

Welcome to the Thirty-Two edition of our Newsletter. In this edition, we shall present the readers with the most prominent legal provisions pertaining to banking secrecy as those are stipulated in the Jordanian legislation.

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“The obligation to maintain the confidentiality of customer information is one of the obligations that takes precedence over other obligations that fall on banks and banking institutions due to the importance of that information to customers. Accordingly, the Jordanian legislator did not provide it with only civil protection, rather the Jordanian legislator has added a penal protection through imprisonment or a fine on anyone who discloses the information of customers dealing with banking institutions in cases other than those permitted to be disclosed by law.”

In this edition of the newsletter, we will present the readers with the most prominent legal provisions of banking secrecy as those are stipulated in the Jordanian legislation, as follows:

Introduction

A 'Secret' is closely related to private life, as it represents an aspect of personal freedom. Therefore, most constitutions guarantee that every individual has the right to keep his/her secrets, and he/she may, if they wish so disclose them or part of them to another person within the ambit a person's rights and personal freedom. Article 7 of the Jordanian constitution stipulates that personal freedom shall be guaranteed and every infringement on rights and public freedoms or the inviolability of the private life of Jordanians is a crime punishable by law. The right to privacy requires that an individual's private affairs, including his/her data, information, bank accounts and cash deposits, not be subject to disclosure and share with others, unless the law allows doing so. The commitment to banking secrecy is one of the most important obligations that falls on the bank's shoulders, based on the fact that disclosing the customer's financial position and the

way his/her money is managed is one of the private matters that disclosing it to others harms the interests of the customer and the interests of the bank. Despite this secrecy meaning that disclosing any information pertaining to any of the bank's clients that the bank's officials, employees or workers have access to is prohibited, there are special cases in which the principle of banking secrecy can be deviated from. In addition, the consequences of the bank's breach of this commitment means that the bank might be exposed to civil or penal liability. Therefore, through this newsletter we will highlight those provisions, according to the following elements: -

First: The Concept Of Bank Secrecy

The Jordanian legislator did not explicitly define the concept of banking secrecy, however article (72) of the Jordanian Banking Law No. (28) of 2000 stipulates that ¹*"a bank shall observe full confidentiality regarding all accounts, deposits, trusts, and safe-deposit boxes of its customers. It shall be prohibited from providing directly or indirectly any information thereon except upon a written consent of the owner of such account, deposit, trust or the safe-deposit box, or an heir of his, upon a decision issued*

¹ Note: All text from referenced Jordanian laws and legislations in this Newsletter is an unofficial translation from Arabic in to English and the firm does not hold any

legal liability or responsibility for any inaccuracies or mistranslations.

by a competent judicial authority in a current litigation, or due to one of the permissible situations pursuant to the provisions of this law. This prohibition shall remain in effect even if the relationship between the bank and the client has terminated for any reason whatsoever”.

Furthermore article (73) of the Banking Law stipulates that *“all present and former administrators of the bank shall be prohibited from providing any information or data on the clients or their accounts, deposits, trusts, safe-deposit boxes, or any of their transactions, or disclosing or enabling others to have access to such information and data in situations other than those permitted under this law. Such prohibition shall apply to anyone who by virtue of his profession, position or work, directly or indirectly, may have access to such information and data, including employees of the Central Bank and auditors”.*

Through extrapolation of these texts, banking secrecy can be defined as the commitment of the bank to secrecy and to preserve all information and data pertaining to the activities and accounts of customers and not to enable others to view them while carrying out banking work. It is worth noting that the bank's obligation to maintain the confidentiality of the customer's information and data is an implicit and legal obligation imposed by the provisions of the law and

valid once a contract is concluded with the customer without the need for an explicit text on this obligation in the wording of the contract.

Second: The Scope Of The Bank's Commitment To Banking Secrecy

1. Who is obligated to keep the banking secret

This obligation rests with the bank itself in its capacity as the contracting party with the customer and the bank as a legal person, who performs its work through its employees, who are aware of the customer positions and their information, therefore the bank means the legal person who is represented by the Chairman of the Board of Directors, as well as in this regard branch managers and senior employees, who have the authority to make decisions. Moreover, employees, and employees in this context means all employees and workers for whom the bank is responsible for due to the accountability of subordinates, who disclose information reached to them in connection with their work and their job in the bank. Therefore, both the bank and the employee who disclosed a banking secret will be questioned, because the bank is deemed responsible for the actions of its subordinates in

accordance with what is required under the rules regarding the responsibility of the principal for the actions of his/her subordinates contained in the Jordanian Civil Law.

2- The beneficiary of keeping the bank secret

The bank's commitment to keeping banking secrets is allocated in favor of the client contracting with the bank, and it must be noted that this commitment cannot be used against the interests of the client, whereby the client has a right to access to all information and data related to his/her bank accounts. Moreover, the same applies to those who have the right to uphold the rights of the client as his/her private agent when that is within the limits of a power of attorney. Furthermore, this applies to a legal representative on behalf of a minor, as well as to an estate liquidator or a company liquidator, in addition to the general successor of the client and his/her heirs.

3- The limits of the bank's commitment to banking secrecy

The principle is that the bank is under the obligation to keep confidential all customer data and information that have the character of a banking secret.

Therefore, the bank shall, in accordance with article (72) of the Banking Law, observe full confidentiality regarding all accounts, deposits, trusts, and safe-deposit boxes of its customers. It shall be prohibited from providing directly or indirectly any information thereon. However, there are a number of exceptions related to the bank's commitment to banking secrecy, which are mentioned in articles (72) and (73) of the Banking Law, as follows:

1. The issuance of a written consent of disclosure by the customer who owns accounts, deposits, trusts, and safe-deposit boxes, or from one of his/her heirs.
2. The issuance of a decision by a competent judicial authority in a judicial dispute.
3. Also excluded from the provisions of bank secrecy are the duties provided in law to be performed by the auditors appointed by the general assembly of a bank or by the Central Bank pursuant to the provisions of this law.
4. The issuance of a certificate or statement on the reasons for the refusal to cash any check/cheque upon the request of a lawful person.
5. The exchange of information pertaining to clients on their debit balances in order to provide necessary data to ensure

safety of credit granting, checks/cheques retained unpaid or any other act deemed necessary by the Central Bank due to its role to the safety of banking. It is provided that the exchange of information is between banks, the Central Bank or any other companies or entities approved by the Central Bank.

6. Disclosure by a bank, in full or in part, of statements on transactions of a client necessary to substantiate a claim of the bank in a judicial dispute between the bank and the client in respect of such transactions.

It must be noted that there is a set of legal texts contained in some special legislations, which expressly stipulate that the provisions of banking secrecy should not be applied, in the context of applying the provisions of these laws. An example of this is what is stipulated in article (40) of the Anti-Money Laundering and Counter Terrorist Financing Law No. (20) of 2021 that *"provisions related to confidentiality including banking secrecy, stipulated in any other law, shall not preclude the implementation of any of the provisions of this law"*.

Third: The Criminal Liability That Results From The Disclosure Of A Banking Secret

Disclosure of banking secrets constitutes a crime punishable in Jordanian law, since article (75) of the Banking Law stipulates that *"whoever violates the provisions of any of articles 72 and 73 of this law shall be punished with imprisonment for a period of no less than six months or a fine of no less than ten thousand dinars and not exceeding fifty thousand dinars, or both penalties"*.

The crime of disclosing a bank secret has two primary components:

- The physical component: The criminal behavior of this crime is represented by the act of disclosure, i.e. the disclosure of the client's confidential information to others, other than the cases in which the law makes that permissible. The matter is not limited to the direct disclosure of bank secrets as the crime extends to the case of enabling others to view the client's secrets that must be kept secret. The physical component of this crime is completed even if the client does not suffer any damage as a result of disclosing those secrets. It is not required for the disclosure to be for a group of people and it is sufficient for it to be for one person and it is also not required to be made public. Accordingly, the physical component of this crime requires the fulfillment of two conditions; The first

6 one is that what has been disclosed is a banking secret that is forbidden to be disclosed except in cases permitted by the law. The second one relates to the position of the culprit being that the bank secret reached him/her due to his/her profession or job which he/she subsequently disclosed to others.

- The moral component: The crime of disclosing a banking secret is one of the intentional crimes, therefore the offender must fulfill the moral component with its two elements, which are knowledge and will. This means that the culprit is aware of his/her criminal act and desires the result achieved from this act.

With regard to the penalty for the crime of disclosing a bank secret, this crime is subject to two criminal provisions, one of which is mentioned in the Banking Law and the other which is mentioned in the Jordanian Penal Code. It is stipulated in article (75) of the Banking Law that "anyone who violates the provisions of any of articles 72 and 73 of this law shall be punished with imprisonment for a period not less than six months, or a fine of not less than ten thousand dinars and not more than fifty thousand dinars, or with both penalties".

Article 355 of the Penal Code states that A person shall be punished with imprisonment

for a period not exceeding three years in the cases of:

- 1- Anyone who, by virtue of their employment or official position, obtains official secrets and discloses these secrets to those who do not have the authority to view them, or to those whose job's nature does not require such access in accordance with the public interest.
- 2- Anyone who was aware of a secret by virtue of his/her profession and disclosed it without a legitimate reason.

However, since the Banking Law is a private law, it takes precedence over what is stated in the Penal Code, pursuant to the rule that stipulates that the private takes precedence over the public. Accordingly, whoever divulges banking secrets shall be punished with imprisonment for a period of no less than six months or with a fine of no less than ten thousand [Jordanian] dinars and no more than fifty thousand [Jordanian] dinars and the judge may, at his/her discretion, apply both penalties to whoever commits this act.

Fourth: The Civil Liability Resulting From The Disclosure Of A Banking Secret

Disclosure of a bank secret is a punishable crime in the majority of laws, whether this law is the Penal Code or the Banking Law. However, the question that arises in this regard is: does it suffice to impose a penal punishment only for disclosing banking secrets? Or is there a civil liability (compensation) that must be imposed on the perpetrator of this act, since there is a civil issue of a violation for breach of either a contractual obligation or a legal obligation as it is an obligation to not infringe on the rights of others unjustly. Accordingly, the bank's disclosure of a banking secret is considered an issue that requires the bank to be responsible for the damages arising from such disclosure. However, it should be noted that there are two kinds of civil liability, either in contract or in tort, but due to the fundamental differences and variances between those two responsibilities, we must specify the form of the liability that results from disclosing a bank secret; is it a contractual liability or a tort liability? The first of these differences is in terms of capacity since capacity in tort is not a requirement as the person is responsible for the harmful act even if he/she does not have capacity, but in contractual responsibility, the person must have the capacity to contract, which is having reached the age of adulthood. The second nuance is in terms of

proof required as in contractual liability the party that suffers the harm is required to prove the breach of the obligation of the other party, but in tort all elements of liability must be proven from action, damage and the causation relationship. The third difference is in terms of compensation, as compensation differs in contractual liability that that in tort. The first one compensates for the expected damage, i.e. the subsequent loss, without the loss of profit, in accordance with article (363) of the Jordanian Civil Code, which stipulates that *"if the compensation is not valued in the law or in the contract, then the court can estimate it to be equal to the actual damage at the time of its occurrence."* Whilst the second one, compensates for the expected and unexpected damage, therefore; if liability is established, then compensation is for the subsequent loss and loss of profits is accordance with article (266) of the same law. The fourth nuance is in terms of the permissibility of agreeing on an exemption from liability, as it is not permissible to be exempt from tort liability because it falls under public policy. Whilst for contractual liability, it is permissible to the parties to agree to be exempt from it.

In principle, the nature of the civil liability arising from the bank's disclosure of a banking secret is a contractual responsibility; since all commercial operations conducted by the bank are contracts, whether they are

deposits or concessions. Therefore, the nature of the relationship between the client and the bank is a contractual relationship, and according to this contractual relationship and like other contractual relationships, it imposes obligations on both parties' that result in legal liabilities. Among those obligations is the non-disclosure by the bank of the client's secrets. Accordingly, if the bank discloses a secret, then this is deemed to be a breach of a contractual obligation, and therefore, contractual liability is established at this point. However, nothing prevents tort liability from also being raised, but this situation does not arise except in certain cases, namely:

A - If there is fraud or gross negligence in order for the provisions of tort liability to apply, and in that case, we are faced with the choice between the two liabilities. [Under Jordanian law] it is not permissible to combine the two liabilities in claiming compensation.

B- If the bank discloses the client's secrets during the negotiation stages of concluding the contract, but the contract was not concluded.

C- If the disclosure takes place after the end of the contract period between the client and the bank.

D- If the contract between the client and the bank is null and void due to any of the reasons for invalidity related to consent, the subject/object of the contract and the cause/reason behind the contract.

Conclusion

Banks in the Hashemite Kingdom of Jordan are subject to the Central Bank of Jordan Law and the Banking Law, and they must adhere to the provisions of these laws, especially with regard to banking secrecy. The prohibition of disclosing banking secrets applies to the bank's board of directors and all of its employees, irrespective of their job positions. The object of the obligation to maintain bank secrecy falls on any information pertaining to the bank's affairs or its customers. Violating the provisions of bank secrecy, and disclosure in cases other than those permitted by law, results in contractual liability on the bank being established based on the contract concluded between the bank and the client. In the event that there is no contractual relationship between the bank and the client, then the bank's act of disclosing the client's secrets is considered a tort liability and, in addition to the civil liability, a criminal liability arises for the criminal offense of disclosing bank secrets. Also, the bank is not liable if it discloses bank secrets in cases permitted by the Banking Law or the provisions of special laws.

If you would like to discuss further any aspects of this Newsletter, please feel free to get in touch with one of our lawyers, using the contact details in the Contributors section below.

If you feel that other persons would be interested to read this Newsletter, please feel free to share this Newsletter.

If you wish not to have our upcoming Newsletter or if you wish to amend the contact details, please inform us by sending an email to info@hammourilaw.com, titled “non-subscription” and/or “amending the contact details”.

Warm regards,

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ABOUT HAMMOURI & PARTNERS ATTORNEYS AT-LAW

Hammouri & Partners Attorneys at-Law, is a Jordanian multi-practice law firm, founded over two decades ago (established in 1994) by the late Professor Mohammad Hammouri. Professor Hammouri was a renowned Jordanian attorney and an arbitrator, a former Minister of Culture and National Heritage and a former Minister of Higher Education, who wrote a plethora of books, primarily on constitutional rights. Professor Mohammad Hammouri also founded the first School of Law in the Hashemite Kingdom of Jordan at The University of Jordan, in which he was its first dean. Today, the firm is managed by Dr. Tariq Hammouri, a distinguished academic and attorney and a former Minister of Industry, Trade and Supply. Dr. Tariq Hammouri is both an experienced attorney and an arbitrator, an expert in the Corporate sector, Commercial Transactions, Financial Markets, Banking Law and International Trade. He is an Associate Professor at the School of Law, University of Jordan and (formerly) the Dean of the School of Law. Dr. Hammouri is also an officially appointed member of the International Center for Settlement of Investment Disputes (ICSID) Panel of Arbitrators upon designation by the Government of the Hashemite Kingdom of Jordan, for the period of 2020 to 2026.

Hammouri & Partners team consists of more than 30 attorneys and a number of other professionals working in the firm's specialized departments, providing professional legal services at a local, regional and international level.

The firm's legal services cover numerous areas of practice, including the following: Corporate and Commercial Law (whether that is corporate set-up or drafting of all types of commercial agreements), Intellectual Property Law, Banking and Finance Law (the Firm advises local and international banks regarding all Banking Transactions and Regulatory Compliance). Additionally, the Firm's Litigation and Arbitration department have the capabilities and competence to represent parties in the most complex and novel legal matters, as it encompasses expertise in several areas of law, whether it is before courts or arbitral tribunals. Hammouri & Partners Attorneys at-Law was one of the first firms in Jordan to establish a specialized International department to cater for the needs and requirements of international clients on an array of tasks with an international element, such as those regarding bilateral and international trade negotiations, projects, contracts and others.

In addition to what has previously been stated, Hammouri & Partners provides legal advice and consultation to various industries such as those of Construction & Infrastructure, Manufacturing, Engineering, Trade, Securities and Energy, as some of its clients are major energy, healthcare, information technology and telecoms companies.

Hammouri & Partners Attorneys at-Law provides its broad services throughout Jordan as well as worldwide, through established collaborations with reputable law firms in the MENA region, Europe, the United Kingdom and the USA. Hammouri & Partners has earned regional and international acclaim by the most reputable legal directories. Chambers and Partners Global, International Financial Law Review (IFLR 1000) and the Legal 500, all highlight Hammouri & Partners as a leading law firm in the Jordanian legal services industry.