and audit reports to their creditors. In all other entities, who have the duty to keep files and file financial reports, creditors have a right to inspect the annual report and the audit reports only if they have a legitimate interest. The annual report consists of the balance sheet, the profit and loss statement, annexes and – if applicable – the consolidated accounts.

II. Requirements for a right of inspection

The right of inspection can be requested by any creditor with a legitimate interest within one year after the approval of the annual report by the competent body, normally the general meeting of the equity holder. If the annual report and/or the audit reports were not approved within the statutory period, the inspection of the documents can be requested, although

the one-year period has not yet started running.

The Swiss Federal Supreme Court affirmed a legitimate interest of a creditor who requested the inspection pursuant to Art. 958e CO to collect evidence for the subsequent enforcement of a civil claim.

Art. 958e CO does neither apply for past or future creditors nor for shareholders. However, pursuant to Art. 697 CO, a shareholder has the right to inspect the annual report.

III. Insights for the claimant

The information according to Art. 958e CO may be essential to assess the financial situation of the defendant, especially whether the defendant is solvent. Furthermore, through the annual report the claimant may identify assets located in Switzerland, which are subject to a freezing order. Finally, a claim is potentially shown as a liability or reserve in the balance sheets which can be an indicator whether the defendant or the defendant's audit believe a claim exists.

Further instruments

It should be noted that further legal provisions provide for rights of information, e.g., for employees (Art. 322a CO), for principals under an agency relationship (Art. 400 CO) or for parties of a general partnership (Art. 541 CO).

Furthermore, many specific legal provisions provide for other rights of inspection for specific situations, e.g., the insured and the liable party under a pension plan have a right of inspection according to Art. 85b of the Federal Act on Occupational Retirement, Survivors', and Disability Pension Plans.

Finally, the Swiss Civil Procedure Code provides instruments to collect evidence precautionary, if the law grants the right to do so or if the claimant shows that the evidence is at risk or that he has a legitimate interest.

Right to information under the Federal Act on Data Protection (FADP)

I. Purpose

According to Art. 8 FADP, anyone has a right to receive information on the personal data which was processed or collected about them. This right is exercised by submitting a request for information under the FADP.

In the context of a possible legal dispute, a potential claimant may pursue various goals with a request for information: He may want to find out what claims he is entitled to or gather evidence for a possible lawsuit. In the pre-trial phase, it is hence recommended for litigation lawyers in the area of private law not to overlook this important instrument of public law.

II. Which data can be retrieved under a FADP-request?

The party required to provide information under an FADP-request must indicate whether personal data about the affected person is being processed and disclose to the requesting party all processed personal data and their origin. Personal data is any information that relates to an identified or identifiable person. Processing is any handling of personal data, regardless of the means and procedures used, in particular the storage and use of data.

In addition, it must communicate the purpose and the legal basis of the data processing.

III. Requirements to file a FADP-request

The hurdles to file for a FADP-request are relatively low: Anyone, natural and legal entities alike, are entitled to file a FADP-request. The request can be submitted to any private natural or legal person who owns a "collection of data". This is defined as any set of personal data that is structured in such a way that the personal

data is accessible by data subject. It is not required that a contractual relationship exists between the owner of the collection of data and the person affected by the data processing.

Further, a FADP-request is not subject to the statute of limitations and can be filed at any time. Also, the right to receive information under the FADP cannot be waived in advance.

Moreover, for a FADP-request, one does not have to prove any legitimate interest in receiving the information requested. However, the request may not be filed vexatiously.

IV. Procedure

As a rule, the information must be provided in writing and free of charge. The information provided must be complete. Although the law does not provide for a right to request the issuance of a confirmation of completeness, it will nevertheless usually make sense to request such a confirmation. In addition, the party obliged to provide the information is liable to a fine if they intentionally provide false or incomplete information.

According to Art. 9 FADP, the owner of a collection of data may refuse providing information based on overriding interests of third parties. Further, private owners of a collection of data can invoke their own overriding interests, provided that they do not disclose the personal data to third parties.

For the owner of a data collection to evaluate whether they have a right to refuse the provision of the data, they may demand from the party who filed the FADP-request that it provides the reasons for its request.

If the owner of a collection of data refuses to provide the information, they must indicate the reasons for doing so.

«A potential claimant, who for the purpose of the litigation needs data which was collected about him by the defendant, should consider filing a request for disclosure of data under the Swiss Act on Data Protection, before lodging a lawsuit with the court.»

V. Obstacles to avoid

The FADP is not applicable to pending civil, criminal, and administrative litigation procedures. If a party wishes to obtain information from the other party during such proceedings, they must use the instruments provided in the applicable procedural rules.

For this reason, it is advisable for a potential claimant to keep this instrument in mind already during the pre-trial phase and if necessary to file a FADP-request (and to await the information provided by the counterparty) before a lawsuit is lodged with the court.

Moreover, the Federal Supreme Court has clarified that if the request for information is made with the sole purpose of obtaining evidence that the party would otherwise not be able to obtain (inadmissible fishing expedition), then, the right to information is being used vexatiously. In a recent decision in 2020, the Federal Supreme Court has (as far as can be seen for the first time) indeed rejected a FADP-request on this ground.

Therefore, if the counterparty requires the potential claimant to state the reasons for its FADP-request, it is advisable to justify the FADP-request very carefully.

Right to information under the Federal Act on Financial Services (FinSA)

I. Purpose

The FinSA entered into force on 1 January 2020. Its main purpose is to protect the clients of financial service providers and to establish comparable conditions for the provision of financial services by

financial service providers. The relatively new legislation contains documentation and disclosure duties for financial service providers, which may be considered during the pre-trial phase of a legal dispute as instruments to receive important information and to balance the asymmetry of information that often exists between financial service providers and clients.

II. Which information and documents can be requested under the FinSA?

Firstly, according to Art. 15 FinSA, financial service providers must document the financial services agreed with the client, those provided to them as well as the information collected about them. If the client received investment advice, the documentation must also contain the needs of the client and the reasons for any recommendation leading to the acquisition or disposal of a financial instrument. According to Art. 16 FinSA, the service provider must, on request, provide the client with a copy of said documentation. However, this provision is construed as a duty of disclosure with a nature of public-law, rather than a civil law right of the client against the financial service provider.

Further, according to Art. 72 FinSA, clients have a right to request a copy of their file and all other documents concerning them, which the financial service provider has prepared within the context of their business relationship. It is controversial whether the "file" contains only the documents which the service provider must create pursuant to Art. 15 FinSA, or whether the right of the client to receive documentation goes beyond that and is based on the duty of accountability under the laws of agency (Art. 400 CO) of Swiss contract law.

«The solvency of the defendant is a crucial aspect for the claimant before entering in cost intensive legal proceedings. If the defendant is an entity, information on its solvency can be retrieved in the pre-trial phase with a request pursuant to Art. 958e CO.»

III. Requirements to file a FinSA-request

The FinSA is applicable on financial service providers, client advisers and producers and providers of financial instruments, regardless of their legal structure. Therefore, a FinSA-request requires that a contractual relationship exists between a financial service provider and a client.

A FinSA-request is not subject to the statute of limitations and can be filed at any time. However, it is not clear whether it can be filed during pending litigation proceedings or whether in this case, solely the Swiss Civil Procedure Code applies. Furthermore, as the FinSA is still young, there exist several other open questions. For example, it is unclear whether the right to receive documents extends to documents which have been created before the coming into force of the law. In our experience most financial service providers tend to provide documents, which were produced before 2020.

IV. Procedure

Any client who wishes to assert their right may submit a FinSA request in writing or in another form demonstrable via text.

The financial service provider must provide the client with a copy of the documents in question free of charge within 30 days after receipt of such request. If it fails to comply with such a request, the client may apply to the court. Moreover, a refusal by the financial service provider to supply the requested documents may be considered by the competent court in any subsequent legal dispute when deciding on procedural costs.

Right of inspections according to the Swiss Code of Criminal Procedure

In those cases, where potential criminal actions have resulted in a damage for the claimant, it is often recommended to file a criminal complaint and to constitute as a private plaintiff in the criminal proceedings.

A criminal complaint can be filed in written form or orally with the police or the state prosecution.

A private plaintiff has an extensive right of inspection to the criminal files after the collection of the most important evidence by the state prosecutor and the first interrogation of the accused has taken place. A limitation of the right of inspection is justified when a party is abusing the procedural provisions or if an inspection would conflict with overriding public or private interests.

The criminal files can be used in civil proceedings. Alternatively, the private plaintiffs can enforce their civil claims against the accused within the criminal proceedings. This has the advantage that no advance payment must be made in respect of court costs and party compensation. The state prosecutor is obliged to present the factual background of the case before the criminal court. That often reduces the burden of proof and litigation costs substantially.

Recommendations

A claimant is well advised to gather as much evidence as possible before initiating legal proceedings and to ensure that the potential award and the litigation costs can be borne by the defendant. To inspect documents and files and gather information, Swiss law provides several instruments, which can be used in the pre-trial phase, depending on the (contractual) relationship between the parties. It is recommended to assess whether such rights of inspection and information apply before entering proceedings, as certain rights of inspection cannot be exerted during pending proceedings.