# INTERNATIONAL BANK SECRECY

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# PREFACE

Tangential references in the Code of Hamourabi imply that confidentiality in banking existed more than 4,000 years ago in Babylon. Ancient Romans may have practiced banking secrecy, and it was then probably recognized as well by barbarian tribes in other parts of Europe.

Customary Austrian law of the sixteenth century acknowledged rules of financial confidentiality, and later associations of Italian and German bankers are known have sanctioned its breach. Financial privacy even acquired the status of an accepted constitutional right in nineteenth century Germany. Today, some concept of financial confidentiality between a client and his banker exists in nearly every country.

The savings and loan association collapses in the United States, the Bank of Commerce and Credit International scandal, the evasion of United States taxes through the use of Swiss accounts, the use of secret accounts by dictators to plunder and stash away the patrimonies of their countries, and the exploitation of banking secrecy in laundering drug-money and clandestine espionage operations are among the activities that have caused lawyers, bankers, and governments to re-examine the concept and scope of banking confidentiality.

Undeniably, banking secrecy may have been an element of greater or lesser importance in many of the scams perpetrated in recent years in the international financial system. However, part of the problem in assessing banking secrecy is that, while the concept has been almost universally acknowledged, its expression, application, role, and legal regime are far from uniform.

The rules providing for banking secrecy may be no more than vague custom. They may be contractually set out in varying degrees of detail by account agreements, or they may be stipulated by law. By the same token, no rights of action may accrue to protect confidentiality, or they may accrue variously to professional associations, public administrators, prosecutors or the betrayed client.

In some jurisdictions, the breaching bank may be faced with nothing more than bad publicity; in others, it may obliged to compensate the client for direct or even hypothetical losses.

Through their employment contracts, some indiscreet bankers might be obliged to indemnify their employers, and they also could still be directly liable to the client on a tort basis. Fines and possible incarceration are deemed appropriate in some jurisdictions to protect the public interest in financial privacy.

Obviously, that public interest is appreciated very differently. Some of banking secrecy's supporters argue that, while some activities exploiting confidentiality may be immoral, banking secrecy itself is not, and thus this

concept should not be tarred with the same brush as the criminals who abuse it. On the other hand, many contend that merely "looking the other way", when done so resolutely and profitably, is in itself worthy of condemnation.

There are, of course, numerous justifications offered for banking secrecy, and each seems to provoke its own counter argument. These rationales include hindering unlawful (or simply unpleasant) confiscation, fostering professional confidence, and promoting fundamental rights.

The first argument encompasses situations in which a public authority wrongly attempts to appropriate private assets. In this respect, one might imagine a foreign investor, a national in a politically volatile state, or a dissident author who wishes to secure his illegal royalties.

How "unlawful" and "illegal" are understood is not always consistent. Beyond this rather philosophical issue, it is sometimes argued that interests like these could be protected equally well by other devices without so much potential for abuse. In the case of the foreign investor, this could be through international conventions.

Tax evaders maintain that secrecy is a legitimate defense against unfair tax systems. They maintain that oppressive or merely progressive taxation is unjustified confiscation and such systematic and plundering regimes should be prevented. Accepting taxes and their legitimacy as an undebatable certainty, opponents dismiss this charge, questioning the principles behind such convictions.

While traditionally few states recognize foreign revenue claims, even fewer would tolerate their tax authorities to be blocked by their own banking secrecy laws. The proliferation of tax treaties and cooperation among sovereign states indicates growing international consensus on the legitimate objectives of revenue collection and perhaps the role that banking secrecy should be allowed to play.

The second argument views confidentiality between financial adviser and account holder as a form of professional secrecy comparable to that between lawyer and client, doctor and patient, or priest and penitent. It is said that such confidence fosters full disclosure and thus more competent and complete service.

However, professional secrecy must be appreciated in a balance. The resulting social utility must outweigh the likelihood and severity of social detriment. The lawyer-client privilege is a corollary to the rights of access to legal counsel and against self-incrimination, as required by the competitive and antagonistic nature of litigation and business. Medical privacy is justified by how an embarrassed silence might exacerbate the consequences of disease, if doctors were not bound to guard information on their patients' health. Finally, many societies offer their reverence to religion to justify confessional privilege.

Banking secrecy's detractors do not recognize such social utility in restricting access to financial information, and they point out that, where



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these other privileges are accepted, they remain subject to limitations and exceptions.

Many advocates of the third argument regard financial privacy as a fundamental right. This may be attractive in light of trends toward privacy rights. It is asserted that in as much as individuals' homes, images, or actions should be protected from public scrutiny, so too should their financial matters. Financial privacy should be an individual liberty, essential to and protected by democratic systems.

However, according to its opponents, banking secrecy is just as wrongly equated with financial privacy as it is with criminality. It may involve matters which should not be characterized as private, but which the individual merely wishes to conceal.

Nowhere is there found unfettered access to the information that a bank holds on its clients. Neither is there anywhere hermetic silence on these matters. The very debate on banking secrecy demonstrates the limits that are imposed and the exceptions that apply.

Helping to rein in insider dealing, Switzerland has supplied United States law enforcement authorities with information under the 1982 and 1987 Memoranda of Understanding. Indeed, enough information leaks out of more obscure and more strict jurisdictions to whet official appetites. Many jurisdictions, such as the Cayman Islands, contemplate exceptions for criminal matters and where the client has waived his right to secrecy.

Such waivers have created their own little controversies. Some judicial authorities, notably those in the United States, have attempted to circumvent foreign banking secrecy rules by ordering those at least theoretically falling within their personal jurisdiction to authorize disclosure.

These less-than-completely voluntary waivers can create multiple dilemmas for banks. On the one hand, the bank may not wish to disclose prejudicial information that its client would really rather keep secret. On the other, neither does the bank want to risk placing its client in contempt by complying with those true preferences and refusing to disclose confidential information.

Such disregard for a compelled waiver could expose the banks to liability in the United States, and disclosure might have the same consequence in their own jurisdictions. Even if the banks could freely avail themselves of an "in bank's interest to disclose" exception, that interest is not always easy to identify.

These issues also touch upon the unsettled conflict of laws problems in banking secrecy. Generally, the law of the place where the account is kept applies. Nevertheless, banks with foreign branches may be constrained by the requirements of their home jurisdictions. The emergence of banking groups and the transfer of information within them, cross-border banking, and a decline in comity have increased the need for collaboration.

After years of an aggressive unilateral approach, the United States appears to be willing to compromise and cooperate. While the European Community has recognized the need for at least coordination, many of its

efforts have yet to bear fruits. At least on paper, some international actions to crack down on the abusers of banking secrecy, rather than the practice itself, look more promising. If they succeed, the debate on banking secrecy may become less heated and more considered.

A thoughtful relationship between the protected interests and the sanctions for breach might ameliorate the more repugnant aspects of banking secrecy. Where legitimate financial interests are prejudiced by disclosure, the bank should be liable, but not where the information is necessary for investigating extraditable offenses. Authorities requesting information might guarantee this and offer indemnities but, for the time being, such solutions are perhaps too simplistic and the hope for a utopia of uniformity naive.

While the patchwork of laws persists, and the demands of more liberal financial systems and more aggressive regulatory bodies pull at its seams, banking secrecy will continue to intrigue and perplex not only lawyers, government officials, and businesspersons, but also the public. It is the former group that will have to concern itself with the ever-changing intricacies of this institution.

In their contributions which follow, lawyers from Australia, Austria, the Bahamas, Belgium, the British Virgin Islands, Canada, Denmark, England, Finland, France, Germany, Gibraltar, Grenada, Greece, Hong Kong, India, Ireland, the Isle of Man, Japan, Liechtenstein, Korea, Luxembourg, Macao, Mexico, The Netherlands, New Zealand, Norway, Pakistan, Portugal, Scotland, Singapore, Spain, Sweden, Switzerland, the United States, and the European Community have surveyed the rules and practice prevailing in their respective jurisdictions under the laws in effect at September 1992.

The result offers an opportunity to assess and compare not only the laws of particular countries but also the social and business practices in which their banking systems operate.

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